COMMERCIAL REAL ESTATE LEASING

Thursday, April 27, 2017
Buffalo

Friday, April 28, 2017
New York City

NYSBA Co-Sponsors:
Real Property Law Section
Committee on Continuing Legal Education

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 1.800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Lawyer Assistance Program

1.800.255.0569

Commercial Real Estate Leases

Thursday, April 27, 2017 | Hodgson Russ, LLP | 140 Pearl St., Suite 100, Buffalo
Friday, April 28, 2017 | NY Society of Security Analysts | 1540 Broadway, NYC

PROGRAM AGENDA - BUFFALO
(There will also be a break midway through the afternoon)

7.5 MCLE Credits (7.5 professional practice)

8:30 a.m. – 9:00 a.m. Registration

9:00 a.m. – 9:10 a.m. Introductory Remarks

9:10 a.m. – 10:25 a.m. Exit Strategies

- Assignment and Subletting : Change of control provisions, profit sharing, enforceability of consent rights, recapture and SNDAs
- Lease terminations and surrenders
- "Go Dark" provisions
- Good Guy Guaranties
  (1.5 MCLE credits)

NYC: Joshua Stein, Esq.
Joshua Stein, PLLC
New York, NY

Buffalo: Sujata Yalamanchili, Esq.
Hodgson Russ, LLP
Buffalo, NY

10:25 a.m. – 11:15 a.m. Current Economics of the Deal

- Structuring the rent, space leases, term commencement and length, annual percentage rent increases and interval step ups, and issues with accounting for rent step-ups
- Structuring expansion and surrender options, renewal options, ROFO/ROFR, and arbitration of FMV rents
- Timing, insurance, restoration upon casualty, LEED Compliance, tenant improvements, sales tax, and exemptions and restoration

- Escalations - Real estate taxes and changes to using operating expenses
  (1.0 MCLE credits)

  NYC: Ron Sernau, Esq.
  Proskauer Rose, LLP
  New York, NY

  Buffalo: TBD

11:15 a.m. – 11:25 a.m. Break

11:25 a.m. – 12:15 p.m. Disputes and Lease Enforcement

- Language in leases to aid Landlord remedies and Tenant remedies in the event of default
- Choice of forum: arbitration vs. litigation
- Remedies: acceleration, valuation, additional rent, mitigation, force majeure relief and financial crisis
- Contemplating bankruptcy of Tenant and bankruptcy of Landlord
- Security deposits - Letter of credit vs cash, liquidated damages
  (1.0 MCLE credits)

NYC: Adam Leitman Bailey, Esq.
Adam Leitman Bailey, P.C.
New York, NY

Buffalo: Steve Wells, Esq.
Hodgson Russ, LLP
Buffalo, NY

12:15 p.m. – 1:15 p.m. Lunch Break

1:15 p.m. - 2:05 p.m. Insurance Issues in Commercial Leasing

- Who insures what?
- Additional Insured - what does it mean?
- 30-day Notice to Landlord
- Waiver of Subrogation
- Access to proceeds
  (1.0 MCLE credits)

NYC: Albert L. Sica
The ALS Group
Edison, NJ

Buffalo: Kathleen M. Sellers
Charles J. Sellers & Company
Athol Springs, NY

2:05 p.m. – 2:55 p.m. Anchor Tenant or Major Retail Tenant Leasing

- Differences between a Lease for an Anchor Tenant and one for a Retail Tenant
- Concerns of an Anchor Tenant
- What is a Protected Area?
- Co-Tenancy and Exclusive Provisions
- Remedies for Landlord's Default
- Leasehold Mortgages
  (1.0 MCLE credits)

NYC: Deborah Goldman, Esq.
Joshua Stein, PLLC
New York, NY

Buffalo: Blaine Schwartz, Esq.
Lippes Mathias Wexler Friedman, LLP
Buffalo, NY

2:55 p.m. – 3:45 p.m. Brokerage - Latest Trends

- Latest trends in Brokerage Agreements and Commissions
- Sources of disputes regarding brokerage commissions
- Best practices in brokerage agreements
- Recent cases regarding brokerage commissions
  (1.0 MCLE credits)

NYC: Lionel Barasch, Esq.
Law Firm of Lionel A. Barasch
New York, NY

Robert Shansky, Esq.
Scarola, Malone & Zubatov, LLP
New York, NY

Buffalo: TBD

3:45 p.m. - 4:35 p.m. Latest Trends in Commercial Leasing

- Concept of shared space arrangements
- Landlord or Tenant market national experience
  (1.0 MCLE credits)

NYC: Pamela Swidler, Esq.
WeWork, LLC
New York, NY

Buffalo: Sujata Yalamanchili, Esq.
Hodgson Russ, LLP
Buffalo, NY

Blaine Schwartz, Esq.
Lippes Mathias Wexler Friedman, LLP
Buffalo, NY

4:35 p.m. – 4:45 p.m. Question & Answer Session

4:45 p.m. Adjournment

Commercial Real Estate Leases

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- Contemplating bankruptcy of Tenant and bankruptcy of Landlord
- Security deposits - Letter of credit vs cash, liquidated damages
- Top 8 Lease Enforcement Provisions that Must be Added to Commercial Leases
- Top 8 Lease Provisions for Commercial Tenants
- Liquidated Damages Provisions:
- Avoiding the Penalty
- Arbitration v. Litigation
- Important Events of Default Recommended for Commercial Leases
- License v. Lease
  (1.0 MCLE credits)

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*Reprinted with permission from *Commercial Leasing*, Third Edition, scheduled for release in June, 2017.

VI. BROKERAGE – LATEST TRENDS

VII. LATEST TRENDS IN COMMERCIAL LEASING

EXIT STRATEGIES

A Checklist for Giving Legally Effective Notices

Model Lease Guaranty

Tenant or Guarantor

When Bad Guarantees Happen to Good Guys

by

Joshua Stein, Esq.

Joshua Stein, PLLC
New York City

A Checklist for Giving Legally Effective Notices

Joshua Stein

To give notices that work—and don't create problems—do it more carefully than might seem necessary and get it right the first time.

Joshua Stein, sole principal of Joshua Stein PLLC, has written several books and over 200 articles on commercial real estate law and practice. For information and reprints of previous publications, visit www.joshuastein.com. An earlier version of this article appeared in *The Practical Lawyer*.

CLIENTS OFTEN ASK attorneys to help them give formal notices under leases, loan documents, or other agreements. Failure to give timely and correct notices can have devastating consequences for the client, hence for the attorneys who were supposed to be helping them. Once the notice deadline has passed, an erroneous notice cannot be repaired. You won't get a "do-over." If a notice relates to exercise of an option, failure to do it right can mean outright loss of the option. If a notice relates to a default and triggers a cure period, then a defective notice could cost a lender or landlord months of delay and create substantive leverage for the borrower or tenant. So the guiding principle for notices is the same one that applies to just about everything else that matters: Do it right the first time.

When a client asks attorneys to help give a notice, there are only two possible outcomes:

- The notice will be given correctly and no one will pay much attention to any issues relating to the actual giving of notice; or
- The attorneys will find a way to mess it up, taking advantage of one of the many available opportunities to make mistakes in giving even the most "trivial" notice.

This checklist seeks to help you achieve the first outcome and avoid the second.

Very little on this checklist is substantive or "legal." But the process demands the same level of care, precision, and attention to detail that you would bring to any legal problem. Practical and logistical exercises like giving notices can and do raise legal issues at any point along the way. The easiest way to screw up a formal notice is to assume that it doesn't require much "legal" attention and that it's impossible to screw up.

1. Context

Start by reviewing the document under which you are giving notice. Does it include any information about when and how to give notices? Make sure that it's the final signed document, not a near-final draft that might not be entirely accurate. Also look at any related amendments, assignments, assumptions, consents, estoppel certificates, and previous formal notices (e.g., change of address notices from the other party). Tracking down all the relevant documents may require some detective work. Once you've done it, organize what you've found and save it so the next person can easily find it.

Does any informal correspondence indicate that a notice recipient may have moved without giving formal notice of a change of address? Does the client know of any such relocation, even if not properly documented or not documented at all?

Understand why the client wants or needs to give the notice. It may affect how you approach the process and what you say. For example, if it's a notice of default, you may need to describe the default and the paragraph of the governing agreement under which it arises.

Any notice – but particularly a notice of default - must also consider the environment where the client may later need to enforce its rights. New York landlord-tenant courts, for instance, will seize any possible opportunity to invalidate a notice from a landlord, including alleged issues with corporate authority of whoever signed the notice. And, of course, if the contemplated notice recipient is in bankruptcy or similar proceedings, ask whether your client is even legally permitted to give the notice in the first place, or needs to proceed in some other way.

Do any related agreements exist that will require similar notices at the same time? Must your client satisfy any conditions – such as getting someone else's approval – before giving the notice? Does giving the notice create any unexpected consequences (e.g., a buyout right under a joint venture agreement or an obligation to remove important communications facilities from a floor that, pursuant to the notice, will be returned to the landlord)? Try to answer these questions before rather than after giving the notice.

Have you or anyone else involved given any similar notices in the past? Take a look at them. See if they suggest answers to any questions raised, or new concerns not mentioned here.

One question you shouldn't ask is whether the notice recipient will try to object to the validity or timeliness of the notice. This question should be utterly irrelevant, because its answer should not affect anything you do. Assume the notice recipient will object to the notice, even if the parties are on the best of terms. It's your job from the beginning to ensure that any such objections will be futile.

One exception to this rule might arise if the parties are on such good terms that they can sign a letter agreement waiving the notice requirement and deeming the notice given. In that case, get the letter agreement signed and exchanged long before the notice deadline. But don't run afoul of any agreement that requires notice to (or consent by) a third party regarding whatever's going on.

2. Timing

When must the notice be given? Everyone knows you shouldn't wait until the last minute to give a notice. But when is the last minute? Before you get too far down the road, figure out exactly when the client must give its notice. Ideally, the documents will identify a specific deadline date for giving notice.

Often, though, a document will define the notice deadline as a certain number of days before some date that is a certain number of years after a date that's not immediately obvious. You may need to do some detective work just to figure out the notice deadline.

That exact problem often arises in leases contemplating that the landlord will perform construction for the tenant, or for some other reason deliver the space at some undefined time after the parties sign their lease. Everything in the lease, including the notice deadline, refers back to the commencement date, but the commencement date depended on when the landlord delivered the space, or perhaps when the landlord gave notice of that delivery – if the landlord remembered to give that notice. The lease usually requires the parties to enter into a letter agreement to confirm the commencement date, but they tend to forget, making it tricky to figure out the lease renewal notice deadline lease or even when the lease expires.

Problems like these are best identified and solved well before the last minute. Clients can help avoid them by planning ahead and having a continuing relationship with a single attorney or law firm as opposed to engaging the cheapest, fastest attorney – usually at the last minute – every time some issue arises. Conversely, if you are the attorney with whom the client maintains a long-term relationship, help the client identify notice deadlines well in advance, as part of the "preventive practice of law" and a gentle reminder of the benefits of a long-term relationship with a single attorney or law firm, i.e., yourself.

With enough lead time, you might be able to obtain an estoppel certificate to confirm any unknown or certain dates. Or an earlier estoppel certificate in the file may resolve the mystery.

In any case, always try to give your notice early enough that you have time to fix it and give it again if you realize it was somehow defective.

3. Signature Mechanics

Who will sign your notice? Identify the right officer or authorized signer in advance. It seems to be an immutable law of the universe that the signer will always be traveling when you most need him or her. And don't assume just anyone can sign. Use a corporate officer or someone else with actual authority to bind the giver of the notice. You don't want to give the notice recipient the chance to argue that the notice was invalid because it didn't really bind the notice giver, i.e., that whoever gave it was just an interloper having some fun. New York courts have sometimes invalidated notices on grounds like these.

Prepare an appropriate signature block, including name of entity, by some other entity, by some other entity, by some signer, and anything else the circumstances dictate. Don't fudge the signature block or assume someone else will fill in the blanks. If you do that, you create a significant risk that when the signer finally pulls out a pen and gets ready to sign, they just won't be able to proceed. Getting the signature block right is part of the job of preparing a notice.

To prevent last-minute problems with signing, you might want to have the notice signed before you've even figured out its final substance and worked through all the necessary details. You can break the signature block for your notice into a stand-alone signature page, with just a few straggling lines of text followed by the signature block. Have the signature block signed (get enough originals!) as soon as you can.

This type of signature page has, however, created opportunities for fraud – it might end up attached to the wrong document. Thus, some careful attorneys and clients now like to include a legend at the top of the signature page identifying the document to which it belongs.

4. Consents, Joinders, and Confirmations

Does anyone else need to confirm, consent to, or join in the notice you are giving? For example, to give a notice of termination of a ground lease, you may need the leasehold mortgagee's consent, which might first require a formal notice to the leasehold mortgagee, raising once again most of the issues in this article.

If you identify any third parties who will need to be involved, let them know as early as possible. If your client is an entity with significant internal approval procedures, think about whether you need to obtain your own internal approvals in order to give the notice. What will those internal approval procedures require from you? How long will they take? You don't want the recipient to be able to argue that the notice was invalid because it violated internal approval procedures.

Do any statutory or regulatory requirements control whether and how your client can give this particular notice or take the action the notice contemplates? What must your client do to satisfy those requirements?

5. Sender

Who should give the notice? Look at the underlying document. But also consider the effect of any transfers. Did the notice sender change its name? Change its signature block? Transfer its position to someone else? If the party giving the notice was not originally a party to the agreement, how should you explain the change? Should the client have given any notice of that change—perhaps joined in by the original party to the agreement? Problems with the authority and identity of the party giving the notice can be difficult to solve, especially at the last minute, if they involve third parties. Therefore, ask the questions as early as possible.

6. Notice by Attorney

The New York Court of Appeals has invalidated notices given by attorneys on behalf of their clients. Some attorneys treat this as a non-issue and do it anyway. Don't be tempted. Do you want your client to become the test case giving the state's highest court an opportunity to overrule the (in)famous *Siegel v Kentucky Fried Chicken* case?

Likewise, don't assume some other agent can sign the notice on behalf of the party giving it. If you cut corners, you create very convenient opportunities for a hypertechnical court to throw out your notice and force you to start all over again.

7. Recipient

The documents will tell you who must receive the notice: a particular party, their attorney, perhaps a guarantor. But do you know whether any notice recipient has transferred their rights? If so, you should probably to give the notice to both the original notice recipient and their successor. If you received a formal notice of the assignment, though, don't worry about the original recipient. Just deal with the assignee or transferee.

Should any other parties receive the notice, even if not listed in the primary document? Guarantors? Lenders? For a lease or hotel management agreement, think about nondisturbance agreements and leasehold mortgagees. Did your client agree to give any third parties copies of any notices? Does your client have any reporting obligations within its own investor group? Third-party notice requirements often won't appear in whatever "main" document is the basis for the notice. You have to figure out what other documents exist out in the world and might require third-party notices.

Can you identify any third parties who you simply think should know about notice, perhaps because you want them know about a budding problem or concern? Before you give copies of notices to any extra parties, though, ask yourself if that's a precedent you want to set. For a one-time notice it might not matter. But for a continuing relationship where you will give similar notices regularly, you may want to state that you are giving the additional notices only as a courtesy, and don't intend to give them every time.

8. Letterhead

If the client will use its own letterhead, set up the notice so it can easily be transferred to letterhead. If the client won't use its own letterhead, or doesn't care, create simple letterhead for the client, built into the notice. Either way, the notice should include the client's letterhead, whether real or computer-generated for this particular occasion. It helps prevent the notice recipient from claiming that the notice was overly mysterious or they had no way to know what it was or from where it came.

9. Means of Delivery

Determine the correct means of delivery by carefully reviewing the “notices” clause of your document. State the delivery method immediately above the recipient’s address in the notice letter. For example, if a document says notices must be given by certified mail or Federal Express, include: “BY CERTIFIED MAIL AND FEDERAL EXPRESS.” If the document provides for multiple means of notice, seriously consider using at least two, for every notice recipient and every copy recipient.

Don’t try to improve on the method the document prescribes. If it says “regular mail,” then use regular mail. Don’t “upgrade” to certified mail. If you really want to, though, send a second copy by certified mail.

Once in a while, of course, lawyers who give formal notices also have to think about the law. Does any law govern how notice must be given? If so, comply.

10. Date

Any notice should be dated, reflecting the date it was sent. Don’t try to give a notice “as of” some other date, or date it a few days before you actually sent it. Use the actual date of sending. That’s true even if the terms of the notice clause dictate that the notice will only become effective later.

11. Reference to Agreement

In the opening paragraph of your notice, refer to the underlying agreement by its correct name and date. If amendments occurred, you may want to recite them, particularly if they affect the notice you are giving.

12. Contents of Notice

Review the provisions in the agreement for which you are giving the notice. But don’t just review the notices clause. Look for any other language in the agreement that might play a role. Does the notice need to say anything in particular? Specify any additional information? Remind the recipient of any response time? Include any enclosures? Include a check or a copy of something? Follow any particular format or template?

Comply with any and all requirements to the letter. Review any relevant provisions of the agreement and any related documents. The notice should say or include everything it needs to, but typically nothing more.

If you go beyond the literal requirements of the document, you’ll create opportunities for issues and arguments. Don’t do this lightly. If you absolutely must add something, say it with as much clarity and specificity as possible. Don't leave any opening for a court to accuse you of vagueness or decide the recipient could not understand what you said. Don’t give the recipient any excuse to not take your notice seriously.

For example, if the client wants to exercise a renewal option just in case some pending renewal negotiations break down, you may be tempted to refer to those negotiations and somehow say your notice is just a preventive measure. Don't. Keep it simple. Exercise the option and keep negotiating, but don't confuse the two of them. You are only asking for trouble.

If you anticipate arguments about the validity or contents of the notice, you'll usually find it doesn't make sense to cover those arguments preemptively in your notice. Just give a good, simple, effective notice first and argue later.

If you feel you absolutely must say something more than the bare minimum, consider sending a second notice to supplement the first. The second notice should make clear that it doesn't limit or vitiate the first, but instead just implements it or addresses uncertainties. For example, if your client intends to exercise a right of first offer or first refusal under a ground lease or joint venture agreement, the exercise notice should just exercise the right. If any uncertainties or further procedures exist, try to discuss them in a separate notice, making clear that the notice of exercise remains effective no matter what.

13. Contents and Clarity

Make the notice absolutely clear and unambiguous. You usually don't need to include copies of related documents, so don't. And don't ask the recipient to do anything that might vary from the documents. Variation will just confuse things and may even make the notice defective. For example, if the documents don't require the notice recipient to acknowledge receipt, think long and hard before asking them to do so. They might be able to argue that the request somehow made the notice "conditional" or took it beyond what the parties contemplated.

If you are concerned about acknowledgment of receipt, you can either establish a clear paper trail or request an appropriate estoppel certificate immediately after giving notice, if the document provides for estoppel certificates. But you don't want to complicate the notice in any way that might create an argument.

If you have any specific demands for the notice recipient, make them absolutely crystal clear. Leave no opening for the recipient to argue that the notice just looked like an interesting discussion of something without legal consequences or implications. Demand and inform and take action; don't ask or request or share ideas or discuss what you might decide to do later.

14. Proof of Mailing

If at all possible, obtain proof of dispatch and proof of delivery. Sometimes these items take a few days to come back. Make sure they do come back. Look at them when they come back. If the recipient refused delivery, what should you do next? Don't just file away the papers without thinking about them. Keep a copy of the notice as given. Prepare a certificate of mailing if necessary.

Think about who you might call as a witness if you had to prove any facts about the notice. If that person is a transient mailroom employee or someone else who might not be easy to locate, you may want to have them sign an appropriate affidavit now and include it in the file. Or consider whether to use someone who will be easier to track down later.

15. Copies

Distribute copies of the notice to anyone who should know about it, including the client. Include a cover note that mentions whether the notice was actually given, and when and how. If the date of effectiveness of the notice will matter, explain what the document says about that.

16. Filing

Keep an official file copy of the notice, with proof that it was given correctly and on time. When the return receipt arrives, file it with the copy of the notice letter. Distribute copies of the whole document set to everyone involved in seeing that the notice was properly given. Consider whether to record the notice, either because a statute requires it (e.g., California trustee's sale procedures) or for clarity and the historical record. When you circulate copies of the notice, include the proof of delivery.

CONCLUSION ● Notices aren't just bread-and-butter documents that you can throw together at the last minute without much thought. They must fully reflect the underlying relationship and all relevant documents, context, and history. Notices require clarity, precision, and absolute attention to detail, and a clear record of validity. The attorney needs to assure any notice does 100% of what the client wants it to do – not just 95% of it.

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Model Lease Guaranty

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Joshua Stein founded Joshua Stein PLLC, a commercial real estate law firm in New York City, in 2010. He is a member of the American College of Real Estate Lawyers and past Chair, New York State Bar Association Real Property Law Section. He has written over 250 articles and five books on commercial real estate law. Readers are welcome to adapt and use this Model Lease Guaranty for transactions, provided the user forwards to the author any comments, improvements, suggestions or corrections. The author acknowledges with thanks the helpful contributions made to this Model Document by attorneys Karen E. Abrams; Brook Boyd; Nancy A. Connery; Jeffrey M. Diamond; Deborah Goldman; Andrew L. Herz; Alfredo R. Lagamon, Jr.; Andrew A. Lance; Gary S. Litke; James Patalano; Keith E. Reich; Diane Schottenstein; Mark A. Senn; and Lauren Silk. Blame only the author for any errors or omissions. Nothing in this article should be construed as legal advice. An earlier version of this model document and commentary appeared in the May 2016 issue of The Practical Real Estate Lawyer.

"Should I stay or should I go?" – The monthly decision process of an uncreditworthy tenant, as immortalized by The Clash.[1]

I. INTRODUCTION

When an owner of commercial real property ("Landlord") signs a lease with a space tenant ("Tenant"), Landlord will care a lot about Tenant's creditworthiness. If Tenant doesn't have strong credit, Landlord will have to hold its breath at least 12 times a year to see if Tenant has decided to stay, go or even try to stay but not pay rent. To bring more certainty to its cash flow, Landlord will often demand that someone more creditworthy than Tenant guaranty Tenant's obligations. The guaranty could cover all Tenant obligations under the Lease (a "full" guaranty), or just some of them (a "partial" guaranty), or just Tenant's obligations until Tenant surrenders the premises without a fight and pays rent until then (a "good guy" guaranty). A guaranty can also go away, either all at once or gradually, or have a cap on liability.

The following Model Lease Guaranty offers template language for the three main flavors of Guaranty, plus optional language for other particular circumstances or deal structures.

This Guaranty template started, once upon a time, as a "short-form" Guaranty, in contrast to a "long-form" Guaranty. Both appeared in the first and second editions of the New York State Bar Association Commercial Leasing treatise edited by the author. Over time the Guaranties converged into this one Guaranty. The "base" Guaranty omits optional and "overkill" provisions, making most available instead as options. And after full footnote removal, the "base" version takes up only about four pages.

The "base" Guaranty consists of a full Guaranty of a Tenant's obligations under a commercial lease (the "Lease"), to be signed at the same time as the Lease. The "base"

[1] For details, visit http://tinyurl.com/llyq7c4.

Guaranty contains a reasonable set of Guarantor waivers—though one can always add more, such as from the optional provisions after the "base" Guaranty. Blank spaces, brackets and footnotes indicate blanks to fill, options, and issues to consider.

The optional provisions after the "base" Guaranty cover partial guaranties, good-guy guaranties, limited guaranties, representations and warranties, multiple or off-shore guarantors, bells, whistles and other "long form" (a/k/a "overkill") provisions that sometimes appear in Lease Guaranties. These optional provisions can make any Lease Guaranty quite long. Some may matter in some transactions. More often they just add words. They are offered here for use as needed or desired. Few serious commercial Lease Guaranties will be shorter than the "base" form offered here, though this article offers two possibilities that are even shorter than the model Guaranty.

Landlord and its counsel typically fear a court will try very hard to find a way to not enforce any Guaranty. Why? Courts often seem to believe that any Guarantor is a "fool with a pen" who calls out for the court's special sympathies and protection. In commercial transactions, that theory usually holds no water. Still, judges seem to have gone out of their way to invalidate or limit guaranties, particularly in California, less so in New York, with other states all over the lot.

Which party does this model Guaranty favor—Landlord or Guarantor? That's a simple question with a complicated answer. A Guaranty is supposed to achieve a very simple result for Landlord: Guarantor stands behind Tenant's obligations, so Landlord gets the benefit of Guarantor's credit in addition to Tenant's, all as if Guarantor had signed the Lease instead of, or in addition to, Tenant. That is a rather simple goal. To the extent the Guaranty achieves it, the Guaranty helps Landlord meet its expectations. Guarantor cannot complain.

The courts have, however, turned Guaranties into a complex minefield by giving Guarantors a panoply of defenses, some rather counterintuitive and exotic. Any or all of these defenses can interfere with Landlord's achieving its reasonable expectations. The defenses "favor" Guarantor. For an introduction to them, *see* Stein and Wang, *Revisiting the 24 Defenses of The Guarantor – 24 Years Later,* The Practical Real Estate Lawyer 9 (January 2012).

Faced with apparently boundless judicial solicitude for Guarantors, any Landlord tries to level the playing field by requiring Guarantor to waive defenses. But those waivers sometimes go so far that Landlord achieves more than its reasonable goals. Instead, Landlord burdens Guarantor with obligations and procedural burdens that unnecessarily or inappropriately exceed Tenant's. If a Guaranty does that, it unreasonably favors Landlord. This Guaranty seeks not to do that. Instead it limits the waivers to the minimum necessary to undo the damage done by the courts in their zeal to protect Guarantors.

A Guarantor should live with waivers that make Guarantor's position no worse than Tenant's, but reject waivers that put Guarantor in a worse position than if Guarantor had

simply signed the lease itself. A careful Guarantor should also ask serious questions about the underlying Lease. Since Guarantor should end up with the same liability as if it had signed the Lease, Guarantor should care whether the Lease is a balanced document, reasonably negotiated for Tenant. A Lease defines a relationship far more complex than a Guaranty. Landlords want and usually achieve leases that favor Landlords, period. Guarantor will have to live with everything in the Lease. Rather than focus primarily on whether the Guaranty "favors" Landlord or Tenant, Guarantor should focus on the Lease itself. And, by delivering the extra credit support of a Guaranty, Tenant and Guarantor can in exchange sometimes obtain a more balanced Lease.

II. GENERAL COMMENTS AND ISSUES TO CONSIDER

A. *Bankruptcy Risks*. If a Guaranty covers all obligations under a Lease, this will increase the likelihood of a substantive consolidation if Tenant or Guarantor files bankruptcy. That risk terrifies securitized lenders to a point where its mitigation becomes a major obsession in the closing process. But it is a small price for Landlord to pay for the benefit of receiving credit support via the Guaranty. Some Landlords will worry about it anyway and, of course, any Lease or Guaranty (or other business transaction of any kind) could face special issues if any party to the transaction filed bankruptcy. Those issues lie beyond the scope of this model document, but Landlord's counsel should think about them in structuring and negotiating any Lease and Guaranty. Others have written about those issues at length.

B. *Bankruptcy Risks – Large Security Deposits.* If Tenant delivers a security deposit or letter of credit that exceeds one year's rent, which doesn't happen all that often, and then files bankruptcy, the bankruptcy courts may force Landlord to "disgorge" part of the large security deposit or L/C proceeds. That result makes no sense given the independence principle underlying any L/C, but bankruptcy judges may care more about unsecured creditors than about the independence principle.

Landlord might protect itself, with or without a creditworthy Guarantor, by having Guarantor rather than Tenant deliver the large security deposit or L/C. The Guaranty becomes a mechanism to support an L/C or security deposit, even if the Guarantor has no credit at all. Having Guarantor rather than Tenant deliver the L/C or cash security should help protect Landlord from a Tenant bankruptcy, but: (a) one can never guarantee anything in bankruptcy court; and (b) Landlord still needs to worry about a Guarantor bankruptcy. This model Guaranty does not offer special language for these circumstances, but the author can provide it on request. As is so often true in leasing, L/C's and bankruptcy, it is not as simple as it sounds.

C. *Completion Guaranties.* This model Guaranty does not include sample language for a completion Guaranty. That type of Guaranty typically arises in ground leasing, not so much in ordinary commercial space leasing, and raises interesting and substantial questions about remedies and measures of damages. The author has a template for completion Guaranties, which is available on request and devotes some attention to

the special issues that completion Guaranties create. It will appear in the second edition of the author's book on ground leases.[2]

D. *Conflicts of Interest.* The interests of Guarantor and Tenant may conflict, yet the same counsel typically represents both. Counsel may want to disclose that conflict and obtain an informed waiver.

F. *Different Deals.* One can readily adapt this Guaranty to become a "partial" Guaranty or a "good guy" Guaranty, depending on the business deal. For example, a "good guy" Guarantor's liability might continue until six months after Tenant has moved out and surrendered possession of the space, rather than immediately after those events have occurred. Or the Guaranty might cover the entire Lease for two years, and then only after a default-free two years does the Guaranty convert to a mere "good guy" Guaranty--though perhaps still covering claims and issues that accrued during those first two years. A Guaranty might also in some other way "burn off" over time or limit Guarantor's exposure in other ways. This represents a business negotiation to be resolved as part of the fundamental Lease deal, best documented as part of the letter of intent or term sheet and not left for future conversation. Optional provisions offered here can help document many possible business deals.

G. *Distributions*. One could prohibit Guarantor from receiving distributions from Tenant when the Lease is in default. Such provisions rarely appear in Lease Guaranties, though, so are not offered here even as "overkill" options for the Guaranty. Nor would a Guaranty otherwise typically limit salary increases, bonuses, or other payments to Guarantor's principals, but some lawyers might think of that.

H. *Due Diligence*. For an entity Guarantor, Landlord should perform the same due diligence one would on a borrower or tenant--confirm its legal existence and exact name; obtain organizational documents, resolutions and consents; perhaps even obtain an opinion of counsel for, e.g., a foreign guarantor. Verify reputation and financial condition. Perform litigation search; general online searches; etc. For an individual person acting as Guarantor, check the Guarantor's address. Confirm it's a residence and not, for example, a vacant lot, motel or office building. Does Guarantor actually own it?

I. *Enforcement*. For an offshore Guarantor, Landlord might consider having the Guaranty provide for arbitration rather than litigation if Landlord ever needs to enforce the Guaranty. Foreign courts are often more hospitable to arbitration awards than to American court judgments. Use of arbitration clauses in guaranties is, however, unusual and might create issues of inconsistency with Lease enforcement. On the other

[2] *See* Joshua Stein, A Guide to Ground Leases (With Forms and Checklists), ALI-ABA, 2005. This book went out of print several years ago. The author is slowly preparing a second edition, which he plans to self-publish. Readers may purchase electronic copies of the first edition or receive an announcement of the second by sending email to office@joshuastein.com. Readers can also preview the first edition through books.google.com.

hand, the Guaranty allows Landlord to enforce the Guaranty without enforcing the Lease at all. Whether and exactly how to go down this road depends on the circumstances of a particular Guaranty, including the Guarantor's home country. As a result, this model Guaranty does not offer arbitration language, but Landlord's counsel should think about it and consult with arbitration experts. In the author's experience, no arbitration expert ever likes the arbitration language crafted by any transactional lawyer.

J. *Full Recourse?* If the Guaranty covers less than all Lease obligations, consider adding language to create full liability for all Lease obligations if Guarantor or Tenant commits bad acts, such as frivolous litigation, or seeks a Yellowstone injunction (a New York procedure by which the tenant seeks to maintain the status quo)—much like the growth of nonrecourse carveouts in loan documents. This concept is, however, off market.

K. *Joinder by Spouse.* For an individual Guarantor, consider requiring Guarantor's spouse to join in the Guaranty to avoid problems with who owns which assets, particularly in community property states. In this case, include optional language offered here for multiple Guarantors. But also consider legal restrictions on requirements for spousal joinders.[3]

L. *Not So Good?* A "good-guy" Guaranty protects Guarantor but doesn't help Tenant. Thus, if Tenant wants the right to move out before the Lease expires by paying rent until departure and satisfying some other conditions, Tenant might prefer to obtain a termination right in the Lease. This would allow Landlord to keep the security deposit and prepaid rent, and perhaps more, rather than structure the arrangement as a good-guy Guaranty. If Tenant has meaningful assets or anticipates it will want to stay in business at another location after "walking" from this Lease before expiration, then Tenant will not want Landlord to have a claim against Tenant. This is the reason for a termination option in the Lease (with the Lease backed by Guarantor until Tenant meets the conditions to termination, and terminates and moves out), instead of a simple "good-guy" Guaranty. Conversely, if the parties agree to a "good-guy" Guaranty, then Landlord will want to preserve its claims against the defaulting Tenant, even if Tenant has moved out and thus terminated Guarantor's liability.

M. *Plain English*. This Guaranty is written in Plain English, to the extent reasonably possible. This means active voice sentences and short paragraphs. Ordinary English words replace legalese where possible. After making a point, this Guaranty does not repeat the same point in different words. It never refers to section numbers. When this Guaranty must refer to a number, it does so only once. As a result of these and other "Plain English" techniques, this Guaranty sometimes does not read like a typical legal document. A nonlawyer might read and actually understand it. And that's a good thing.

[3] *See, e.g.*, 15 U.S.C. §§ 1691 *et seq.*; 12 C.F.R. § 292.7(d). States may have their own rules.

N. *Principal*. This Guaranty assumes Guarantor is a principal of Tenant or otherwise owns or controls Tenant—or at least has some significant interest in Tenant's business—and is somewhat creditworthy. The client should of course confirm this. If Guarantor is no more creditworthy than Tenant, then this Guaranty may, in practice, add little value, except perhaps as a club to hold over Guarantor's head (or as a vehicle for a large security deposit or L/C, as discussed above). If Tenant's credit declines, however, and Guarantor's does not, this Guaranty may indeed have value.

O. *Security*. If Landlord obtains security for Guarantor's obligations, this Guaranty may require changes. Any security arrangements will create their own issues, which: (a) will vary by state; and (b) this model Guaranty does not consider.

III. CAVEATS

A. *Bad Dates*. If the parties engage in a mad last-minute scramble to sign and exchange documents, inconsistencies may arise regarding dates. Those inconsistencies can allow a Guarantor to try to disclaim liability under the Guaranty if, for example, the Guaranty refers to the wrong date on the Lease. And if the Guaranty is dated after the Lease, it could raise issues on consideration. As the best practice, counsel should make sure all dates align. Because that might not happen, this Guaranty refers to a Lease dated "on or about" a certain date.

B. *Defined Terms*. The "base case" Guaranty includes its own definitions for all capitalized terms. Check and adjust those definitions as appropriate. They should typically match the nomenclature and definitions in the Lease. Terms fundamentally important to the Guaranty, such as the "Guarantied Obligations," should be defined in the Guaranty, but the wording should match the Lease to the extent appropriate. For lesser definitions, one can refer to the Lease, which avoids the risk of inconsistencies if the parties negotiate the Lease definitions but don't conform the Guaranty. After the "base case" Guaranty, optional language offered here does not always include all necessary definitions. In any case, check that every capitalized term is defined somewhere, or adjust it to match the structure of definitions in the Lease. As a matter of preference, one might want to move definitions in the Guaranty to an Exhibit, so the reader doesn't have to wade through them before reaching the Guaranty's operative language. On the other hand, this Guaranty doesn't have that many definitions to wade through.

C. *State-Specific Provisions.* This Guaranty assumes New York law governs. New York has no special state-specific provisions that must or should appear in a Guaranty except as this paragraph notes. In any other state, check for state-specific waivers or provisions. For example, use in California would require waivers of specified statutory or even constitutional provisions, sometimes in all capital letters, which may look very fierce but typically just impede comprehension and overwhelm the reader—assuming anyone actually tries to read them. Other states have other requirements. Also consider adding language driven by Guarantor's home state or other jurisdiction, even if the law of that state or other jurisdiction does not otherwise govern the Guaranty, because Landlord might choose to enforce the Guaranty there. As a New-York-specific provision,

optional language for this Guaranty does require Guarantor to acknowledge that the Guaranty is an instrument for the payment of money only. This might give Landlord some benefits under Civil Practice Law and Rules 3213, but those benefits come with issues. The Guaranty does not strictly need to refer to 3213. If the Guaranty covers performance rather than payment, one may wish to delete the reference to 3213, though keeping it probably does no harm. Landlord may choose not to rely on this language. The optional provisions also include some language seeking confidentiality and speed in any action to enforce this Guaranty. Those are generic but not yet market standard.

IV. SHORTER-THAN-SHORT

If this model Lease Guaranty does not seem short enough, one could take an entirely different approach and try to distill the essence of a lease guaranty into just a few paragraphs. As an exercise in comparative law, here is how a "shorter-than-short" lease guaranty might look. This was designed for use in residential leasing outside New York City. No representation or warranty is made on the efficacy of this "shorter-than-short" lease guaranty, particularly in New York City.

> 1. *Guarantied Obligations.* Guarantor unconditionally and irrevocably guarantees to Owner that Resident shall perform and observe all its obligations under the Lease, or arising by law from Resident's occupancy of the Premises, including Resident's obligations to pay rent and do everything else the Lease or law requires (collectively, the "Guarantied Obligations"). Resident's bankruptcy or other proceeding shall not reduce, limit or discharge the Guarantied Obligations.
>
> 2. *Nature of Liability.* Guarantor shall be equally and primarily liable with Resident for all Guarantied Obligations as if Guarantor had signed the Lease. Owner can sue Guarantor directly without suing Resident or applying security to cure a default. This Guaranty remains in full force and effect even if the Lease is assigned, changed, extended or renewed in any way, with or without Owner's or Guarantor's consent; Owner makes a claim against Guarantor or Resident; or Resident leaves.
>
> 3. *Waivers.* Guarantor waives all notices of any kind, including notices about Resident, the Lease, the Guarantied Obligations or any default. Owner doesn't need to notify Guarantor of anything at all or deal with Resident in any particular way. Guarantor waives all defenses otherwise available to Guarantor under suretyship or guaranty law except only the defense of actual full payment and performance.
>
> 4. *Miscellaneous.* Any amendment or waiver of this Guaranty must be in writing and signed by Owner to be effective. Owner may perform credit checks and other investigations at any time on Guarantor. On request, Guarantor shall deliver a certificate satisfactory to Owner

> confirming the status of this Guaranty. In any action, proceeding or counterclaim relating to or arising from this Guaranty, the Lease or the parties' relationship: (a) the parties waive jury trial; (b) Guarantor consents to New York jurisdiction; and (c) if Owner prevails, Guarantor shall pay Owner's reasonable attorneys' fees.[4]

This language probably delivers 95% of the practical benefit of any Guaranty. It does, however, expose Landlord to the risk that a court might decide Guarantor did not adequately waive one defense or another. In today's world, well-represented Landlords know about those defenses and in most cases can take steps to prevent them. Relatively few recent Guaranty litigations have actually hinged on the exact words of the Guarantor's waivers. Nevertheless, no one wants to be the first commercial real estate lawyer who chopped out most of the standard provisions of a Guaranty.

If even the four paragraphs above are not short enough, one could try replacing them with this, right after Tenant's signature: "I join in, assume, and guaranty payment and performance of all obligations of Tenant, as if I had personally signed the above Lease myself." It makes the point and supports a claim, but leaves out everything else.

V. LEASE LANGUAGE BASED ON GUARANTY

The Lease should recognize the Guaranty exists. For example:

A. *Concessions to Guarantor*. To the extent Landlord agrees to any concessions to Guarantor of the types suggested in the optional provisions below, those may work better if incorporated into the Lease than if incorporated into the Guaranty, just so Landlord can't argue the concessions don't bind Landlord. For example, the Guaranty might say Landlord agrees to pay Guarantor's attorneys' fees if Guarantor prevails in litigation. But Landlord never actually signed or became a party to the Guaranty. One can easily argue that Landlord agreed to its terms by preparing and accepting the form of Guaranty, but it's still a potential issue. One could avoid it by moving any "Landlord covenants" out of the Guaranty and into the Lease. As an alternative, if the form of Guaranty is attached to the Lease, Landlord could confirm in the Lease that Landlord agrees to all the terms of the Guaranty, and will perform all Landlord obligations under the Guaranty. Broad language like that might scare a Landlord, so it may make more sense to move the substantive provisions to the Lease.

[4] Under New York Real Property Law § 234, any attorneys' fees clauses in "leases of residential property" are automatically deemed mutual. As between landlord and tenant, which party (if unsuccessful in litigation) is more likely to actually pay a judgment entered against it for the other party's attorneys' fees? Although § 234 has led to much litigation, no available case indicates whether "leases of residential property" include guaranties of such leases. Ordinary principles of the English language suggest that a "lease" is not a "guaranty" and vice versa. But ordinary principles of the English language are not always a good guide to residential landlord-tenant jurisprudence in New York.

B. *Events of Default*. If a Lease contemplates a Guarantor, the Events of Default should include a few that relate to the Guaranty and the Guarantor. Tenant could negotiate a right to cure each by delivering a replacement Guaranty from a Satisfactory Guarantor[5] within a certain time. As Landlord's starting position, the Lease should define an Event of Default to include occurrence of each of these circumstances:

1. *Guarantor Impairment.* Only for so long as this Lease requires a Guaranty to remain in effect (a "Guaranty Period"), if Guarantor fails to meet the Guarantor Financial Standard.[6]

2. *Guarantor Insolvency*. Only in a Guaranty Period, if any Guarantor is the subject of an Insolvency Proceeding, unless involuntary and dismissed within __ days.[7]

3. *Guarantor Nonperformance.* Only in a Guaranty Period, if Guarantor fails to perform any obligation under the Guaranty, including failure to deliver any document or financial information, or fails to comply with any negative covenant in the Guaranty, and any such failure continues for __ days after notice from Landlord, or if any representation

[5] This definition will matter. See sample definition of "Satisfactory Guarantor" offered within the optional Concessions to Guarantor later in this model document. Landlord will prefer to have the right to approve any replacement Guarantor in its sole discretion. In that case Tenant's right to deliver a replacement Satisfactory Guarantor gives Tenant no comfort at all. It doesn't really justify any verbiage, legal time or printing costs.

[6] The Lease or Guaranty should define "Guarantor Financial Standard." For inspiration, see the definition of Satisfactory Guarantor. If a Lease contains financial covenants for Guarantor, then it should have consequences for not meeting them. But must those consequences always include a premature end of the transaction? Tenant and Guarantor would argue they cannot control the risk of future Guarantor financial impairment, and it should not adversely affect the Lease and Tenant's right to occupy its space and obtain the benefit of its investment in the location. Hence, if Guarantor fails to meet the Guarantor Financial Standard, Tenant may want the right to post a letter of credit; demonstrate that Tenant's credit has improved in a way that compensates for any problems with Guarantor's credit; eliminate or trim back the Guarantor Financial Standard if Tenant has adequately performed for a certain time; or push back in other ways limited only by the ingenuity of counsel. Landlord might suggest that an increase in Fixed Rent, rather than an Event of Default, might adequately compensate Landlord for the increased risk resulting from an impairment of Guarantor's credit.

[7] Guarantor or Tenant might propose that, especially for an involuntary Insolvency Proceeding, Guarantor should have a reasonable time in which to assume the Guaranty, cure all defaults, give Landlord relief from the automatic stay, and thereby prevent an Event of Default. Tenant should remember that, if Tenant is not itself subject to an Insolvency Proceeding, then Guarantor's Insolvency Proceeding constitutes a perfectly valid and enforceable Event of Default.

or warranty by Guarantor in the Guaranty is false or misleading in any material respect.

4. *Guarantor Termination*. Only in a Guaranty Period, if any Guarantor dies, becomes disabled,[8] is dissolved or terminates its legal existence.[9]

C. *Guaranty*. The Lease should require Tenant to deliver the Guaranty, and state that Landlord would not have entered into the Lease without the Guaranty, to prevent any later issues about why the Guaranty existed.

D. *Interaction with "Good Guy" Guaranty*. A "good guy" Guaranty will allow Guarantor to terminate liability if Tenant gives, e.g., 60 days' notice that Tenant intends to vacate and surrender the Lease. Creative and aggressive Landlords have been known to assert that mere delivery of such a notice constitutes an anticipatory breach of the Lease, immediately entitling Landlord to all remedies for an Event of Default. Although the argument has a certain dubiousness and hypertechnicality to it, Tenants and Guarantors should prevent it entirely by stating in the Lease that delivery of such a notice does not constitute an anticipatory breach. Even better, Tenant and Guarantor should try to simplify the relationship and deal structure by giving Tenant an outright termination option, under conditions like those contemplated in a good-guy guaranty, as suggested above.

E. *Notices*. In the "notices" clause of the Lease, include Guarantor as a party that must receive copies of any notices to Tenant. Guarantor and Tenant should resist any language suggesting that notice to Guarantor is just a "courtesy" and not really required.

F. *Special Tenant Rights.* If the Lease gives Tenant any pre-emptive rights, such as an expansion or purchase option or a right of first refusal or first offer, Landlord might require that any notice of exercise include Guarantor's consent. As an alternative, the Guaranty might affirmatively say no such consent is necessary and any exercise will nevertheless bind Guarantor. This model Guaranty does include language to that effect. And if the pre-emptive right involves a sale of Landlord's building, does the business deal contemplate that Guarantor will backstop Tenant's obligations regarding the sale? It may not matter, if Tenant's liability will not exceed loss of its deposit. That will depend on the circumstances of the particular deal.

VI. TENANT OR GUARANTOR?

[8] Disability should perhaps not constitute an Event of Default. Incompetence or a guardianship might.

[9] Tenant may want a mechanism to replace a dead or disabled Guarantor with one or more people, named or to be named, who individually or collectively meet the Guarantor Financial Standard. If Guarantor's estate assumes the Guaranty, that might also prevent an Event of Default.

If Guaranties present so many possible impediments to enforcement, should Landlord instead just ask Guarantor to sign the Lease, along with Tenant? Or perhaps have Guarantor alone sign the Lease instead of Tenant and then sublease to the originally intended Tenant? Would that give Landlord a stronger position against Guarantor?

The answers to those questions are not simple.

Litigation to enforce a Guaranty may turn out to be easier to pursue than litigation to enforce a Lease, especially if the Lease raises lots of complex landlord-tenant issues. The various waivers in the Guaranty may, if Landlord is lucky, eliminate issues that Tenant have raised. Depending on the procedural posture and strategy of the dispute, Landlord might be able to bring separate actions, suing Tenant in one action while also suing Guarantor in a simpler action, or at least having some possible options along those lines.

If the creditworthy Guarantor is a foreign company, Landlord may want the option of easily suing Guarantor in its home country, rather than obtaining a judgment in the United States and then trying to enforce it overseas—not always easy. If Landlord ever did try to sue Guarantor in its home country, Landlord might have better luck trying to enforce a Guaranty (an ordinary contract) rather than a Lease (which the foreign court might deem a real estate transaction that can only be enforced where the property is located). That's another reason why Landlord might well prefer a Guaranty to a direct Lease obligation.

A creditworthy Guarantor may also prefer signing a Guaranty to signing a Lease. Signing a Lease may increase Guarantor's exposure to all kinds of claims and litigation arising from the leased space—personal injury lawsuits, bills from someone providing services, and the other exposures that come from visible operation and occupancy of any real estate. If Guarantor is based overseas, it may want to minimize any argument it is "doing business" in the United States, to protect itself from high corporate tax rates and American plaintiffs and judges in unrelated lawsuits. Signing a Lease looks a lot more like "doing business" than does just signing a Guaranty.

All things considered, it might make sense for both parties to use a Guaranty rather than have a creditworthy parent company directly sign onto the Lease. Of course, that puts the burden on Landlord and its counsel to assure the Guaranty contains the waivers it needs, so Guarantor cannot assert spurious theories to escape liability. This model offers suitable language. For a foreign Guarantor, Landlord may want to add language, also offered here, by which Guarantor appoints an agent for service of process in the United States.

On the other hand, Landlord may also want to consider the business culture of Guarantor's home country. That culture, unlike the American business culture, might make it very difficult for a Guarantor to default—for example because it would cause great "shame" to Guarantor. In that case, Guarantor might be more willing to let Tenant default, and Landlord might mitigate that risk by having Guarantor actually sign the Lease. Guarantor's fear of suffering shame if it defaulted on the Lease might help protect

Landlord's cash flow more than if Tenant, a mere foreign subsidiary of Guarantor, signed the Lease.

VII. CLOSING DOCUMENTS

In addition to the Guaranty, the Lease and any Lease-related documents, the transaction may require these closing documents:

A. Consent to obtain copies of Guarantor's tax returns from tax authorities. (This requirement is atypical but not insane.)

B. Copy of Guarantor's driver's license or passport, if an individual.

C. Corporate documentation (formation, authorization, internal approvals, etc.) for an entity.

D. Due diligence searches and information on Guarantors.

E. Financial statements and (to facilitate future enforcement of a judgment) information to identify assets and liabilities. Guarantor will typically delay delivering these items until the last minute, hoping Landlord will be so anxious to close the deal that Landlord won't pay much attention or ask many questions.

F. If multiple Guarantors exist, then an indemnification and contribution agreement among them, and suitable language in Tenant's organizational documents to address the consequences of payments under the Guaranty.

G. Any other special arrangements to reimburse Guarantor if Guarantor needs to pay under the Guaranty, at least to the extent those arrangements go beyond Guarantor's automatic common-law claims against Tenant.

H. Opinion of counsel, in rare and special cases, relating to corporate matters but not enforceability.[10] A Landlord might more likely obtain an opinion for an "unusual" Guarantor such as a governmental entity, a nonprofit, a small business investment company, a credit union or other financial institution, a foreign entity, an entity subject to special regulatory restrictions, or the like. Even in an ordinary partnership, a partner may lack authority to sign a guaranty on behalf of the partnership unless the partnership agreement expressly allows it.

I. Waiver of conflicts, if necessary, reflecting the fact that the same counsel represents both Tenant and Guarantor, whose interests may conflict.

VIII. POST-SIGNING ADMINISTRATION

[10] The general absence of opinions of counsel in leasing transactions, including Guaranties, does not seem to have produced an epidemic of invalid or unauthorized Leases or Guaranties.

Once the Lease transaction has closed and the Guaranty is in place, the existence of a Guaranty requires Landlord to consider a few special matters in administering the Lease and otherwise. Some of these administrative suggestions apply to all legal documents, not just Guaranties.

A. *Amendments, Etc.*. If Landlord and Tenant agree to amend (or extend, etc.) the Lease, Landlord should insist that Guarantor consent and confirm the continued effectiveness of the Guaranty, and also acknowledge that the Lease and the Guarantied Obligations have been redefined to include the changes to which Guarantor consented. That's true even though the Guaranty waives any requirement for Guarantor consent. An "extension" or "renewal" of a Lease – which this Guaranty covers – is not the same thing as a new Lease. If Landlord and Tenant sign a new Lease instead of extending or renewing the old one, Landlord should assume the Guaranty will not apply to the new Lease.[11]

B. *Change of Address; Other Notices.* If Landlord receives a notice of a change of Guarantor's address, Landlord should update its records. If any other notice arrives from Guarantor, Landlord should pay attention. And if Guarantor or Landlord moves, it should remember to send a change of address notice. If Guarantor appointed a corporate service company as its agent for the Guaranty, Guaranty should also notify that company of the new address.

C. *Lines of Communication.* Aside from administering the words of the Guaranty, Landlord would be well advised to maintain good relations and lines of communication with Guarantor and Tenant. If Landlord ever needs anything from them, it will help if Landlord readily knows who to call; has spoken to them before, and recently; and has handled any of their previous requests in an expeditious and reasonable way.

D. *Loan Closings.*. For a future mortgage loan on the property, Landlord or its lender may (should) require an estoppel certificate from Guarantor, not just Tenant. Landlord should handle that as part of the closing process. It may take longer than an ordinary tenant estoppel certificate.

E. *Renewal and Extension.* This Guaranty, like most other lease guaranties, covers any "renewal" or "extension" of the guarantied Lease. If that Lease expires and Landlord and Tenant sign a new lease, is that a renewal or extension of the old Lease? Probably not. Therefore, if Landlord wants to preserve (or have any hope of preserving) the benefit of the Guaranty, any extension or renewal transaction should not be documented as a new lease, but instead as an extension or renewal of the old Lease.

[11] Lo-Ho LLC v Batista, 62 A.D.3d 558 (App. Div. 1st Dep't 2009) (guaranty covered "renewal, change or extension" of lease, but not a new lease after the old one expired, even though the new lease was captioned "extension of lease"; court called it "in reality a new lease").

F. *Reporting.* Obtain periodic financial statements, estoppel certificates, litigation searches, credit check updates, background investigation updates, etc. If Guarantor authorized Landlord to obtain copies of tax returns from the tax authorities, periodically exercise that right. If Landlord anticipates a sale or refinancing, Landlord may wish to pay particular attention to enforcing Guarantor's reporting obligations.

G. *Termination of Guarantor.* Landlord should check periodically that Guarantor has not died, become disabled, filed bankruptcy, liquidated, lost its corporate (or other entity) status, or taken any other action that would constitute a Lease default or limit the utility of the Guaranty. If one of these events does occur, Landlord may have a relatively short time in which to act to protect itself. If a Guarantor dies, for example, Landlord may need to file a claim relatively quickly in Guarantor's estate. The Lease may, as suggested above, give Landlord certain rights and remedies upon Guarantor's death, etc.

H. *Workout Negotiations*. If the transaction gets into trouble and Landlord and Tenant sign a pre-negotiation agreement, Guarantor should also sign it. Guarantor should participate in any workout discussions, as Guarantor may be the most likely source of a financial solution to the problem.

VII. BASE CASE: FULL GUARANTY OF LEASE[12]

This **GUARANTY** (the "Guaranty") is made as of _____, 201__ (the "Guaranty Date") by _____, a _____, whose address is _____ (with its successors and assigns, "Guarantor"),[13] for the benefit of _____, whose address is _____ (with its successors and assigns, "Landlord"). This Guaranty uses terms before defining them. An Index of Defined Terms follows the signatures. Guarantor signs and delivers this Guaranty based on these facts:

A. Landlord is about to enter into a _____ Lease (as further defined below, the "Lease") with _____ (with its successors and assigns, "Tenant"), dated on or about the Guaranty Date.[14]

[12] One might adjust the title of the document, to prevent confusion, misunderstandings, and bad assumptions about the Guaranty's scope. For example, it could be a Full Guaranty, Lease Guaranty, Limited Guaranty or Good-Guy Guaranty. On the other hand, such gradations may invite arguments and theories about what the guaranty was "really" intended to cover. Those issues don't arise if it's just a "Guaranty" and someone has to read it to figure out what it means. As a psychological matter, Guarantor may derive comfort from a more limited title for the document.

[13] If multiple Guarantors exist, they will typically sign the same document rather than each sign a separate Guaranty. This prevents needless multiplication of documents and can simplify enforcement. The optional provisions after this model Guaranty include some for multiple Guarantors.

[14] One could also identify the leased premises here, but it seems unnecessary. It should suffice to identify the Lease.

B. The Lease initially demises premises consisting of _____ (as modified from time to time in accordance with the Lease or by agreement between Landlord and Tenant, the "Premises").

C. Guarantor directly or indirectly owns a substantial percentage[15] of the equity interests of Tenant, or is a principal of Tenant.

D. The Lease will therefore benefit Guarantor.

E. Landlord would not enter into the Lease unless Guarantor signed this Guaranty.

NOW, THEREFORE, in exchange for $100 and other valuable consideration,[16] receipt of which Guarantor acknowledges, and to induce Landlord to enter into the Lease, Guarantor agrees:

A. *Definitions.* Any term defined in the Lease has the same meaning in this Guaranty, except as expressly modified or superseded here.[17] This Guaranty also uses these terms:

1. "Guarantied Obligations" means all liabilities and obligations of Tenant under the Lease,[18] in each case whether or not Tenant's notice or cure period, if

[15] One could specify the percentage as a matter of extra care, but it seems unnecessary and just creates extra work. And what if the percentage is inaccurate?

[16] If Guarantor delivers the Guaranty separately, well after the Lease closing, then issues could arise on consideration. In those cases one may need to do more than recite consideration, instead explaining for example that Landlord agreed to accept the Guaranty in exchange for a Lease amendment or a forbearance in Lease enforcement. In any case, Landlord's counsel should make sure Landlord can satisfy ordinary contractual requirements for delivery of consideration.

[17] The "base case" Guaranty contains all its own definitions, so one can delete the previous sentence, using it only when additional defined terms have crept into the document. One may, however, prefer to delete some lesser definitions in this document and rely on definitions in the Lease. In that case, one would keep this sentence. One might also adjust defined terms to match those in the Lease (e.g., "Attorneys' Fees" rather than "Legal Costs").

[18] This language works for a full guaranty. Some Landlords like to add a laundry list of "Guarantied Obligations," such as obligations to pay rent, escalations, utilities, and construction costs; to comply with law; to provide insurance; to remove liens; etc. This seems unnecessary. What is unclear or inadequate about referring to "all" obligations under the Lease? If Landlord wants to include a list, or if the Guaranty is just a partial guaranty of the Lease, please see the menu of "Guarantied Obligations" offered below for a partial guaranty. If Landlord leaves something out by mistake, does that implicitly diminish the scope of "Guarantied Obligations"? And what about performance obligations that Guarantor cannot perform? For example, what if a performance obligation requires a special license that Tenant has but Guarantor does not? Landlord would typically not care about these questions or their answers.

any, has ended.[19] If a Guarantied Obligation arises only after notice to Tenant but Landlord cannot legally give notice to Tenant, then Landlord may at its option instead notify Guarantor. The Guarantied Obligation shall then be determined, for this Guaranty, as if Landlord had notified Tenant. If the Lease gives Tenant a right to contract, expand, extend or renew, or to acquire the Premises or an interest in Landlord, then the "Guarantied Obligations" include Tenant's obligations from an exercise of that right, whether or not Guarantor consents.[20] The Guarantied Obligations also include all obligations of Tenant to Landlord relating to the Premises and arising under landlord-tenant law, such as liability for holdover rent, damages, use and occupancy payments and rent for month-to-month occupancy after the Lease ends.

2. "Insolvency Law" means Title 11, United States Code, or other or successor state or federal statute on assignment for benefit of creditors, appointment of a receiver [(excluding one appointed at the request of a Leasehold Mortgagee)][21] or bankruptcy, composition, insolvency, moratorium, reorganization, trustee appointment or similar matters.

3. "Insolvency Proceeding" means any proceeding (or appointment), voluntary or involuntary, under Insolvency Law.

4. "Landlord Remedies" means Landlord's rights and remedies under the Lease or law, including Insolvency Law, including any right to terminate the Lease, evict Tenant, collect damages for default and apply or not apply any security deposit or letter of credit Tenant delivered.

5. "Lease" means: (a) the Lease, as initially defined above, as amended,[22] assigned, extended or renewed from time to time,[23] whether or not with Guarantor's consent; and (b) Tenant's obligations to Landlord under law regarding the

[19] One could state that the Guaranty of "all" obligations ends on a Termination Date, in which case it could become a broad form of good-guy Guaranty and require some conforming changes. Sample language appears in the optional provisions below.

[20] Not everything in this sentence would apply in a typical space lease. Trim as appropriate.

[21] Add this bracketed language for a ground lease.

[22] One expects to also see "modified." But is "modified" any different from "amended"? "Extended" and "renewed" may in fact be different concepts, hence both appear.

[23] Typically, a Guaranty supports not only the original Lease but amendments, extensions, renewals, and so on, whether or not the Lease provides for them. At least that's what it says. If Guarantor does not in fact control Tenant (or stops controlling Tenant because Tenant assigns to a third party), Guarantor may want to limit the Guaranty to cover just the original Lease, not any future transactions, or perhaps not any renewals, extensions or expansions. In that case, Landlord will want to state that any future amendment, etc., does not vitiate Guarantor's liability for the original Lease. Instead, Guarantor merely has no incremental liability (or benefit) as a result of the amendment, etc. In any event, counsel should make sure Guarantor understands the scope of its potential liability. For an unsophisticated or forgetful Guarantor, this could require written advice to Guarantor.

Premises, including after the Lease as defined above expires, terminates or otherwise ends. The "Lease" shall be defined without regard to any: (i) Insolvency Proceeding; (ii) resulting limitation, modification, reinstatement, rejection or termination of the Lease or Tenant's obligations; or (iii) exercise of Landlord Remedies.

6. "Legal Costs" means Landlord's actual reasonable costs of collection and legal representation for any actual or threatened: (a) Tenant default under any Guarantied Obligation; (b) Guarantor default or Landlord claim under this Guaranty; or (c) Proceeding. Those costs include reasonable[24] attorneys' fees, disbursements and other charges billed by Landlord's attorneys, court costs and costs of process servers, private investigators and all other personnel whose services are charged to Landlord in connection with Landlord's receipt of legal services.[25] Legal Costs also include all other costs of collection.

7. "Proceeding" means any action, arbitration, counterclaim, litigation or other proceeding on, arising out of or relating to interpretation or enforcement of this Guaranty or the Lease, including a Tenant or Guarantor Insolvency Proceeding and any exercise of Landlord Remedies.[26]

8. "Tenant" means: (a) Tenant as defined above; (b) any estate created through a Tenant Insolvency Proceeding; (c) any liquidator, receiver or trustee of Tenant or any of its property; (d) any similar person or officer, appointed in any Insolvency Proceeding or otherwise and (e) any heir, successor or assign of Tenant.

B. *Guaranty of Guarantied Obligations.* Guarantor absolutely, irrevocably and unconditionally guarantees Tenant's timely payment [and performance][27] of all Guarantied Obligations. Guarantor covenants that Tenant will pay [and perform][28] all

[24] A court will often infer the word "reasonable" whether or not the parties include it, but if it's not there Guarantor will ask for it and Landlord will typically agree. So here it is. And perhaps it creates an unnecessary hook on which Tenant can hang issues in a Proceeding. But the hook is there anyway, in all likelihood.

[25] Landlord may want to add: "If Landlord uses in-house counsel, "Legal Costs" shall include the estimated value of the time of those attorneys based on billing rates of Landlord's outside counsel."

[26] Guarantor will want to limit this definition to anything arising from the Guaranty, so it excludes anything arising from the Lease or Landlord Remedies under the Lease. That argument may make sense if the Guaranty covers less than all obligations under the Lease. But if the Guaranty covers all Tenant obligations under the Lease, then it would include Tenant's obligations regarding any Proceeding or exercise of Landlord Remedies.

[27] Landlord may not care about performance, just payment. Performance raises issues about access. Landlord may prefer to cure any performance defaults and send a bill. In that case, delete all references to the Guaranty covering performance. Limit it to payment.

[28] See previous comment.

Guarantied Obligations when and as the Lease requires.[29] If Tenant does not do that, then Guarantor shall.[30] For any Guarantied Obligation, Guarantor shall pay all damages[31] and losses that Landlord suffers and the Lease or governing law entitles Landlord to recover, including Landlord's Legal Costs, because Tenant fails timely to pay or perform. Guarantor's liability under this Guaranty is primary, not secondary, in the full amount of the Guarantied Obligations, including interest, default interest, late fees[32] and costs and fees (including Legal Costs) relating to the Guarantied Obligations. Any unpaid Guarantied Obligation shall bear interest from the date it accrues until the date paid, both before and after entry of judgment, at the higher of: (a) the interest rate that applies after default under the Lease; or (b) the judgment rate. If Landlord obtains a judgment against Tenant for any Guarantied Obligation, then Guarantor shall on Landlord's demand pay it and Landlord's Legal Costs of collecting it.

C. *Landlord's Exercise of Landlord Remedies*. Landlord may enforce this Guaranty against Guarantor independently of, and with or without enforcing, any Landlord Remedy, and without regard to any event in any Proceeding with Tenant. Any Guarantied Obligation and Guarantor's primary personal liability for it shall not decrease if: (a) Tenant abandons, surrenders or vacates the Premises or is subject to an Insolvency Proceeding; (b) Landlord exercises any Landlord Remedy or enforces this Guaranty; (c) Landlord fails to do so or delays in doing so; (d) Landlord obtains a judgment against anyone; (e) the Lease ends; or (f) any other circumstance occurs except actual payment and performance.[33] Nothing in this paragraph limits Landlord's obligation to credit Guarantor for any sums actually collected on account of the Guarantied Obligations.

D. *No Offset*. The Guarantied Obligations are not subject to counterclaim, deduction, defense, offset or reduction of any kind, including any arising or purportedly arising under the Lease or from the landlord-tenant relationship under the Lease, except actual payment or performance. If Landlord holds a security deposit: (a) Landlord need not apply it toward the Guarantied Obligations; (b) Landlord may continue to hold or apply it, in accordance with the Lease, as Landlord determines; (c) Landlord may apply it

[29] Guarantor may ask that if Tenant does not pay or perform, Landlord will give Guarantor notice, and then Guarantor will have, e.g., 30 days to cause Tenant to pay or perform before Guarantor must.

[30] What about nonmonetary obligations that require access to the Premises? Does Landlord implicitly allow Guarantor to enter the Premises for that purpose? Or does Guarantor need to work out access with Tenant, the party with the right to possession? Though these questions are interesting, they would seem to be Guarantor's problems rather than Landlord's. If Landlord worries about them, Landlord may want to address them, but it seems unnecessary, especially in a "short form" Guaranty.

[31] One could include a list of damages; for example: "direct, indirect, incidental, and consequential." Usually an obligor will want to exclude some of these.

[32] If the Lease and hence the Guarantied Obligations do not already provide for a late fee and default interest, consider providing for them in the Guaranty.

[33] Adjust if the business deal contemplates a Termination Date for the Guaranty.

toward any Lease obligations that do not constitute Guarantied Obligations; and (d) it does not limit the Guarantied Obligations.[34] If Landlord holds a letter of credit, Landlord may draw on it or not, in Landlord's sole discretion subject to the terms of the Lease.

E. *Changes in Lease*. Without notice to or consent by Guarantor, in Landlord's discretion and without prejudice to Landlord or in any way limiting or reducing Guarantor's liability under this Guaranty, Landlord may but shall have no obligation to: (a) grant extensions of time, renewals or other modifications; (b) amend the Lease by agreement with Tenant; (c) accept or make compositions or other arrangements or file or not file a claim in any Insolvency Proceeding; and (d) otherwise deal with Tenant and anyone else related to the Lease as Landlord sees fit. Guarantor's liability under this Guaranty shall continue even if Tenant's obligations under the Lease are altered or terminated in any way or if any Landlord Remedy is in any way impaired or suspended with or without Guarantor's or Landlord's consent. A Lease assignment, even with Landlord's consent, does not limit this Guaranty.[35]

F. *Waivers of Rights and Defenses*. Guarantor waives any right to require Landlord to proceed against Tenant or anyone else or pursue any Landlord Remedy for Guarantor's benefit. Landlord may exercise in its sole discretion any right or remedy against anyone without impairing this Guaranty. Guarantor waives diligence and every demand, protest, presentment and notice, including notice of acceptance, accrual, creation, dishonor, extension, modification, nonpayment, protest or renewal of any Guarantied Obligation.

G. *Nature of Guaranty*. This is a guaranty of payment, not collection. Guarantor's liability is not conditioned or contingent on the Lease's enforceability or validity. If any Guarantied Obligation is or becomes void or unenforceable, Guarantor's liability under this Guaranty shall continue as if all Guarantied Obligations were and remained legally enforceable.

H. *Miscellaneous*. Guarantor waives any defense because Landlord failed to obtain or perfect any security interest. The parties waive jury trial in any proceeding.[36] Nothing in this Guaranty may be amended, terminated or waived without Landlord's

[34] Guarantor and Tenant may think Landlord should first use the security deposit before claiming under the Guaranty. Landlord will of course feel otherwise and will note that if Landlord does apply the security deposit, then Tenant and Guarantor will have an immediate obligation to replenish it, so they shouldn't care.

[35] Tenant and Guarantor may negotiate for a release of liability if an assignment meets certain tests. See suggested concessions to Guarantor, following this Model Document.

[36] Particularly outside New York, a jury trial waiver often appears in **ALL CAPITAL LETTERS, BOLD TYPE**. Any jury trial waiver could also include this language: "Neither party shall seek to consolidate any Proceeding involving this Guaranty with any Proceeding in which jury trial has not been waived." Although that language seems right, it is not market standard.

written consent. This Guaranty contains all (and supersedes all prior) agreements between the parties on the matters this Guaranty covers. In entering into this Guaranty, Guarantor does not rely on any representation, promise or other assurance by Landlord. Nothing Landlord said or did, except entering into the Lease, in any way induced Guarantor to enter into this Guaranty. The words "include" or "including" shall be interpreted as if followed by "without limitation." Landlord may give notice under this Guaranty in accordance with the notice procedures in the Lease. [37]

I. *Additional Documents*. Guarantor shall within 10 days after Landlord's request sign and deliver a certificate as Landlord reasonably requests directed to such addressee(s) as Landlord reasonably requires confirming: (a) this Guaranty and its continued status and validity; (b) the fact that it has not been waived or amended; (c) the current identity of Guarantor, Landlord and Tenant; (d) whether Guarantor has received notice of assignment; (e) whether Guarantor has any defenses and, if so, what they are; (f) if an attornment occurs under any nondisturbance agreement signed by Tenant, then the new landlord will also be entitled to the benefit of this Guaranty but not be bound by any amendment or waiver of this Guaranty made by Landlord without the requisite mortgagee consent; (g) Guarantor knows of no facts inconsistent with any simultaneous estoppel certificate delivered by Tenant; and (h) other matters as Landlord reasonably requires. So long as Tenant is not in default under the Lease, Landlord shall not request more than two such certificates in any calendar year.[38] Landlord may from time to time without notice as Landlord deems appropriate: (a) obtain updated credit reports or other information on Guarantor; and (b) investigate Guarantor and Guarantor's credit, property and background.

IN WITNESS WHEREOF, Guarantor has executed this Guaranty as of the Guaranty Date.[39]

GUARANTOR

_____

_____, in his or her individual and personal capacity
Residence Address: [40]

[37] Should those procedures allow email notices? Cautious lawyers say no, because of potential issues of proof. Those same lawyers often regret their caution the first time they need to give a formal notice under the document in question. Pressure for verifiable notices by email will probably continue to build.

[38] The preceding sentence is optional but reflects a common concession by Landlord.

[39] Break the signature page so it will at least include this paragraph of text. The previous page can be a "short page" ending with, e.g., "No Further Text on This Page." The signature page could then include language like: "Signature Page for Guaranty Signed by _____ for Lease [Dated _____] Between _____ and _____." Marc Dreier's contribution to this Model Guaranty is duly noted.

[40] To underscore the "personal" nature of the Guaranty, Landlord might ask Guarantor to provide its social security number and driver's license information, plus a copy of the

_____
_____

GUARANTOR
_____, a _____

By: _____, a _____, its _____
By: _____
Name:

_____
Title:

ACKNOWLEDGMENT[41]
STATE OF _____)
COUNTY OF _____) ss:
)
_____)

On the _____ day of _____ in the year 201__, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

latter. If the Guaranty includes blanks for those items, Landlord should make sure Guarantor fills them in; leaving them blank could invite theories and claims. Guarantor will generally procrastinate about providing any of this information, and will try not to provide it at all by forgetting about it. If Landlord wants it, Landlord's counsel should insist on obtaining it well before closing, and tracking its absence on the closing checklist.

[41] Use the right acknowledgment. Although a guaranty will not always include an acknowledgment, their use has become more prevalent. An acknowledgment can mitigate issues of proof, though probably not likelihood of fraud. After all, why would a fraudster stop at the signature block? A requirement for an acknowledgment will create logistical and procedural issues for an offshore Guarantor. Those issues will often require lead time, and sometimes a trip to the United States Consulate, to handle correctly. In many countries, having a document notarized entails an expensive, tedious and lengthy visit to a public official called a "notary." Counsel may also need to educate any Guarantor that Guarantor can't sign the Guaranty and then send it to counsel with the expectation that counsel will notarize it.

Notary Public

X. PARTIAL GUARANTY

For a partial guaranty, change the definition of "Guarantied Obligations" in the base Guaranty to capture only whatever Tenant obligations Guarantor has agreed to guaranty. This will represent a business negotiation in each case. Landlord can always suggest reasons why the Guaranty should cover just about any Tenant obligation. See, for example, the expansion of nonrecourse carveouts in real estate financing.

Any attempt to limit the Guaranty to certain "Guarantied Obligations" could cause disputes over line drawing. For example, if the Guaranty covers Tenant's construction obligations, does that also cover some maintenance and repairs? If it relates to Tenant's end of term obligations, does that only mean obligations that specifically arise at the end of the term, or also Tenant's obligations to be in general compliance with the Lease at the end of the term? Guarantor might argue for a limited reading of "obligations at the end of the term." One can mitigate these issues by referring to specific Lease sections[42] or by foreseeing them and trying to prevent them.

The Guarantied Obligations might also reduce over time, potentially to zero, if Guarantor and Tenant meet certain conditions. Language to that effect follows the menu of Guarantied Obligations.

Menu of Guarantied Obligations. For defining the "Guarantied Obligations" under a partial Guaranty, consider this menu, but bear in mind that many of these items are "off market," assuming it is possible to define "market":

A. "Guarantied Obligations" means these obligations of Tenant under the Lease:[43]

1. *Construction.* Tenant's obligations under Lease Section ___, including Tenant's obligations under Section ___ to remove mechanics' and other liens.[44]

2. *Contests.* Tenant's obligation to pay or perform any Contested Matter if Tenant's Contest fails.

3. *Demolition.* Tenant's obligation not to commence or perform any demolition or construction except as the Lease allows.

4. *Deposits.* Tenant's obligations to make, replenish or increase any deposit the Lease requires.

5. *End of Term*. Tenant's obligation to surrender possession of the Premises when and as the Lease requires, and in the condition the Lease requires, at the

[42] Section number references create the risk that they will become incorrect as the Lease changes during negotiations. The author prefers to use (and refer to) suitable defined terms in the Lease.

[43] This Guaranty defines the Lease, once, in a manner that disregards any Tenant Insolvency Proceeding. One doesn't need to keep saying that.

[44] Try to create and refer to suitable defined terms in the Lease rather than Section references, which will inevitably become wrong as the parties negotiate the Lease.

end of the Term (including any premature end because of an Event of Default or a surrender of the Premises) and Tenant's obligation under the Lease to indemnify Landlord, or otherwise make any payment to Landlord on account of Tenant's breach of any obligation under the Lease on those matters.

6. *Environmental Matters.* Tenant's obligations under Lease Section ____.

7. *Expenses.* Tenant's obligations under the Lease to pay utilities, management fees and operating expenses for the Premises.

8. *Insurance.* Tenant's obligations to maintain insurance under Lease Section ___, and if Tenant fails to perform those obligations then this Guarantied Obligation shall include an obligation to pay any amounts that an insurance carrier would have paid if Tenant had performed its obligations to maintain insurance.[45]

9. *Judgment.* Payment of any judgment Landlord obtains against Tenant for breach of any Guarantied Obligation.

10. *L/C.* Tenant's obligation to maintain, extend and replace the L/C from time to time.

11. *Legal Costs.* Payment of Landlord's Legal Costs in enforcing the Guarantied Obligations against Tenant or Guarantor.

12. *Liens*. Tenant's obligations regarding mechanics' and similar liens.

13. *Rent.* Tenant's obligation to pay all "Rent," which means any and all payments that the Lease requires Tenant to make as Fixed Rent, Additional Rent, interest, default interest, late charges, per diem damages or administrative fees, holdover rent, or otherwise, and any and all damages and other sums otherwise payable by Tenant under the Lease or for or on account of Tenant's default under the Lease or Lease termination or in any Tenant Insolvency Proceeding.[46] "Rent" also includes any payments Tenant must legally make for use, occupancy or possession of the Premises (after the Lease ends), or in substitution for any payments under the Lease, or otherwise under the terms of the Lease, or after its rejection or premature termination. Rent and any damages for nonpayment of Rent shall be calculated without regard to any deferral, limitation or reduction that might apply under 11 U.S.C. § 502(b)(6) or otherwise in a Tenant Insolvency Proceeding.[47]

14. *Subleases.* Tenant's obligation not to enter into below-market or statutory subleases, as provided for in Lease Section ____.

[45] Guarantor should try to limit the Guarantied Obligations to payment of premiums, arguing that Landlord should maintain its own backup coverage in any case. Landlords typically reject that argument.

[46] The remaining language in this subparagraph sometimes appears in Guaranties but probably adds words without adding value.

[47] For a partial Guaranty or good-guy Guaranty, Guarantor should worry that this very broad definition of Rent will capture too much. Any Lease typically says that if Tenant commits an Event of Default and the Lease terminates, then Tenant owes damages based on an acceleration of some component of rent that would otherwise become due after termination. A partial or "good guy" Guarantor will want to avoid liability for those damages.

Limitation of Liability. Notwithstanding anything to the contrary in this Guaranty, the aggregate dollar amount of the Guarantied Obligations, and Guarantor's liability for the Guarantied Obligations, shall never exceed the sum of: (a) $_____[48] plus (b) Landlord's Legal Costs in enforcing the Guarantied Obligations against Tenant and Guarantor.

Application of Payments. To the extent Tenant makes any payment under the Lease, Landlord shall credit it as Landlord determines. For example, Landlord may credit it first against any Tenant obligation under the Lease that does not also constitute a Guarantied Obligation, regardless of how Tenant characterized the payment.

XI. GOOD-GUY GUARANTY

For a Good-Guy Guaranty, one could start with either a partial Guaranty (mix and match as suggested above) or a full Guaranty ("all" means "all" Lease obligations). Either way, one would then say liability ends on a "Termination Date," subject however to Landlord's rights on Recovered Payments.

Definitions.

A. "Tenant Occupant" means Tenant and any person occupying or claiming any Premises by or through Tenant, except to the extent Landlord has agreed in writing that such person may remain after the Lease ends.[49]

B. "Termination Date" means the date [__ days after the date] when Tenant has met these conditions: (a) all Tenant Occupants have vacated the Premises and delivered possession of the entire Premises[50] in the condition the Lease requires; (b) Tenant has given Landlord at least ___ days prior written notice of Tenant's intention to

[48] One could express this as a multiple of the monthly Fixed Rent at the time of determination, or in some other formulaic way. One could also have a fixed number, but adjust it based on CPI.

[49] This language covers nondisturbance agreements and pick-up leases. If a Subtenant is in default beyond cure periods under its Sublease, then it will typically lose nondisturbance protection. Landlord may want any such bad Subtenant to constitute a Tenant Occupant. If Tenant enters into subleases without nondisturbance protection, Tenant should remember that if any such subtenant remains, or fails to deliver the required surrender documentation, no Termination Date can occur. Tenant should keep this in mind when: (a) negotiating Subtenant nondisturbance protections in the Lease; (b) evaluating possible Subtenants; and (c) writing Subleases and Sublease guaranties.

[50] For a large space, Tenant might seek some wiggle room on the "entire" Premises. For example, if a Subtenant remains in a corner of one floor, Tenant might still have the right to achieve a Termination Date for three other floors, all vacant. Or Tenant's holdover exposure might be limited to just the subleased space, or in some other way.

do so [51]; (c) all Tenant Occupants have surrendered the Lease under surrender documentation in form and substance reasonably satisfactory to Landlord[52]; (d) Tenant has performed all its Lease obligations arising from any construction Tenant initiated; and (e) all Rent accrued under the Lease to date has been paid, and all other obligations of Tenant accrued to date under the Lease (excluding any obligations calculated in whole or in part by any reference to obligations accruing or arising after the Termination Date) have been paid or performed.[53]

XII. REPRESENTATIONS AND WARRANTIES

Many legal documents require the obligor to make representations and warranties to confirm facts about itself, the real property in question and other matters. One could argue that in most cases--at least for a "full" Guaranty of all obligations under the Lease—representations and warranties don't give the obligee much incremental benefit. Still, the obligor just might go to the trouble of confirming they are correct and disclosing any inaccuracies. Guaranties typically do not include representations and warranties, but of course they sometimes do. If Landlord wants to include them, here is some sample language.

Representations and Warranties. Guarantor acknowledges, represents and warrants as follows, and acknowledges that Landlord is relying on these assurances in entering into the Lease and accepting this Guaranty.[54]

[51] This notice requirement does not always apply. If a good-guy Guaranty does contemplate Tenant or Guarantor will give prior notice of Tenant's departure, what happens if Tenant doesn't move out as scheduled? Often Landlord will establish draconian per diem damages, but this seems excessive as long as Tenant moves out reasonably soon after the scheduled date, and otherwise goes away in peace.

[52] Guarantor may want to attach a required form of Surrender Agreement, to prevent any future discussions or uncertainty if Tenant ultimately decides to surrender. Landlord will want to make sure the Surrender Agreement only relates to Tenant's surrender of possession, and does not in any way limit Landlord's rights to recover damages under the Lease or cause any termination of Tenant's liability under the Lease.

[53] Guarantor can reasonably object to this clause "d," as it is unnecessary to create the incentives that a good-guy guaranty is supposed to create, and exposes Guarantor to potentially open-ended liability even after giving up and surrendering the Premises—the desired behavior that this Guaranty sought to incentivize. Landlord will feel otherwise, probably strongly.

[54] Sometimes the corporate representations and warranties about Guarantor will also cover Tenant. For a partial Guaranty, that represents a backhanded expansion of the scope of the Guaranty. For a full Guaranty, it doesn't matter. The menu of representations and warranties offered here is fairly typical for any transactional document. The fact that most Guaranties don't include these representations and warranties does not seem to have caused terrible problems for holders of Guaranties. One could include the same representations and warranties in the Lease. Whether the representations and warranties

A. *Accuracy of Facts.* The recitals of this Guaranty are correct.

B. *Authority to Contract.* Guarantor has full power, authority and legal right to execute, deliver and perform its obligations under this Guaranty. Guarantor has taken all necessary actions to authorize this Guaranty, and has duly authorized, executed and delivered it.

C. *Formation.* Guarantor is an entity duly organized, validly existing and in good standing under the laws of an American state.

D. *Guarantor's Financial Statements*. Guarantor's most recent financial statements delivered to Landlord on or before the Guaranty Date[55] were prepared in accordance with sound accounting practices consistently applied. They correctly depict Guarantor's financial condition as of their date. Since then, no material adverse change has occurred in Guarantor's condition. Guarantor is solvent. Delivery of this Guaranty on the Guaranty Date does not render Guarantor insolvent.

E. *Lease Representations and Warranties*. Tenant's representations and warranties in the Lease are correct in all material respects.[56]

F. *No Conflict.* The execution, delivery and performance of this Guaranty will not violate any provision of any law, regulation, judgment, order, decree, determination or award of any court, arbitrator or governmental authority, or of any mortgage, indenture, loan or security agreement, lease, contract or other agreement, instrument or undertaking to which Guarantor is a party or that purports to bind Guarantor or any of its assets.

G. *No Legal Action Pending.* "Legal Action" means any litigation, arbitration, investigation or administrative proceeding of or before any court, arbitrator or governmental authority: (a) regarding this Guaranty or (b) against or affecting Guarantor's property or assets. No Legal Action is pending or, to Guarantor's knowledge, threatened against Guarantor or any of its assets. Guarantor shall notify Landlord of any future Legal Action within five days after Guarantor becomes aware of it.

appear in the Guaranty or the Lease, one can easily expand them without limit beyond those suggested here.

[55] The parties may want to identify those financial statements by date. Add them to the closing checklist. Guarantor, especially if weak, will typically not rush to deliver financial statements, hoping Landlord will be "so pregnant" by the time of signing that Landlord will pay no attention to them.

[56] This represents a "grab," a backhanded expansion of the Guaranty. See earlier comments on having Guarantor make representations and warranties about Tenant corporate matters. As a comment going in the other direction, Landlord might expand the various representations and warranties to cover not only Guarantor but also Tenant.

H. *No Misstatements*. No information, exhibit or report that Guarantor gave Landlord in connection with this Guaranty contained as of its date, or, if there is no such date, the Guaranty Date, any material misstatement of fact or omitted to state a material fact or any fact necessary to make any statement in it not materially misleading.

I. *No Third Party Consent.* Guarantor's execution of, and payment and performance under, this Guaranty are not contingent on any unobtained consent, license, permit, approval or authorization of, exemption by, notice or report to, or registration, filing or declaration with any person or governmental authority.

J. *Tax Returns*. Guarantor has filed all tax returns it must legally file, except to the extent any deadline(s) have been validly extended. Guarantor has paid all taxes due on those returns and any assessments made against it.

K. *Tenant's Financial Condition*. Guarantor is fully aware of Tenant's financial condition. Guarantor delivers this Guaranty based solely on its own independent investigation and based in no part on any representation or statement by Landlord. Guarantor is not relying on, nor expecting, Landlord to give Guarantor any information on Tenant's financial condition.[57]

L. *Valid Obligation*. This Guaranty constitutes a legal, valid and binding obligation, enforceable against Guarantor in accordance with its terms.[58]

XIII. MULTIPLE GUARANTORS

When multiple Guarantors exist, new issues arise. The next few paragraphs offer sample language to deal with them. Are the multiple Guarantors jointly and severally liable? (Usually yes.) Does each Guarantor make any representations or warranties about the others? (Usually, no. Each Guarantor should insist on that.) As with anything else in this model Guaranty, the appropriateness of the following language will depend on the circumstances. Also, multiple Guarantors will usually want to sign a reimbursement and indemnification agreement among themselves, a mutual-aid pact, so that if Landlord claims against one Guarantor, the other(s) must pay their share(s). The author can provide a template for such an agreement. Finally, think about how to tailor Events of Default triggered by Guarantor-related events. If one Guarantor runs into trouble but the others are just fine, should that constitute an Event of Default? (Probably not.) What if one Guarantor fails to deliver required financial reports, but the others do timely deliver their reports? If one Guarantor dies or becomes disabled, but all the others are alive and well, should that constitute an Event of Default? (Probably not.) Of course it all depends on the relative strength of the various Guarantors.

[57] This proposition may seem rather obvious, but the California courts once decided that a holder of a Guaranty has an obligation to inform Guarantors about financial risks relating to their principals.

[58] And what if Guarantor is lying about this? Does it change anything? If the Guaranty is not enforceable, then neither is this paragraph.

A. *Joint and Several Liability*

If more than one person signs this Guaranty, then every signer shall be jointly and severally liable as "Guarantor" under this Guaranty. Guarantor shall indemnify Landlord on any claims arising from any dispute between or among Guarantors, plus Legal Costs. Landlord may, at its option, proceed against any one or more Guarantor(s) in any order without proceeding against other any Guarantor(s). Landlord may settle its claims against Guarantor(s) without, as a result, impairing Landlord's rights against any other Guarantor(s).

B. *Notices and Service*

Each Guarantor irrevocably appoints each Guarantor as its agent for receipt of notices and service of process. If Landlord gives any notice to any Guarantor, or serves any process on any Guarantor, then Landlord shall be deemed to have given that notice or served that process on all Guarantors.[59]

C. *Counterparts*

This Guaranty may be executed in counterparts.[60] If any Guarantor fails to execute this Guaranty, that does not limit any other Guarantor's liability.

XIV. GUARANTOR FINANCIAL MATTERS

If Guarantor's credit motivated Landlord to enter into the Lease, what happens if Guarantor's credit later suffers? Nothing, usually. Landlord makes its decision at Lease inception, signs the Lease and then lives with the risk that Guarantor will suffer financial reverses.

Even under those circumstances, Landlord may still want to receive regular financial reports on Guarantor. If Guarantor merely delivers summary financial statements, they don't help Landlord much if Landlord can't act on any adverse information. But Landlord might also require Guarantor to deliver identifying information for Guarantor's assets—both at inception and periodically after that--to help Landlord chase Guarantor if the transaction ever gets into trouble. As a practical matter, though, how likely will those schedules of assets be complete, informative and useful?

In a minority of cases, Landlord goes a step further and requires Guarantor to meet a certain financial standard throughout the Lease term. If Guarantor no longer meets the standard, Landlord can call an Event of Default. This makes great sense for Landlord--

[59] This may make Guarantors uncomfortable. Why can't Landlord serve process on a Guarantor the same way Landlord would serve process on any other defendant in any action? Special language on service of process on Guarantor may amount to another example of irrational exuberance in trimming back a Guarantor's rights and protections.

[60] One could add: "Delivery of this Guaranty by electronic (including scanned "pdf") or facsimile transmission shall have the same effect as delivery of original signatures." Do we really need that language or will general legal principles adequately cover the issue?

assuming the courts will enforce that Event of Default—but imposes on Guarantor and Tenant a risk they cannot really control, with draconian consequences.

Here is sample language.

A. *Financial Information*[61]

Within __ days after each calendar year, Guarantor shall give Landlord Guarantor's complete financial statements as of the end of that year. Within __ days after Landlord's request, made up to once a year, Guarantor shall deliver schedules of assets, identifying Guarantor's assets in reasonable detail.[62] Guarantor shall file its tax returns on or before the last day (after any valid extensions) Guarantor must do so without penalty. Within 15 days after each such filing, Guarantor shall give Landlord a copy of Guarantor's complete filed tax returns. [Guarantor shall also, promptly on request, give Landlord any other financial or other information on Guarantor as Landlord reasonably requests.][63]

B. *Guarantor Financial Standard*[64]

Guarantor shall, so long as this Guaranty has not been terminated or released: (a) meet the Guarantor Financial Standard; and (b) not Transfer any property or asset or take any other action if, after that Transfer or other action, Guarantor would no longer meet the Guarantor Financial Standard.[65]

[61] If Guarantor is a public company, financial reporting could raise some special issues. For example, Guarantor will not want to provide (and Landlord might not want to receive) material nonpublic information. On the other hand, any public information will usually be available online – at least as long as Guarantor remains a public company. One could limit the reporting obligations accordingly.

[62] This is intended to help Landlord chase Guarantor later.

[63] Any obligation to deliver financial statements should also trigger obligations of confidentiality, which should appear directly in the Lease rather than require negotiation of a future confidentiality agreement. Sometimes Landlord will go a step further and require Guarantor to sign a consent (in the form the tax authorities require) so Landlord can obtain copies of Guarantor's tax returns directly from the tax authorities. This is not market for lease guaranties, but one often sees it in some areas of commercial lending.

[64] This paragraph is optional depending on the business understanding, and not often seen. If this paragraph is included, one must define the Guarantor Financial Standard either in this Guaranty or in the Lease. See the definition of Satisfactory Guarantor for possible language. For a Lease of any significant term, Landlord should think about adjusting the Guarantor Financial Standard for inflation. And what happens if Guarantor fails to meet the Guarantor Financial Standard? Does that constitute an Event of Default? Is there a cure period to allow Guarantor to make more money? Must Tenant post cash security or a letter of credit? All of this belongs in the Lease, not (just) in the Guaranty.

[65] Does clause "b" give Landlord anything Landlord did not already have by requiring Guarantor to meet the Guarantor Financial Standard at all times?

XV. RECOVERED PAYMENTS[66]

Any holder of a Guaranty may worry that the principal (here, Tenant) will pay a Guarantied Obligation and then soon commence an Insolvency Proceeding, persuading the court that Tenant's payment constituted a preference or a fraudulent transfer. Some Guaranties address that hypothetical circumstance, by allowing the beneficiary of the Guaranty to "claw back" the Guaranty as soon as the court "claws back" the payment in question. Here is some suggested language:

> A. *Definition.* A "Recovered Payment" means any payment that Landlord: (a) received from Guarantor or Tenant on account of a Guarantied Obligation or as a condition to a Termination Date; but (b) must return or "disgorge" for any reason, for example because a court decided it constituted a preference or fraudulent transfer. The Recovered Payment shall include: (a) Landlord's reasonably projected interest and other charges on the Recovered Payment until the date of reimbursement by Guarantor and (b) Landlord's Legal Costs in determining the existence and amount of that Recovered Payment.
>
> B. *Landlord's Disgorgement of Payments*. If Landlord is required to return or "disgorge" any Recovered Payment, then Guarantor's obligations under this Guaranty shall continue and remain in full force and effect as if Landlord had never received the Recovered Payment. If Guarantor purports to revoke this Guaranty, or if this Guaranty otherwise terminates, before Landlord has a claim against Guarantor under the previous sentence, then that termination or purported revocation shall not limit Landlord's rights against Guarantor. Guarantor shall promptly pay Landlord the amount of any Recovered Payment. Guarantor's liability under this Guaranty shall continue until (a) all periods have expired within which Landlord could be required to make any Recovered Payment; (b) Guarantor has reimbursed all Recovered Payments; and (c) all other conditions to termination of this Guaranty have been met.
>
> C. *Recovery Motions*. If, in any Tenant Insolvency Proceeding, any party claims Landlord must repay any Recovered Payment (a "Recovery Motion"), then Guarantor shall pay Landlord on demand an amount equal to the claimed Recovered Payment, as increased from time to time through accrual of interest and other fees (a "Recovery Security Payment"). If Guarantor pays a Recovery Security Payment and continues to perform its Guaranty obligations when and as required, then Landlord shall, at Guarantor's request, allow Guarantor to defend the Recovery Motion at Guarantor's expense (including Landlord's Legal

[66] The first paragraph is typical and often appears in "full" guaranties. The second paragraph could be regarded as overkill. Without the second paragraph, though, Landlord has no (possible) protection from a degradation of Guarantor's financial condition.

Costs) on Landlord's behalf, all in a manner reasonably satisfactory to Landlord, provided this does not in Landlord's judgment cause Landlord to incur any cost, expense, liability or other detriment of any kind, including any adverse effect on any other actions by Landlord in the Tenant Insolvency Proceeding. To the extent Guarantor's defense succeeds, Landlord shall return the Recovery Security Payment. If the defense fails, Landlord shall apply the Recovery Security Payment to reimburse Landlord for the Recovered Payment.[67]

XVI. SPECIAL MORTGAGEE PROTECTIONS

Sometimes Landlord uses a Lease as a vehicle to create a stream of high-quality payments ultimately backed by Guarantor, supporting substantial financing. In these cases, the Lease itself may purport to "demise" something that isn't really separately demisable, such as the fixtures in a store. The transaction is really just a financing backed by Guarantor. The store fixtures aren't really very good real property collateral, but the Guaranty from the corporate parent may make the transaction work. In those cases, the mortgagee will worry even more than usual about preserving and protecting the stream of incoming "rent" payments. Language offered here will help Landlord mitigate that concern. Ordinarily neither Landlord nor its typical real property mortgagee would expect to see any of this language.

Guarantor acknowledges Landlord has mortgaged or collaterally assigned (or intends to mortgage or collaterally assign) the Lease, this Guaranty, all payments and obligations arising under the Lease and this Guaranty and Landlord's entire interest in the Premises, to _____ ("Mortgagee").[68] Guarantor has received notice of that assignment and acknowledges its validity and effectiveness. That assignment, and any later assignment, does not require Guarantor's consent. Notwithstanding anything to the contrary in the Lease or this Guaranty, unless and until Mortgagee has released of record its interest in this Lease:

1. *Effect on Guaranty*. Landlord's assignment of the Lease shall be deemed, without any further action by anyone, to include a collateral assignment of this Guaranty to Mortgagee or, from and after a Foreclosure Transfer,[69] an outright assignment to any party that acquires the Fee Estate through a Foreclosure Transfer.

[67] This paragraph rarely appears, even when a Guaranty addresses possible disgorgement of payments. It is quite creative and off market. But it makes sense as a mechanism to protect Landlord if Tenant initiates a Disgorgement Motion.

[68] One could also provide generically for future Fee Mortgages rather than a specific Fee Mortgage a specific Fee Mortgagee.

[69] In the definitions, add: "Foreclosure Transfer" means any (a) foreclosure sale (or trustee's sale, assignment in lieu of foreclosure, bankruptcy sale, or similar transfer) affecting the Fee Estate; or (b) a Fee Mortgagee's exercise of any other right or remedy under its Fee Mortgage (or Law) that divests Landlord of the Fee Estate.

2. *No Impairment.* This Guaranty may not be amended, modified or waived, in whole or in part, without Mortgagee's prior written consent.

3. *Continuation of Guaranty*. From and after any Foreclosure Transfer, this Guaranty shall, in accordance with its terms, continue to apply to the Guarantied Obligations for the benefit of Successor Landlord,[70] but only until the Termination Date. Guarantor shall not assert against Successor Landlord any claim, defense, counterclaim or offset that the Lease or a separate nondisturbance agreement would prohibit Tenant from asserting against Successor Landlord.

4. *Direct Enforcement*. Mortgagee may enforce directly against Guarantor (and give notices under) this Guaranty with no need for any confirmation, consent or joinder by Landlord.

5. *Redirection Notice*. If Mortgagee so directs in writing (a "Redirection Notice"), then Guarantor shall pay to Mortgagee, as Mortgagee directs, all payments this Guaranty requires, and shall not make those payments to Landlord. Payments made to Landlord in violation of or after a Redirection Notice shall not bind Mortgagee. Any Redirection Notice shall be irrevocable unless and until Mortgagee notifies Guarantor otherwise in writing. Guarantor shall disregard any instructions from Landlord inconsistent with a Redirection Notice.[71]

XVII. ENFORCEMENT

If the Guaranty goes into litigation, Landlord will want it to contain a few provisions to make that litigation go faster and better. Some of those provisions appear in the "base" model Guaranty, such as a jury trial waiver. Here are a few more provisions Landlord might add.

In the event of any Proceeding:

A. *Commercial Division*. If that Proceeding is heard in the New York State Supreme Court Commercial Division, then the parties consent and agree to application of the Court's accelerated procedures, Uniform Rules for the Supreme and County Courts (currently, the Rules of Practice for the Commercial Division, Section 202.70(g), Rule 9).

B. *Confidentiality*. The parties shall promptly enter into and submit to the court (with a request to be "so-ordered") a Stipulation and Order for the Production and Exchange of Confidential Information in the

[70] In the definitions, add: "Successor Landlord" means any party that becomes owner of the Fee Estate through a Foreclosure Transfer.

[71] The loan documents should limit Mortgagee's right to give a Redirection Notice. Tenant and Guarantor will not want to get involved in those limitations.

form promulgated by the Association of the Bar of the City of New York Committee on State Courts of Superior Jurisdiction.

XVIII. MISCELLANEOUS – NONBUSINESS

The miscellaneous provisions that follow consist of Guaranty "boilerplate" that sometimes appears but does not seem strictly necessary. One might call these provisions "overkill," although they will occasionally make a difference. They generally relate to weird hypothetical eventualities that rarely occur, although arguably they "could" occur and hence "should" be addressed. And that is how any type of legal document gets longer and longer—never shorter—over time and how the "base" Guaranty can easily double in length.

A. *Consent to Jurisdiction*

Any Proceeding to enforce this Guaranty may be brought in any state or federal court located in the State with subject matter jurisdiction. Guarantor irrevocably accepts and submits to the nonexclusive personal jurisdiction of each such court, generally and unconditionally for any such Proceeding. Guarantor shall not assert any basis to transfer jurisdiction of any such proceeding to another court. A final judgment against Guarantor in any Proceeding shall be conclusive evidence of Guarantor's liability for the full amount of that judgment. Any such judgment may be enforced in any other jurisdiction, either inside or outside of the United States, by suit on the judgment. Nothing in this paragraph limits Landlord's right to enforce this Guaranty in any court with jurisdiction.

B. *Death or Disability*

If Guarantor dies or becomes disabled or incompetent, then, whether or not Tenant is in default under the Lease, Landlord may: (a) make a present claim against Guarantor's estate in an amount equal to Landlord's reasonable estimate of Guarantor's maximum full liability under this Guaranty, measured as if Tenant had defaulted under the Lease beyond applicable cure periods; and (b) require Guarantor's executor or other personal representative to escrow that amount or any other amount Landlord reasonably determines would be appropriate to cover any possible future claims under this Guaranty.

C. *Tenant Insolvency Proceeding*

If Tenant is subject to any Insolvency Proceeding, then Landlord may, on demand, require Guarantor to deposit with Landlord, as security for Guarantor's payment and performance, an amount equal to _____. Guarantor shall comply with any such demand within 10 days. Landlord shall apply any such deposited funds against Guarantor's obligations under this Guaranty, when and as they arise. If a Termination Date occurs, then Landlord shall refund the unapplied amount of the deposit.

D. *Debt Collection*

Guarantor acknowledges that none of Guarantor's obligation(s) under this Guaranty constitute(s) a "debt" under the United States Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5). Landlord and its counsel do not need to comply with that Act if they make any demand or start a Proceeding to enforce this Guaranty.[72]

E. *Demand on Guarantor*

Whether or not Landlord has requested payment or performance of any Guarantied Obligation from Tenant, Landlord may at its option demand that Guarantor pay or perform any Guarantied Obligation then accrued without demanding that Tenant do so. Guarantor shall promptly comply with any such demand.

F. *Further Assurances*

Guarantor shall execute and deliver such further documents, and perform such further acts, as Landlord reasonably requests to achieve the intent of the parties as expressed in this Guaranty, provided in each case that Landlord's requests are consistent with this Guaranty and the Lease.

G. *Maximum Guaranteed Amount*

Notwithstanding anything to the contrary in this Guaranty, if a court determines that Guarantor's obligations under this Guaranty would otherwise be unenforceable to any extent because of the amount of that Guarantor's liability, then notwithstanding anything else in this Guaranty to the contrary, the amount of that Guarantor's liability under this Guaranty shall be reduced to the maximum amount that is enforceable. That limitation of liability shall in no way limit anyone else's liability.

H. *Notices*

All notices, requests and demands under this Guaranty shall be given in writing at the address in the opening paragraph in accordance with the notice provisions of the Lease. Guarantor and Landlord may each change its address for notices, to any other address within the United States, by notice to the other. Notices shall become effective as the Lease states.

I. *Other Guaranties*

This Guaranty is in addition to and independent of any: (a) guaranty(ies) executed by any other person(s) and (b) other guaranties of Tenant's obligations executed by Guarantor in favor of Landlord.

[72] If this statement is inaccurate, Guarantor's acknowledgment won't change that. Therefore Landlord and its counsel should consider possible application of FDCPA and not rely on Guarantor.

J. *Reimbursement and Subrogation Rights*

Guarantor waives[73] any right to be reimbursed by Tenant for any payment(s) Guarantor makes on account of the Guarantied Obligations. Guarantor acknowledges that Guarantor has received adequate consideration for execution of this Guaranty by Landlord's entering into the Lease, which benefits Guarantor, as a principal of Tenant. Guarantor does not require or expect, and is not entitled to, any right of reimbursement against Tenant as consideration for this Guaranty. Guarantor shall have no right of subrogation against Tenant or Landlord, and no right of contribution against any other person, unless and until: (a) that right of subrogation does not violate (or otherwise produce any result adverse to Landlord under) any Law, including any Insolvency Law; (b) all Guarantied Obligations have been paid in full and all other performance required under the Lease has been rendered in full to Landlord; and (c) all periods within which any Person can claim against Landlord for a Recovered Payment have expired with no such claim (that deferral of Guarantor's subrogation and contribution rights, (the "Subrogation Deferral"). To the extent that a court determines Guarantor's Subrogation Deferral is void or voidable for any reason, Guarantor agrees: (a) Guarantor's rights of subrogation against Tenant or Landlord and Guarantor's right of subrogation against Tenant's assets shall at all times be junior and subordinate to Landlord's rights against Tenant and Tenant's assets; (b) Guarantor's right of contribution against any other person shall be junior and subordinate to Landlord's rights against that other person; and (c) Guarantor shall not file a claim in any Tenant Insolvency Proceeding without Landlord's consent.

K. *Scope of Lease Obligations*

Each reference to the "Lease" also includes Tenant's obligations when Tenant occupies the Premises as: (i) a "holdover tenant"; (ii) a "statutory tenant"; or (iii) as the beneficiary under any other rent regulation, mandatory arbitration or other scheme that continues the landlord-tenant relationship in a manner not contemplated by the express terms of the Lease. As of the Guaranty Date, however, nothing mentioned in clause "ii" or "iii" now applies.[74] The "Guarantied Obligations" shall be determined without regard to any (a) Tenant Insolvency Proceeding or (b) determination or limitation that applies to Tenant in any such Insolvency Proceeding, including any limit on Landlord's recovery under 11 U.S.C. § 502(b)(6) or any similar provision.

[73] Guarantor will prefer merely to subordinate and defer any rights against Tenant to Landlord's rights. Language later in this paragraph on the Subrogation Deferral suggests how a subordination and deferral would look.

[74] This concept makes sense but the vast majority of Lease Guaranties seem to get by without it.

L. *Security*

If at any time Tenant is in default under the Lease beyond applicable cure periods, or is the subject of any Insolvency Proceeding, Guarantor shall, on Landlord's written request, deliver to Landlord cash, a letter of credit or other security satisfactory to Landlord in an amount equal to 110% of Landlord's reasonable estimate of the amount of Landlord's claim against Tenant as a result of Tenant's default.[75]

M. *Miscellaneous*

No course of dealing, trade usage, or parol or extrinsic evidence shall modify this Guaranty or waive any Landlord right. If any court decides that any provision of this Guaranty is unenforceable, then the balance of this Guaranty shall remain fully effective. This Guaranty is an instrument for the payment of money only under Civil Practice Law and Rules ("CPLR") 3213.[76] New York law governs this Guaranty, its interpretation and enforcement and the relationship between the parties.[77] Guarantor confirms that the recitals of this Guaranty are true and correct. The Lease and this Guaranty are a commercial transaction. Neither is entered into for personal, family, household or agricultural purposes. This Guaranty is executed and delivered to benefit Landlord and its successors and assigns, and no one else. This Guaranty shall bind Guarantor and its administrators, assigns, executors, heirs and successors.

XIX. DESIGNATION OF AGENT FOR SERVICE

Language like this sometimes appears, especially for foreign Guarantors.

[75] This is nonstandard but could enable Landlord to act aggressively against Guarantor upon default.

[76] Delete preceding sentence for Guaranty of performance. Even for a Guaranty of payment, don't assume it helps much.

[77] Guaranties often require Guarantor to waive the statute of limitations, perhaps because as long as Guarantor is waiving things, the statute of limitations seems like a good thing to add to the list. One might describe this as irrational exuberance in Guarantor waivers. Why should a Guarantor lose the benefit of a general principle of civil procedure that applies to all other obligors under all other contracts? No one expects Landlord, Tenant or any other contracting party to waive statutes of limitation. Why should Guarantor? Such waivers may not be enforceable anyway, but that's not a reason for Guarantor to accept them.

A. *Initial Designation*. Guarantor irrevocably designates and appoints _____,[78] whose address is _____, in the Borough of Manhattan, City of New York, as Guarantor's agent ("Agent") to receive, accept and acknowledge, for and on behalf of Guarantor and its property: (a) demands for performance under this Guaranty or the Lease; (b) any notice regarding this Guaranty; and (c) service of any legal process, summons, notices and documents for any Proceeding, including all notices required to institute a Proceeding in any court or in any other way required to confer personal jurisdiction over Guarantor in any court (item "c" being referred to as "Service"). Service may be made on Agent in accordance with the procedures of the court where the Proceeding is pending. Service or demand on Agent shall constitute good and sufficient service and demand on Guarantor for all purposes, including to obtain personal jurisdiction over Guarantor and its property, wherever located, for any Proceeding.

B. *Preservation of Agent's Status; Replacement of Agent*. Guarantor shall take all actions necessary to continue Agent's designation in full force and effect. If Agent becomes unable to act as Agent for any reason, then Guarantor shall forthwith irrevocably designate a replacement Agent satisfying the requirements of this paragraph that would apply to any replacement Agent. Upon written notice to Landlord (but no more often than once every six months), Guarantor may substitute in place of Agent any one other person. If Agent changes its address, then Guarantor or Agent shall promptly notify Landlord. Agent must always have a full-time business office in [New York City].

C. *Means of Service*. Guarantor irrevocably consents and agrees to Service in any Proceeding by mailing copies of such Service by registered or certified mail, postage prepaid or by third party overnight delivery service such as FedEx,[79] to Agent as described above or to Guarantor at Guarantor's address stated in this Guaranty or to any other address of which Guarantor shall have given notice to Landlord or to Agent. Service in accordance with this paragraph on Guarantor or Agent

[78] Counsel should generally hesitate to accept this appointment as it can only produce grief. Guarantor should appoint a corporate service company and then make sure the corporate service company always has Guarantor's correct address.

[79] Language like this often appears in Guaranties. But the rules of Civil Procedure do provide reasonable means of serving process. A careful Landlord will probably not rely on language like this paragraph anyway. And a careful Guarantor will argue, legitimately, that this entire paragraph represents another example of a Landlord's irrational exuberance in trimming a Guarantor's rights in a way that goes beyond waivers of case law principles that unreasonably prevent a Landlord from achieving its reasonable expectations as the result of obtaining a Guaranty. On balance, the author disfavors this paragraph, but recognizes that many Guaranties include similar language.

shall constitute valid and effective personal service on Guarantor. Any such Service shall be effective upon dispatch as evidenced by the receipt from the Postal Service or delivery service. Any failure of Agent to notify Guarantor of any Service shall not impair or affect the validity of that Service or any judgment rendered in any Proceeding based on it.

D. *No Limit on Landlord*. Nothing in this Guaranty or the Lease limits Landlord's right to (a) bring any Proceeding in any court where Landlord could otherwise validly do so; (b) serve process in any way law allows; or (c) give notice in any way this Guaranty allows.

XX. CONCESSIONS TO GUARANTOR

When a Guarantor negotiates a Guaranty, Guarantor may want to seek concessions to prevent unexpected or uncontrollable liability, particularly given that many Guaranty forms seem to go quite far in imposing broad obligations on Guarantor. Here are provisions a Guarantor might add to a Guaranty along these lines. In rare cases, Landlord might include some such concessions in the first draft Guaranty. These provisions all work better in the Lease itself, because Landlord signs the Lease but not the Guaranty, but: (a) Landlord can say in the Lease that Landlord agrees to its obligations under the form of Guaranty attached as an exhibit; and (b) Guarantor will want to protect itself from a Lease amendment that might eliminate these Guarantor protections.

A. *Assignment to Guarantor*. Tenant may assign this Lease to Guarantor without Landlord's consent, provided that: (a) Guarantor assumes this Lease by an instrument reasonably satisfactory to Landlord; (b) at the time of assignment, Guarantor cures all monetary Defaults; (c) with reasonable diligence after the assignment, Guarantor cures all nonmonetary Defaults; and (d) Tenant (assignor) and Guarantor (assignee) deliver an Estoppel Certificate and a waiver of any claims against Landlord.[80]

B. *Assumption of Lease.* Guarantor may, at any time, assume as a direct primary obligor all past, present, and future obligations under the Lease, as modified to date, excluding any modification resulting from an Insolvency Proceeding involving Tenant, all by executing and delivering to Landlord an unconditional, complete, and irrevocable assumption of the Lease in ordinary and customary form. If Guarantor does that, then this Guaranty shall automatically terminate.[81]

[80] The waiver of claims may be excessive.

[81] This language would allow Guarantor to avoid the effect of overbroad suretyship waivers that deprive the Guarantor of defenses that it could have asserted had it entered into the Lease in its own name. The author has never seen language like this in a Guaranty, but has been involved in disputes where this language would have served the Guarantor appropriately and well.

C. *Confidentiality*. To the extent that this Guaranty or the Lease requires delivery to Landlord of any information about Guarantor, Landlord shall maintain the confidentiality of that information, in accordance with the same procedures Landlord would employ for its own information that it desired to keep confidential.[82]

D. *Mutual Attorneys' Fees*. If Guarantor prevails in any Proceeding with Landlord, then Landlord shall pay Guarantor's Legal Costs.[83]

E. *New Lease*[84]. If (a) Landlord terminates the Lease for an Event of Default; and (b) Guarantor fully pays and performs all defaulted obligations of Tenant under the Lease (not merely the Guarantied Obligations under this Guaranty [85]), within 15 days after Lease termination, then upon full completion of all that payment and performance Guarantor shall have the right (the "New Lease Option") to enter into a new lease for the Premises with Landlord for what would have been the remaining Term of the Lease, on the executory terms of the Lease as it existed before termination (a "New Lease"). To exercise the New Lease Option, Guarantor must, within five Business Days after Lease termination: (x) notify Landlord that Guarantor exercises the New Lease Option, which notice must be accompanied by payment of all sums due under the Lease at termination; and (y) cure all existing Tenant defaults

[82] One can easily convert these few lines into a few pages, but the few lines say it all. In any case, Landlord will want to avoid any obligation to "enter into a confidentiality agreement" as the price of receiving financial reports down the road. Those agreements can be very difficult to negotiate, if one side or the other wants them to be difficult to negotiate.

[83] In the "base case" Guaranty, "Legal Costs" is defined to mean only Landlord's attorneys' fees. One would need to adjust that definition.

[84] This paragraph and the next are optional and reflect concessions a Guarantor might sometimes seek. Giving a Guarantor a New Lease sounds bizarre and rarely appears. Landlords will presumably hesitate to give a New Lease to an Affiliate of a Tenant that defaulted. It may, however, actually help Landlord enforce the Guaranty by showing that the relationship is balanced and reasonable. But Landlord may prefer to decide whether to offer a New Lease only when Landlord enforces the Guaranty. It may make sense to make the New Lease Option something Landlord can choose to initiate. Moreover, Landlord might reasonably argue that if Guarantor wants a New Lease, Guarantor can achieve exactly that result by having Tenant assign the old Lease to Guarantor when Guarantor cures Tenant's defaults. Guarantor is hardly in the same position as a leasehold mortgagee, because Guarantor presumably controls Tenant whereas a leasehold mortgagee does not control its leasehold mortgagor.

[85] This parenthetical applies only if the Guarantied Obligations consist of less than all the obligations under the Lease.

under the Lease, as if the Lease continued. If Guarantor exercises its New Lease Option then Landlord shall promptly prepare at Guarantor's expense and give Guarantor a New Lease. Guarantor shall sign and return the New Lease within five Business Days after receipt or shall be deemed to have waived the New Lease Option. Any New Lease Option shall be subject and subordinate to Tenant's claims and any possessory rights of Tenant or anyone claiming through Tenant. Landlord shall make no representation, warranty or covenant of quiet enjoyment under any New Lease.[86]

F. *Notice and Opportunity to Cure*. Landlord shall give Guarantor notice, simultaneous with notice to Tenant, of any Tenant default for which Landlord intends to exercise Landlord Remedies. Guarantor may cure that default on Tenant's behalf. Landlord shall accept that cure from Guarantor.[87]

G. *Preserved Defenses*. Notwithstanding anything to the contrary in this Guaranty, Guarantor does not waive, and reserves and may assert, any claim, counterclaim, defense or offset that Tenant could validly assert against Landlord arising only from: (a) Landlord's acts or omissions, including Landlord's breach of the Lease;[88] (b) the express terms of the Lease; or (c) Tenant's actual payment and performance in accordance with the Lease. In no event shall the Guarantied Obligations exceed Tenant's express obligations under the Lease on the same matters (plus Legal Costs), except to the extent Tenant's obligations are diminished, limited, or terminated through any: (x) Tenant Insolvency Proceeding; or (y) judicial determination that they are unenforceable, in whole or in part, for any reason except those in clauses "a" through "c" of this paragraph.[89]

[86] This New Lease clause may require consent from Landlord's lender.

[87] Guarantor may also want some additional time to cure, similar to the rights of a leasehold mortgagee. That may be excessive.

[88] Landlord may regard clause "a" as very broad, and want to trim it back. On the other hand, if the Lease requires Landlord to do or not do something, and Landlord violates that requirement, and Tenant could have asserted a defense as a result, why shouldn't Guarantor have the same defense?

[89] Clause "y" requires Guarantor to stand behind Tenant obligations even if general legal principles would make those obligations unenforceable against Tenant. Guarantor might reasonably argue that if the obligations were unenforceable against Tenant, they should also be unenforceable against Guarantor. The function of the Guaranty is to protect Landlord against Tenant's weak credit, not against Landlord's unenforceable documents. Why should Guarantor have more exposure under the Guaranty than it would have had if Guarantor had signed the Lease itself in its own name?

H. *Release on Assignment*. If Tenant assigns the Lease in compliance with the Lease (except an Affiliate Transaction),[90] then Landlord shall release Guarantor from this Guaranty (and return the original Guaranty marked "CANCELLED" or deliver a lost document certificate in ordinary and customary form) if Tenant or the assignee: (a) pays by certified check all Guarantied Obligations then accrued and outstanding; (b) cures all Defaults; and (c) gives Landlord a new Guaranty in the same form as this one, signed and acknowledged by a Satisfactory Guarantor.[91] That replacement Guaranty must also cover existing undischarged Guarantied Obligations, if any.[92] A "Satisfactory Guarantor" means a person that, based on Landlord's reasonable confirmation: (a) has a net worth at least equal to [the net worth of Guarantor] [on the Commencement Date] [at the time] [___ times then annual Fixed Rent]; (b) is a person with whom United States persons may legally do business; (c) is subject to the jurisdiction of _____ and not entitled to any sovereign, diplomatic or other immunity (unless waived in a manner reasonably satisfactory to Landlord); and (d) _____.[93]

I. *Termination of Guaranty*. If [at any time no undischarged Guarantied Obligations remain or can later arise,[94]] [Tenant has never been in default under the Lease, beyond applicable notice and cure periods, as of the date _____ months after the Guaranty Date,] then

[90] The parties will need to adjust this paragraph based on the negotiated business deal. What type of assignment (and new Guarantor) will get the former Guarantor off the hook? The Lease will set conditions for the permitted assignment, such as no uncured default; completion of construction; prior notice; assumption by the assignee; and criteria the assignee must meet. Those are all beyond the scope of this model Guaranty. The conditions to any release will vary depending on the space, Tenant, Guarantor and market conditions.

[91] Rather than define a Satisfactory Guarantor, Landlord would prefer to require: "a replacement Guarantor satisfactory to Landlord in all respects, in Landlord's sole and absolute discretion, including creditworthiness." Without an objective definition of Satisfactory Guarantor, though, the right to replace Guarantor doesn't give Tenant/Guarantor anything more than they would have if the Guaranty were silent. And a "reasonable" Landlord would typically agree to a later substitution of Guarantor, absent extraordinary circumstances, so Landlord isn't really giving up much by agreeing to an objective definition of Satisfactory Guarantor.

[92] Tenant may object to this sentence. Landlord's response will depend on circumstances.

[93] Add any deal-specific criteria the Satisfactory Guarantor must meet.

[94] If Tenant could remain liable under the Lease even after it ends, Landlord should hesitate to define the circumstances under which Landlord will release Guarantor. For example, even after the Lease ends, Landlord could incur liability for which Tenant (and Guarantor) must indemnify.

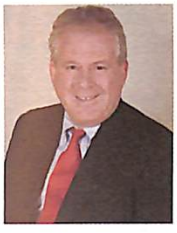
Guarantor's liability under this Guaranty shall terminate, subject to Landlord's rights under this Guaranty on Recovered Payments. At Guarantor's or Tenant's request, Landlord shall promptly confirm that termination of liability in writing[95] and return the original of this Guaranty marked "Cancelled" or deliver a [notarized certificate] [lost document certificate and indemnity] in customary form, reasonably satisfactory to the parties, to that effect. Landlord's failure to comply with the previous sentence shall not limit the effect of any termination of this Guaranty.

4835-1890-3559, v. 56

[95] Landlord could argue that under these circumstances the Guaranty is a nullity and Guarantor has no need for a written confirmation. But Guarantors often want one anyway, for essentially the same reason Landlords want lien waivers from potential mechanics' lien claimants even if Tenant has delivered proof of payment.

Tenant Or Guarantor?

By Joshua Stein, Joshua Stein PLLC



When a landlord signs a lease with a weak tenant, the landlord will often ask the tenant to obtain a guaranty from the tenant's parent company, principal, or other owner. If the tenant doesn't pay or perform, the landlord can then try to chase the guarantor instead.

Traditionally, the courts have bent over backwards to find reasons a landlord can't enforce a guaranty. For example, if the landlord and tenant modify the lease but don't get the guarantor's consent, then this can limit the guaranty. Other actions or omissions of the landlord can likewise create problems. Courts sometimes seem to regard guarantors as "fools with a pen," who must be protected from their folly. The result: a dozen pages of boilerplate in every guaranty, in which the guarantor waives every possible defense to liability.

If guaranties present so many possible impediments to enforcement, should a landlord instead just ask the guarantor to sign the lease, along with the tenant? Or perhaps have the guarantor alone sign the lease instead of the tenant and then sublease to the originally intended tenant? Would the landlord have a stronger position that way?

A client recently raised those questions. The answers are not as simple as one might expect.

Litigation to enforce a guaranty may turn out to be easier to pursue than litigation to enforce a lease, especially if the lease is full of complex landlord-tenant issues. The various waivers in any guaranty may, if a landlord is lucky, eliminate issues that a tenant might be able to raise. And, depending on the procedural posture and strategy of the dispute, the landlord might be able to bring separate actions, suing the tenant in one action while also suing the guarantor in a hopefully-much-simpler action, or at least having some possible options along those lines.

If the tenant gives the landlord a security deposit for more than a year's rent and then eventually files bankruptcy, strange rules under bankruptcy law may require the landlord to "disgorge" part of the security deposit above a year's rent. Those rules are murky and unpredictable. Some people think landlords can avoid them by having the tenant deliver a letter of credit instead of a security deposit, but goal-oriented bankruptcy judges have often treated a letter of credit as if it were a cash deposit, again forcing the landlord to "disgorge" part of that security deposit.

A landlord can probably avoid the problem by having the security deposit or letter of credit come from a guarantor, rather than from the tenant under the lease. The fact that the guarantor is not a "tenant" paying "rent" should mean that the bizarre "disgorgement" principles of bankruptcy law do not apply, even if the guarantor files bankruptcy. Assuming that's true, a landlord should always want to bring a guarantor into the picture – if only as a vehicle to deliver a security deposit or letter of credit – whenever the security deposit or letter of credit exceeds a year's rent.

If the creditworthy guarantor is a foreign company, the landlord may want the option of suing the guarantor in its home country, rather than obtaining a judgment in the United States and then trying to enforce it overseas – not always easy. If the landlord ever did try to sue the guarantor at home, the landlord might have better luck trying to enforce a guaranty (an ordinary contract) rather than a lease (which the overseas court might deem to be a real estate transaction that can only be enforced where the property is located). So that's another circumstance where a landlord might well prefer a guaranty to a direct lease obligation.

A creditworthy guarantor may also prefer signing a guaranty to signing a lease. For one thing, signing a lease may increase the guarantor's exposure to all kinds of claims arising from the leased space – personal injury lawsuits, bills from someone providing services, and all the other exposures that travel with the visible operation and occupancy of any real estate. If the company is based overseas, it may have tax and other reasons to want to minimize any argument it is "doing business" in the United States. Signing a lease looks a lot more like "doing business" than just signing a guaranty.

All things considered, it may make sense for both parties to use a guaranty rather than have a creditworthy parent company directly sign onto the lease. Of course, that puts the burden on the landlord and its counsel to make sure the guaranty contains all the waivers it needs to contain, so the guarantor cannot assert spurious theories to escape liability. The guaranty should also, of course, contain "magic language" to support easy enforcement of the guaranty, and a judgment, against the guarantor, domestic or foreign.

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When Bad Guarantees Happen To Good Guys

130200 - Mann Report (Pg. 59)

By Joshua Stein, Joshua Stein PLLC

I promise I'll be a good guy.

If my company occupies space and stops paying rent, then I'll make sure the tenant moves out. The landlord won't have to endure a year or two of potentially baseless litigation, collect no rent in time, and then obtain a judgment against a tenant that can't pay.

that

Instead, I promise the defaulting tenant will just move out and give back the space. That's what a good guy would do, and I'm a good guy.

How will I do all this? I'll sign a "good guy guaranty"—my promise to pay all the rent due until my company moves out.

That's how the "good guy guaranty" started. It protects the landlord, without imposing ruinous liability on a guarantor if the tenant can't afford the lease or even goes out of business.

Like some other good ideas in the world of guaranties, these guaranties have some surprises and tricks to them. Over time those tricks have gotten trickier – sometimes to a point where "just a good guy guaranty" can bite the guarantor in very unpleasant ways. A tenant's principal shouldn't necessarily sign something just because it's a "good guy guaranty."

The first question to ask: Exactly what must happen for the "good guy" to "get off" the guaranty? Remember the plan was to give the landlord credit support for the rent until the tenant actually left. Once the tenant leaves, the guarantor's exposure should end, right?

Not necessarily. Sometimes, the guarantor's liability keeps growing until the guarantor actually pays whatever the guarantor owes. If the tenant dutifully moves out 15 minutes after default – the goal of the guaranty – but the guarantor can't pay the unpaid rent, then the guarantor's liability keeps building up even though the guaranty has already served its purpose.

A landlord will certainly favor having such an ever-expanding claim, but it goes beyond the premise of a "good guy guaranty." Once the tenant has moved out, the landlord has achieved its goal of having a claim against the tenant's owner for unpaid rent while the tenant was in default.

A careful good guy guarantor can insist that the claim should not keep growing just because the guarantor can't pay it immediately.

The second question to ask: Exactly what must the good guy guarantor pay? The guaranty might, for example, simply cover all payments due under the lease until the tenant moves out. That sounds reasonable. But the lease probably says that upon a tenant default, the tenant owes a lump-sum payment based in part on the rent due through the end of the lease.

The good-guy guarantor shouldn't have to pay that lump-sum payment or anything remotely like it, even if it becomes due under the lease before the tenant actually moves out.

A "good guy" guaranty should limit the guarantor's liability so it covers only the monthly base rent, and a few other very specific financial obligations under the lease, and only to the extent specifically allocable to the time until the tenant moved out. If possible, the guaranty should not cover the entire canoply of payments the lease might require the tenant to make.

panoply

The third question to ask: What about the tenant? Under a typical good guy guaranty, once someone has paid the rent through the tenant's move-out date, the guarantor is off the hook. But the tenant stays fully liable under the lease. That makes perfect sense if the tenant will go out of business once it defaults on its lease. Usually that's a safe assumption.

If, however, the tenant might stay in business – just need to move its business to less expensive space – then a good guy guaranty doesn't help the tenant much. The tenant could still face a huge judgment on the lease, and potentially having the landlord enforce that judgment against the tenant's bank account, equipment, inventory, and other assets.

In these cases, the tenant and the guarantor should probably replace the "good guy guaranty" with an outright termination option for the tenant. The lease would give the tenant the right to terminate at any time, or at some specific times, perhaps by making a payment or giving up the security deposit. The termination would typically require some prior notice.

After that, the tenant would need to pay rent until they actually moved out, but once they moved out no further liability for rent would arise. The transaction could still require a "good guy" guaranty. In the guarantor's opinion, though, that guaranty would cover only rent until the tenant moved out.

By asking the three questions suggested here, and a few others, the principal of a small business tenant can make sure that a bad guaranty doesn't happen to a good guy.

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CURRENT ECONOMICS OF THE DEAL

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Structuring Rent

a. Gross Lease versus Net Lease
    1. Gross Lease – The tenant is accountable only for a fixed fee or rent; the property owner pays all other expenses, service fees, and taxes, e.g., insurance, maintenance, real property tax, etc.
        i. An operating lease is a gross lease whereas a capital lease is not.

    2. Net Lease - Lease arrangement by a tenant pays rent plus its share of associated operating expenses, such as insurance, taxes and utilities
        i. A capital lease is a net lease but an operating lease is not.

    3. Modified Gross – Similar to a Gross Lease, but the tenant pays some operating expenses, perhaps only increases over a base year.

b. Percentage Rent – Applicable to retail leases only; a percentage of rent is paid in lieu of, or in addition to, base rent, and is calculated based on the "gross sales" at the premises.

    1. The practical effect of this type of lease is that the Landlord shares in the risks and rewards of the business.

    2. Key Concepts – how to define gross sales, how does the tenant report this information to the landlord, while maintaining confidentiality for its operations, when is percentage rent paid (usually, quarterly and then reconciled at the end of the year).

c. Increases in rent based on CPI, inflation or other factors – often rent will increase based on some external measure, rather than at a fixed amount

    1. The parties may like relying on an objective, neutral measure rather than having to negotiate increases, or to rely on appraisals or broker opinions, which are more subjective

    2. Consider which standard to use. CPI is the most commonly used, but there are different Indicies (each All Urban Consumers, US Average City). Depending on

the circumstances, you may want to use a rural or regional index that better reflects the economic conditions of your deal

3. Sample Provision

Beginning on _____ __, ____ and on each subsequent anniversary of the Commencement Date, including during any renewal periods, (each such date being hereinafter referred to as an "Anniversary Date"), Rent for the upcoming lease year shall be adjusted in accordance with this paragraph. If the Consumer Price Index for all Urban Consumers: All Items (CPI-U), U.S. City Average (1982-1984=100) (the "Price Index") for the most recently available month is greater than the Price Index at the commencement of the preceding lease year, then the Rent shall be multiplied by the percentage difference between the Price Index for such most recently available month and the Price Index at the commencement of the preceding lease year and the product will be added to the Rent then in effect, which amount shall thereafter be paid by Tenant as the Rent during the ensuing lease year.

If a substantial change is made in the Price Index, the Price Index will be adjusted to the figure that would have been used had the manner of computing the Price Index in effect on the date the original term of this Lease commences had not been altered. If the Price Index (or a successor or substitute index) is not available, a reliable or governmental or other non-partisan publication evaluating the information used in determining the Price Index will be used.

d. Rent increases based on FMV – often, the parties want to try to determine rent in the future based on actual market conditions, rather than a set index, like CPI.

1. One method is to obtain an appraisal – consider whether each side gets their own appraisal or the parties rely on one appraisal. Appraisals can be expensive and may take time to complete.

2. Alternatively, the parties may use broker opinions of value. These are generally less expensive and may be quicker to produce.

3. The parties should decide whether to have “dueling” valuations and take the average of the valuations. Or, each side can pick a broker or appraisal or will jointly pick a third, whose opinion will govern. Another variation is the so-called baseball arbitration method where each side obtains an appraisal or broker opinion. The parties select a neutral third party to select which one will govern. The third, party cannot determine its own number. It must select one of the numbers provided by the two brokers or appraisers.

4. Case Law

i. Bernstein v. 1995 Assocs., 586 N.Y.S.2d 115, 117 (1st Dep’t. 1992).

1. Fair Market Value is a sufficiently specific price term to consider a contract enforceable.

2. "The letter, which was accepted by counsel for 1995 Associates without any attempt to vary or contradict its terms, sufficiently set forth the area to be leased, the duration of the lease and the price to be paid, fair market value. The price term in the agreement was sufficiently precise since the amount of rent to be paid could be determined objectively."

ii. New York Overnight Partners, L.P. v. Gordon, 633 N.Y.S.2d 288 (1st Dep't. 1995)

1. Where the lessee maintains ownership of an improvements on the land, and "improvements" is specifically defined in the lease, the "fair market value" of the property for rent purposes is the unimproved land.

Lease Term

a. Lease Commencement - this can be tied to turn over of possession, completion of landlord work or inclusive of some free rent period (most common in retail leases). For example, rent might start 60 days after the lease term starts. This allows the tenant some time to set up their business and begin operations (i.e. begin receiving cash flow from the business).

b. Early occupancy – Sometimes, a tenant will want to start occupancy while the landlord is still finishing its build out work. The tenant may install its IT lines or engage in other preparations for its occupancy. Generally, the tenant doesn't start operating during this time. When there is an early occupancy, you should consider when the Tenant's insurance obligation and payment of utilities and other operating expenses start. Also, consider tenant parking needs, use of freight elevator, loading docks, and disruption to other tenants.

c. Renewal Options –what will the rent be during renewal terms, how much advance notice is needed. (See 74A N.Y. Jur. 2d Landlord and Tenant § 848)

1. A common issue is what happens if a tenant is late providing notice of a renewal of the lease term. In NYS, generally, a tenant has a right to equitable relief, provided that:
    a. Factor 1: was tenant's failure to provide notice due to inadvertence or mistake, not bad faith.
    b. Factor 2: is there prejudice to landlord (e.g. has the landlord relet the space?)
    c. Factor 3: has the tenant installed significant tenant's improvements
    d. Factor 4: is there substantial harm to the tenant.
2. A tenant is entitled to renew where there is nothing in the record to contradict the tenant's assertion that its failure to timely notify the landlord of its exercise of the option was the result of inadvertence and honest mistake, the tenant made permenant structural improvement to the premises, and removal of the improvements would be costly. Dutchess Radiology Associates, P.C. v. Narotzky, 192 A.D.2d 1049, 597 N.Y.S.2d 238 (3d Dep't 1993).

3. Equity would intervene where:
    a. a tenant's predecessor in interest had made substantial improvements;
    b. the leased premises had been used for the past 20 years as the location for a retail business;
    c. the tenant paid a large mortgage transfer tax and secured a $3 million leasehold mortgage on the property;
    d. tenant intended to renew the lease, and its one-month lateness in giving notice of its exercise of its option to renew was merely the result of inattention, not bad faith, and
    e. landlord failed to allege any prejudice due to the tenant's late notice.

   Tritt v. Huffman & Boyle Co., 121 A.D.2d 531, 503 N.Y.S.2d 842 (2d Dep't 1986)
4. Equity **would not** protect tenant's option to renew lease after option had expired, where tenant:
    a. made no improvements to the premises,
    b. was not a long-term tenant,
    c. had since moved out of the condominium due to business requiring his presence in Europe, and
    d. sought to enforce renewal option so he could exercise purchase option, which would have allowed him to gain a windfall from the greatly increased value of the property.

   Kunze v. Arito, Inc., 48 A.D.3d 272, 851 N.Y.S.2d 182 (1st Dep't 2008)
5. The court can grant equitable relief to a tenant that inadvertently failed to timely exercise its option to renew where:
    a. The failure to renew was inadvertent
    b. The tenant would have to forfeit a substantial investment made into the property, and
    c. where the court obviates any prejudice to the landlord by directing the tenants to reimburse the landlord for all proven expenses incurred due to the default.

   Mass Properties Co. v. 1820 New York Ave. Corp., 152 A.D.2d 727, 544 N.Y.S.2d 180 (2d Dep't 1989).
6. Tenants are **not** entitled to the renewal of a lease, where
    a. tenant made no substantial improvements to the premises, and
    b. tenant was required to provide notice nine (9) months prior to the end of the term, but did not provide notice by mail until the day before the end of the term, received by landlord four days thereafter.

   Dan's Supreme Supermarkets, Inc. v. Redmont Realty Co., 216 A.D.2d 512, 628 N.Y.S.2d 790 (2d Dep't 1995).

7. Where tenant’s investments presumably have been amortized and depreciated over the life of the lease, and the fixtures associated with the tenant's business could be relocated if necessary, Tenant is not entitled to equitable relief. Soho Development Corp. v. Dean & DeLuca Inc., 131 A.D.2d 385, 517 N.Y.S.2d 498 (1st Dep't 1987).

d. Early termination - in addition to termination related to casualty or condemnation, a lease may allow either the landlord or the tenant to terminate the lease early. These provisions often require the terminating party to pay the non-terminating party a lease.

Examples:

i. Landlord or Tenant is a public or not-for-profit entity and the financial circumstances or funding sources change enough to require a termination.

ii. in a retail lease, the Tenant fails to achieve certain sales figures or an anchor tenant at a shopping center stops operating

iii. the tenant wants to terminate for other business reasons.

Transfer Tax – be aware that NYS transfer tax may be owing on an early termination, if the landlord (i.e. the "grantee") pays the tenant (i.e. the "grantor") to recapture to the space from the tenant. There would not be a tax if the tenant pays the landlord to terminate the lease early, since the tenant (i.e. owner of the leasehold estate) is not selling its real property interest

e. ROFR and ROFO – can be used related to the sale of property or to leasing additional space at the property

1. Right of First Refusal requires the landlord to provide the tenant of any bona fide arms-length offer it receives to purchase the property or lease other space in the property. The tenant then has some period of time in which to elect to purchase the property or to lease the space on the same terms and conditions of the offer. If the offer involves the lease of spade, often the term will be co-terminus with the tenant's existing term, even if that is different from the offer. Landlords often resist providing a right of first refusal since it can impair negotiations with a third party.

2. Right of First Offer requires the landlord to first offer the property or additional space to the tenant before marketing it to third parties. This is generally less of a burden on a landlord.

3. Consider whether these rights should be one time or continuing? Also, what should the terms of the sale or the lease be?

Construction

a. Work letter versus allowance – Work letter specifies the specific work the landlord will perform for the tenant. This is usually done on a turn-key basis. An allowance, by contrast, provides the tenant with a set amount of money which it can use towards its desired improvements. An allowance is usually expressed in dollars per ***rentable*** foot. This should be the same as the manner in which rent is expressed.

b. Who maintains casualty insurance and who rebuilds? Typically, the party who performs construction work also maintains insurance during the construction process. Rebuilding is usually governed by the casualty provisions of the lease

c. Negotiating refurbishment allowances – sometimes, tenants will seek a refurbishment allowance from a landlord after 5, 10 or more years. Sometimes, this is tied to exercise of a renewal option. This is typically negotiated at the commencement of a lease, and not at the time of a renewal. Like initial construction, this can be structured as an allowance or as the landlord performing the work for the tenant

d. Obtaining a certificate of occupancy – the end of construction is usually marked by issuance of a certificate of occupancy by a local municipality (city, town, village). Some jurisdictions provide a temporary or conditional certificate of occupancy prior to issuance of a final certificate of occupancy. A certificate of occupancy isn't usually issued required for minor, non-structural items, such as painting, new carpet. It might be helpful to consult an attorney, local town official, or architect to determine what is required in each case.

NYS Transfer Taxes on Leases

a. Lease with an Option to Purchase

1. Statutory Authority:

   20 NYCRR §575.7 (c): "Creation of a lease for less than 49 years *coupled with the granting of an option to purchase*.

   (1) An option to purchase real property is an interest in real property. Where an option to purchase real property is coupled with the granting of the right to use and occupancy of the real property, a conveyance subject to the transfer tax has occurred. Therefore, the creation of a lease coupled with the granting of an option to purchase the real property, regardless of the term of the lease, is a conveyance subject to the transfer tax.

   (2) In the case of the creation of a lease for less than 49 years, coupled with the granting of an option to purchase, the consideration is the present value of the net rental payments under the lease plus the consideration paid for the granting of the option to purchase. Rental payments for periods that occur after the last date that the property may be purchased, if the option is exercised, are not included in the calculation of the present value of the rental payments."

2. What it means:
   i. When a tenant enters a lease containing an option to purchase the property at or after a certain point in time or event, the tenant is purchasing an interest in the property. An option to purchase provides the tenant with additional property rights, an ownership interest, in addition to the lease, which is merely a right to use the property.

ii. The consideration upon which the tax is assessed is the amount paid for the option, including net present value of rental payments to be made prior to the expiration of the option, plus any additional option fee charged.
iii. The transferor, likely the landlord, is responsible for paying the transfer tax.

b. **Lease with a Term Greater than 49 Years**

1. Statutory Authority:

20 NYCRR §575.7 (a). Creation of a taxable lease or sublease *not* coupled with an option to purchase. The creation of a lease or sublease is a conveyance subject to tax *only where*:
(1) the sum of the term of the lease or sublease and any options for renewal exceeds 49 years; and
(2) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee; and
(3) the lease or sublease is for substantially all of the premises constituting the real property. *Substantially all* means ninety percent or more of the total rentable space of the premises, exclusive of common areas. For the purpose of determining whether a lease or sublease is for substantially all of the premises constituting the real property, premises shall include, but not be limited to the following:
(i) an individual building, except for space which constitutes an individual condominium or cooperative unit;
(ii) an individual condominium or cooperative unit; or
(iii) where a lease or sublease is of vacant land only, any portion of such vacant land.

2. What it means:
i. A lease for a term greater than 49 year, including all options to renew, may be subject to transfer tax. The length of the lease along with the other designated terms indicate that the tenant is gaining more the merely a right to use the premises on a temporary basis.

c. Assignment of Lease

1. Statutory Authority:

20 NYCRR §575.7 (d). Assignments and surrenders of leases, options and contracts.
(1) An interest in real property includes a leasehold interest and an option or contract to purchase real property. Therefore, the transfer of a leasehold interest, regardless of the term, or the transfer of an option or contract to purchase real property, by assignment or surrender, is a conveyance subject to tax.

2. What it means:
    i. The assignor has an interest in the real property, and interest is transferred to the assignee. Therefore, the lease on its own, independent of the lease term or any associated options, is an interest in real property transferred and subject to transfer tax.
    ii. Note that the mere creation of a lease is not subject to transfer tax on its own; the lease must include an option to purchase or be of a certain length (49 years), among other conditions set forth above and below (Sections (a) and (b)).

3. Examples: [adapted from §575.5(d)]

    Example 1: A, a lessee under a 30 year lease, enters into an agreement to assign the leasehold interest to B, who will replace A as tenant under the lease. B agrees to pay A $500,000 for the leasehold interest. The assignment of A's leasehold interest to B is subject to tax at the rate of $2 for each $500 of consideration, plus the additional Erie County assessment of $2.50 for each $500, resulting in a tax due of $4,500.

    Example 2: A is the purchaser/contract vendee under a contract to purchase real property. A agrees to assign all rights under the contract, including the right to use and occupancy of the property, to B for $100,000. The assignment of the contract is subject to tax at the rate of $2 for each $500 of consideration, resulting in a tax due of $400, plus the additional Erie County assessment of $2.50 for each $500, for a total of $900.00.

d. Termination of Lease (Surrender)

1. Statutory Authority:

    20 NYCRR §575.7 (d). Assignments and surrenders of leases, options and contracts.
    (1) An interest in real property includes a leasehold interest and an option or contract to purchase real property. Therefore, the transfer of a leasehold interest, regardless of the term, or the transfer of an option or contract to purchase real property, by assignment or surrender, is a conveyance subject to tax.

2. What it means:
    i. Where either landlord or tenant wants to terminate the lease, and the lease is so terminated prior to the end of the term, the right to use that property is transferred from the tenant to the landlord.
    ii. The transferor, in most cases the tenant, is responsible for paying the transfer tax.

3. Examples: [adapted from §575.5(d)]

Example 2: X is the owner of a building which is leased to Z under a 20 year lease which has 10 years remaining under the terms of the lease. X wishes to cancel the lease before it expires and, therefore, enters into an agreement with Z whereby X will pay Z $400,000 to surrender the lease. The surrender of the leasehold interest by Z is subject to tax at the rate of $2 for each $500 of consideration, plus the additional Erie County assessment of $2.50 for each $500, resulting in a tax due of $3,600.

DISPUTES AND LEASE ENFORCEMENT

by

Stephen W. Wells, Esq.

Hodgson Russ LLP
Buffalo

CONTINUING LEGAL EDUCATION PROGRAM

COMMERCIAL REAL ESTATE LEASES

DISPUTES AND LEASE ENFORCEMENT

APRIL 27, 2017

HODGSON RUSS, LLP ● 140 PEARL STREET, SUITE 100 ● BUFFALO, NEW YORK 14202

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BANKRUPTCY CONSIDERATIONS

Automatic Stay. Section 362 of the Bankruptcy Code provides for an automatic stay against any property of the debtor upon the filing of the bankruptcy petition. This means that any action or proceeding to recover possession of the leased property will be stayed. If, however, all that is remaining to terminate a lease is the passage of time, the filing of a bankruptcy will not stay the termination. *See* Section 362(b)(10) of the Bankruptcy Code; *see also, In re Policy*, 242 B.R. 121, 126 (S.D.N.Y. 1999).

Post-Petition Obligations. Section 365(d)(3) requires the debtor to timely perform all post-petition obligations of the debtor under unexpired leases for commercial property. The court can extend, for cause, the time for performance of an obligation that arises within sixth (60) days of the order for relief, but the time cannot be extended beyond the sixty (60) day period.

Time to Assume or Reject Commercial Leases

The Bankruptcy Abuse Prevention and Consume Protection Act revised Section 365(d)(4) of the Bankruptcy Code, which is the section that addresses when a debtor must assume or reject a lease upon filing for bankruptcy protection.

Former Section 365(d)(4). Required a debtor to decide whether to assume or reject an unexpired lease on nonresidential real estate within sixty (60) days after the bankruptcy filing. The bankruptcy court could extend the sixty (60) day period "for cause," and no limit existed on the number or length of extensions that the bankruptcy court could grant to debtors.

Current Section 365(d)(4). Extends the initial period for a debtor to determine whether to assume or reject a lease on nonresidential real property to one hundred twenty (120) days, but the period can only be extended by ninety (90) days without the consent of the lessor.

Assumption. Section 365(b) of the Bankruptcy Code requires that a debtor seeking to assume a commercial lease cure the defaults under the lease and provide adequate assurance of future performance.

If the lease pertains to real property in a shopping center, adequate assurance of future performance includes adequate assurance:

> (A) of the source of rent and other consideration due under the lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lease under the lease;
>
> (B) that any percentage rent due under the lease will not decline substantially;
>
> (C) that assumption or assignment of such lease is subject to all provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity

provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3).

Rejection. Pursuant to Section 365(g) of the Bankruptcy Code, the rejection of a commercial lease by a debtor/lessee constitutes a breach of the lease as of the date immediately before the date of the filing of the petition.

Damages. Pursuant to Section 502(b)(6), a lessor's damages for rejection of a lease by a debtor lessee are limited to unpaid rent as of the date of the petition and the greater of the rent reserved under the lease (i) for one (1) year, or (ii) fifteen (15) percent, not to exceed three years, of the remaining term of such lease. Although these amounts may be large, the rejection damages are unsecured claims that are not entitled to any priority.

If, however, a debtor/lessee assumes a lease and then defaults, the lessor is entitled to an administrative claim for up to two (2) years of lease payments pursuant to Section 503(b)(7).

Debtor as Lessor. Pursuant to Section 365(h)(1)(A), if the debtor or trustee rejects an unexpired lease of real property under which the debtor is the lessor and:

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

Bankruptcy Drafting Considerations

1. Ipso Facto Clauses. Section 365(e)(1) provides that notwithstanding a provision in an unexpired lease, or in applicable law, an unexpired lease of the debtor may not be

terminated or modified, and any right or obligation under such lease may not be terminated or modified at any time after the commencement of the bankruptcy case solely because of a provision in such lease that is conditioned on (a) the insolvency or financial condition of the debtor at any time before the closing of the bankruptcy case; (b) the commencement of a bankruptcy case; or (c) the appointment of or taking possession by a bankruptcy trustee or a custodian before the commencement of the bankruptcy case.

2. Anti-Assignment Provisions. Section 365(f)(1) provides that, notwithstanding a provision in an unexpired lease of a debtor in bankruptcy, or in applicable law, which prohibits, restricts, or conditions the assignment of such lease, the bankruptcy trustee may assign such lease if (a) the trustee assumes such lease in accordance with the Bankruptcy Code, and (b) makes adequate assurance of future performance by the assignee of such lease, whether or not there has been a default under such lease.

3. Bankruptcy Waiver Provisions. Any provision in a lease that attempts to waive a tenant's right to file for bankruptcy is unenforceable.

4. Bankruptcy Default Provisions. Most leases provide that any bankruptcy filing by the tenant constitutes a breach of the lease. As a practical matter, however, the filing of the tenant's bankruptcy case prevents the landlord from terminating the lease and/or removing the tenant from occupancy of the leased premises due to the automatic stay imposed by Section 362 of the Bankruptcy Code.

PROTECTING A TENANT'S RIGHTS WITH A FINANCIALLY TROUBLED LANDLORD

1. Obtain a Non-Disturbance Agreement. If the landlord cannot make payments to the mortgagee holding a mortgage lien on the property, there is a chance that the tenant could lose its tenancy in the event of a foreclosure action. It is almost always the case that the mortgage was recorded prior to the execution of the lease such that the interest of the tenant in the property is inferior to the lien of the mortgagee and will be wiped out in a foreclosure sale. If, however, there is a memorandum of lease recorded prior to the date the mortgage was recorded, then the foreclosure of the subsequently recorded mortgage will not eliminate the tenancy. To ensure that the tenant's leasehold is protected, it should attempt to obtain a non-disturbance agreement with the mortgagee pursuant to which the mortgagee will agree that the tenant's interest will not be impacted by a subsequent foreclosure.

2. Limit the Amount of Money Spent on Tenant Improvements. Especially in instances where the tenant is unable to obtain a non-disturbance agreement from the landlord's mortgagee, the tenant will want to limit the sums that it expends on improving the leased premises because of the chance that its tenancy could be cut short by a foreclosure.

3. Rent Offset Provision. If the landlord files for bankruptcy, the right to offset the rent for the landlord's failure to perform it obligations post-rejection are provided for in Section 365(h)(1)(B). A bankruptcy is not, however, the only instance in which a tenant may find itself in a situation where the landlord is unable to perform its obligations under the lease due to financial perils. The most obvious example is a case where a landlord is unable to repair or

replace a structural defect (usually the landlord's obligation under a lease) because it lacks sufficient resources to do so. If a properly drafted offset provision is provided for in the lease, then the tenant can pay for the repairs or replacement and then offset that amount from the rent that will come due under the lease.

PROTECTING A LANDLORD'S RIGHTS WITH A FINANCIALLY TROUBLED TENANT

1. Personal Guaranties. In the context of small and closely held businesses, the landlord will always want to obtain personal guaranties from the owners of the business. In those circumstances, the assets of the corporate entity executing the lease will often be limited to whatever business is being operated upon the leased premises. As such, in the event that the business experiences financial difficulties sufficient to cause rent arrears and a subsequent termination of the lease, through a summary eviction proceeding or otherwise, there may be little to no value left in the business from which to recover the arrears, whether or not they have been reduced to a judgment. In addition, a tenant whose owners have guaranteed the lease obligations is much more likely to pay that obligation over other creditors whose obligations have not been guaranteed. Last, in the event that the tenant files for bankruptcy, the automatic stay will not prevent the landlord from seeking the lease arrears from the personal guarantors.

2. Security Interest in Business Assets. A landlord can obtain a security interest in the assets of the business by including a security agreement in the lease or by having the tenant sign a separate security agreement. This will allow the landlord to be able to enforce that security interest against the assets of the business in the event that the tenant defaults on its monetary obligations pursuant to the lease. This can save the time and expense of having to obtain a judgment before the landlord can proceed against the assets of a business. For example, if a landlord knows the identity of some or all of a tenant's customers, upon a default under the lease, the landlord can send an account debtor notification to the tenant's customers pursuant to UCC § 9-607 notifying them to pay any amounts owed by the customers to the tenant directly to the landlord. The ability to cut off a tenant's income stream, in addition to providing a possible avenue of recovery for lease arrears, also places the landlord at the top of the tenant's priority list. This protection, however, may not always be available or be of limited benefit in practical application. Almost every business has at least a line of credit with a secured lender that will have a first priority security interest in all assets of the business. A tenant may not be able to grant the landlord a security interest in its assets because it might be prohibited by the loan documents it executed in favor of the secured lender. Even if a landlord is able to obtain a security interest subordinate to a secured lender's interest, it may not be able to recover anything from that interest in a liquidation context because the superior interest must be paid in full before the landlord can obtain any payment on account of its security interest. It is also worth noting that, in the event that a tenant files for bankruptcy within ninety (90) days following its provision of a security interest in its assets to the landlord, the landlord's security interest can be avoided as a preference pursuant to Section 547 of the Bankruptcy Code.

3. Avoid Extensive Lease Payment Arrears. The obvious reason for this is to limit the potential exposure of the landlord. Regardless of a landlord's ability to obtain a judgment for past due rent, or even for future rent, the ability to turn that paper judgment into dollars is never

certain. In fact, in the case of small businesses, even when there is one or more personal guarantors, the ability to collect on an unsecured judgment is usually minimal. By the time the business has gotten to the point where the landlord has to take legal action to enforce its rights, there is usually no significant value left in the business and whatever value is left is usually realized by the tenant's secured lender. In addition, the owners that have personally guaranteed the tenant's lease obligations will have often invested significant personal resources attempting to keep the business afloat and, therefore, seldom have any assets with equity above existing liens and applicable exemptions from which a landlord can collect a judgment. The best way for a landlord to protect itself against substantial exposure is to move quickly when a tenant defaults under the lease. The summary eviction procedures provided for in Article 7 of the New York Real Property Actions and Proceedings Law provides an expeditious method by which landlords can recover possession of the leased premises. The sooner a landlord can remove a defaulting tenant from occupancy, the sooner it can relet the property to another tenant that can pay rent. There simply is no better way to mitigate against extensive damages due to a nonpaying tenant than to replace that tenant with a tenant that has the capacity to pay rent. Avoiding significant arrears can also protect a landlord from a large preference liability in the event that the tenant files for bankruptcy. If a tenant makes a substantial payment of past due rent within ninety (90) days preceding a bankruptcy filing, and the lease is rejected, the bankruptcy trustee will likely commence an adversary proceeding seeking to recover the payment(s) made during that period on account of past due rent. Unlike rent payments that are made on or around their due date, which are protected from preference liability pursuant to the "ordinary course of business" exception provided for in Section 547(c)(2) of the Bankruptcy Code, payments on account of substantial lease arrears are likely recoverable by a trustee as a preference because it would allow the landlord to receive more in the tenant's bankruptcy case if the transfer had not been made.

4. Default Provisions. A landlord should include all of the default provisions discussed in the accompanying written materials provided by Adam Leitman Bailey, Esq. and John M. Desiderio, Esq.

SECURITY DEPOSITS

Cash

Pursuant to New York General Obligations Law ("NYGOL") § 7-103, a security deposit given in connection with a lease for real property remains the property of the tenant and is held in trust by the landlord for the tenant. The landlord is prohibited from commingling the security deposit with the landlord's own funds. If a landlord commingles a security deposit with its own funds, it is guilty of a conversion at the time of the commingling, which gives the tenant an immediate right to the commingled funds. If the security deposit is for the rental of property containing six or more family dwelling units, the landlord must deposit the security deposit in an interest bearing account. Any provision of a lease whereby the tenant waives any of these requirements is absolutely void.

Upon the filing of a bankruptcy by a tenant, the security deposit generally becomes property of the bankruptcy estate pursuant to Section 541(a) of the Bankruptcy Code. A landlord, however, has a security interest in the security deposit, and courts have permitted landlords to retain security deposits to the extent of their allowable claims. In *Oldden v. Tonto*

Realty Corp., 143 F.2d 916 (2d Cir. 1944), the court held that a landlord may deduct the security deposit from the landlord's allowed claim, but that any surplus must be returned to the debtor.

Section 553(a) of the Bankruptcy Code is the provision that allows the landlord to use a security deposit to offset the total amount of lease rejection damages and pre-petition damages, on the basis that the landlord is entitled to setoff as a secured creditor to the extent of the security deposit. Under Section 362(a)(7) of the Bankruptcy Code, however, relief from the automatic stay is needed to offset a security deposit after the filing of a bankruptcy petition by the tenant. As a practical matter, the landlord should list the amount of the security deposit in the poof of claim form as a credit or deduction from the total amount claimed.

A landlord can lose its status as a secured creditor with respect to the security deposit, and its rights to offset its lease rejection and pre-petition damages with the security deposit pursuant to Section 553(a), if the landlord fails to segregate the security deposit pursuant to NYGOL § 7-103. If a tenant files for bankruptcy, the bankruptcy trustee succeeds to the interests of the tenant and may, therefore, require a turnover of the converted funds. *See In re Spinelli*, 36 B.R.819 (Bankr. E.D.N.Y. 1984). If, however, a landlord that has commingled a security deposit with its own funds, restores the deposit to a segregated account prior to the bankruptcy filing or to an action having been commenced for the conversion, the statutory "trust" may be reinstated and the tenant or trustee in bankruptcy will no longer possess a cause of action for the conversion and the landlord will be entitled to its right of offset pursuant to Section 553 of the Bankruptcy Code.

Letters of Credit

Although most landlords hold cash security deposits, some landlords require letters of credit to secure a tenant's lease obligations. Neither the letter of credit nor its proceeds are property of a tenant's bankruptcy estate pursuant to Section 541(a). *See Praedium II Broadstdone, LLC v. Wall Street Strategies, Inc.*, 2004 WL 2624678 (S.D.N.Y. 2004).

Because letters of credit are not included in the tenant's bankruptcy estate, they are not subject to the provisions of the Bankruptcy Code. This can have substantial benefits to the landlord. In *In re Stonebridge Technologies, Inc.*, 430 F.3d 260 (5th Cir. 2005), the tenant, which had filed the bankruptcy case, had provided the landlord with a security deposit of $105,298.85 in cash and a letter of credit for $1,430,065.74. Although there were only $71,895.61 in lease arrears prior to the filing of the bankruptcy, the landlord drew on the full amount of the letter of credit when the landlord and tenant agreed that the lease would be rejected on the basis that it was entitled to accelerated damages under the lease of approximately $1.6 million. The Fifth Circuit held that, since the letter of credit was not part of the tenant's bankruptcy estate, it was solely a contract between the issuer bank and the landlord, and, thereby, unaffected by the tenant's bankruptcy. The court, therefore, determined that the statutory cap for lease rejection damages contained in Section 502(b)(6) (the rent reserved under the lease for the greater of one year or 15 percent, not to exceed three years, of the remaining term) did not apply. Accordingly, the fact that the landlord used a letter of credit for the substantial portion of the security deposit allowed it to recover far more than it would have if the deposit had been cash and therefore subject to the Section 502(b)(6) cap. It should be noted though that, if the landlord had filed a proof of claim in the tenant's bankruptcy case, the court may have determined that the

statutory cap applied. *See, e.g., Solow v. PPI Enterprises, Inc.*, 324 F.2d 197 (3d Cir. 2003); *Redback Networks, Inc. v. Mayan Networks Corp.*, 306 B.R. 295 (9th Cir. BAP 2004).

There is an increasing trend in commercial leasing toward utilizing letters of credit to secure lease obligations. In addition to the distinct advantages that arise in the context of a tenant's bankruptcy, there are other practical advantages to using a letter of credit. First, if the letter of credit is large enough, it may cause a landlord to be willing to enter into a lease agreement that it would otherwise refuse based upon the tenant's lack of creditworthiness. Second, a letter of credit does not tie up large amounts of the tenant's cash or liquid collateral. Third, as a substantial benefit to a landlord, but a potential detriment to the interests of the tenant, a draw under a letter of credit cannot be enjoined under Article 5 of the UCC unless the applicant can show egregious fraud and all the conditions entitling the applicant to equitable relief have been fulfilled. Those conditions include showing probable success in proving fraud, irreparable harm, no adequate remedy at law, balance of the equities, and the public interest will be served. Accordingly, it is very difficult to sustain a contested injunction against a facially conforming draw on a letter of credit.

Drafting Tips to Consider When Providing for a Letter of Credit in a Commercial Lease

1. Keep the draw conditions simple. A landlord will be better able to make an error-free draw if the letter of credit it receives: (i) calls for few documents, (ii) minimizes verbiage in the documents to be presented, and (3) does not require the wording of the draw documents specified in the letter of credit to be verbatim. A landlord will want the simplest form of presentment which is a draft or demand without any other documents, statements, or certificates accompanying it. A tenant will want, at least, a certificate by the landlord stating that the tenant is in default under the lease.

2. Avoid documents not within the landlord's control. Avoid as a draw condition presentment of any certificate or documents that must be signed by the tenant, or a court or an arbitrator or any third party over which the landlord has not control.

3. Allow partial draws. The landlord should be able to make partial draws on the letter of credit, as well as multiple draws.

4. Avoid specification of use of funds. The landlord should not be required to specify the use or deployment of the funds drawn on a letter of credit other than in a very general nature, such as pursuant to the terms or on account of a default under a lease.

LIQUIDATED DAMAGES

In *Truck Rent-A-Center*, 41 N.Y.2d 420, the New York State Court of Appeals analyzed the enforceability of liquidated damages provisions as follows:

> Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract. In effect, a liquidated damage provision is an estimate, made by the parties at the time they enter into their agreement, of the extent of injury that would

> be sustained as a result of breach of the agreement. Parties to a contract have the right to agree to such clauses, provided that the clause is neither unconscionable nor contrary to public policy. Provisions for liquidated damages have value in those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage. In such cases, the contracting parties may agree between themselves as to the amount of damages to be paid upon breach rather than leaving that amount to the calculation of a court or jury.
>
> On the other hand, liquidated damage provisions will not be enforced if it is against public policy to do so and public policy is firmly set against the imposition of penalties or forfeitures for which there is not statutory authority. It is plain that a provision which requires, in the event of a contractual breach, the payment of a sum of money disproportionate to the amount of actual damages provides for penalty and is unenforceable. A liquidated damage provision has its basis in the principle of just compensation for loss. A clause which provides for an amount plainly disproportionate to real damage is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion. A promisor would be compelled, out of fear of economic devastation, to continue performance and his promise, in the event of default, would reap a windfall well above actual harm sustained. As was stated eloquently long ago, to permit parties, in their unbridled discretion, to utilize penalties as damages, would lead to the most terrible oppression in pecuniary dealings.

Id. at 424-25 (internal quotation marks and citations omitted). Based on the foregoing, a security deposit may be applied to liquidated damages under a lease provided that the liquidated damages provision is enforceable and the lease provides that the security deposit may be used to cover such liquidated damages.

ARBITRATION V. LITIGATION

Arbitration (Pros)

- Arbitration proceedings are not public information so the dispute between the parties can remain confidential.

- The Parties can choose an arbitrator that has expertise in the subject area of the dispute. This should make the arbitration process more efficient.

- Arbitration can lead to a more expeditious result. Depending on where you practice, it can take months or years to get on a court's trial calendar. Arbitrators, however, usually have availability in a matter of weeks. Also, since the parties do not have to go through the formal discovery process of litigation, or motion practice, the time and

expense to get to an arbitration hearing is significantly less than it is to get to the trial stage of litigation.

- Arbitration is usually referred to as more cost-effective than litigation.

- Relaxed rules of evidence.

- Flexible scheduling unlike trial court calendars.

- The parties may control the process by making certain decisions regarding the arbitration processes and procedures in advance.

Arbitration (Cons)

- Could result in a significant delay in a landlord being able to recover possession of the leased premises. This is especially detrimental where the default is failure to pay rent. For this reason, it is recommended that disputes involving nonpayment of rent be excluded from an arbitration provision.

- There is limited recourse from a binding arbitration proceeding because the decisions are not appealable. Accordingly, a party could get "stuck" with a bad decision. Ordinarily an arbitration award can only be appealed on five narrow grounds:

    - The award was procured by corruption, fraud or other undue means.
    - There was evident partiality, corruption or misconduct by the arbitrator.
    - The arbitrator exceeded his or her powers.
    - The arbitrator refused to postpone the hearing or hear evidence, or improperly conducted the hearing.
    - There was no arbitration agreement.

- If it is a non-binding arbitration, the parties could go through the cost and time of the arbitration proceeding to end up right back where they started.

- Limited opportunity for discovery.

- Relaxed rules of evidence could allow hearsay evidence in the proceeding from witnesses that are not available to testify and, therefore, cannot be cross-examined or impeached.

- The parties to a lease that contains an arbitration provision typically cannot join third parties to the arbitration.

- Arbitration fees may be substantial.

- Arbitrators typically make awards without written opinions or explanatory documents.

- There is a tendency to "split the difference" when making an award.

Litigation (Pros)

- Summary eviction proceedings provided for in Article 7 of the New York Real Property Actions and Proceedings Law provides an expeditious method for landlords to recover possession of leased premises and obtain judgments for past due rent.

- The discovery process and motion practice can lead to findings and ruling that cause the matter to settle or at least narrow the issues. The parties can also obtain a clearer picture of the strengths and weaknesses in their case.

- The losing party has the right to appeal all final orders.

Litigation (Cons)

- Very expensive and drawn out. If a case is taken through written discovery, depositions, motion practice and trial, the economic cost will be high and it can last for years. In fact, the attorneys' fees for either party could become greater than the actual amount in controversy. If there is a fee shifting provision, it could substantially raise the stakes of the litigation because one party could ultimately have to pay their own attorney's fees, the attorneys' fees of the opposing party, and the amount in controversy.

- The losing party can prolong the litigation indefinitely by filing appeals.

III. DISPUTES AND LEASE ENFORCEMENT

The Essential Guide to the Most Important Clause in a Commercial Lease: The Default Clause*

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CHAPTER FORTY-EIGHT

THE ESSENTIAL GUIDE TO THE MOST IMPORTANT CLAUSE IN A COMMERCIAL LEASE: THE DEFAULT CLAUSE

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[48.0] I. INTRODUCTION

Commercial leases require an effective default clause that allows the landlord to force a tenant to comply with all lease obligations. The default clause commonly provides the procedure for obtaining an eviction or the threat of an eviction for a commercial tenant's violation of the lease. In addition, many default clauses include provisions requiring payments for unpaid rent or other damages, or for violations of non-monetary requirements in the lease, including, but not limited to, required landlord approvals for alterations and subleasing, or for failure to comply with the law and government regulations. A well-drafted default clause should incentivize a tenant to follow the protocols specified in the lease, knowing that an eviction and damages will result from a default. Because in many parts of the state, some more than others, commercial tenants are able to use the court system to delay and manipulate a landlord and its property, much time and money can be saved by negotiating a powerful and effective default clause—one that will motivate the tenant to comply with all of the terms and procedures of the lease, including the requirement for timely vacating the premises upon the expiration date of the lease.

The main objective of any default clause is to give the commercial landlord the legal means either (1) to cause the tenant to cure the breach in an expeditious manner; (2) to swiftly and efficiently obtain a judgment of eviction against a tenant in default of the lease and thus be able to relet the premises to a new tenant ready and able to pay the rent; or (3) to minimize the landlord's out of pocket losses from the noncomplying tenant's breach of the lease. For these reasons, after the rent clause, the default clause is the most important clause in any commercial lease.

However, even the most frequently used "standard form" commercial leases permit a defaulting commercial tenant either (1) to procedurally stall a summary proceeding that would otherwise end in a swift eviction, or (2) to avoid a summary proceeding altogether by seeking equitable relief and applying for a so-called "*Yellowstone*" Injunction[1] or to use dozens of other defenses and tactics to keep the tenant in possession, often without paying rent. Since the authors started practicing law in commercial landlord-tenant court some decades ago, the courts have become less

1 *See First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc*., 21 N.Y.2d 630, 637, 290 N.Y.S.2d 721, 724-25 (1968) where, as a matter of common law, the Court of Appeals, in dicta, created a declaratory judgment action that stops the clock on a notice to cure while the parties litigate whether the tenant really is defaulting on the lease. *See* "Notices to Cure and Avoiding the *Yellowstone* Injunction," *infra*.

tolerant of tenant tricks, and many judges will follow the strict construction of the lease no matter how poorly written.

Simple cases can go on for years of debating or litigating a poorly written default clause. In many cases poorly drafted default clauses frustrate the ability of the landlord to take back the premises and to relet to a new tenant who would pay rent for the leased space during what, in some cases, can be an unduly lengthy period of litigation. During this period, the tenant in default can take advantage of poorly drafted lease provisions and/or equitable judicial relief to continue in possession without, in some cases, paying any rent or other monies owed under the lease.

Nevertheless, while the consequences of poor drafting can hardly ever be avoided, the parties to a commercial lease may avoid intrusive judicial revision of their lease agreement by negotiating lease terms expressly intended to preclude such judicial activism.[2] New York courts have consistently enforced lease provisions that produce harsh results for one party to the lease "no matter how unwise it might appear to a third party."[3] Accordingly, attorneys representing landlords should strive to negotiate lease terms providing (1) that the lease shall be terminated for the chronic nonpayment of rent, (2) that all rents due during the lease term shall be accelerated upon one or more defaults in the payment of rent, (3) that the availability of a cure period, the trigger to seeking a *Yellowstone* Injunction, either be omitted from the lease entirely or that the lease contain agreed terms to be included in a *Yellowstone* injunction, should a court be inclined to grant one, such as the amount of the bond to be posted during the *Yellowstone* period, limitations on discovery, and a requirement for expedited litigation, and (4) that all monies due under the lease, other than the specified rent, shall be deemed "additional rent," thus also making a default in payment of such "additional rent" subject to a summary nonpayment proceeding.

2 Too many cases recite that it is not the job of the court to redraft a lease when that is precisely what the court is, in effect, doing.

3 "A lease agreement, like any other contract, essentially involves a bargained-for exchange between the parties. Absent some violation of law or transgression or a strong public policy, the parties to a contract are basically free to make whatever agreement they wish no matter how unwise it might appear to a third party." *Rose v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 412 N.Y.S.2d 62 (1978); *see also GAB Mgt. v. Blumberg*, 226 A.D.2d 499, 641 N.Y.S.2d 340 (2d Dep't 1966); *Queen Art Publishers, Inc. v. Animazing Gallery*, 2002 WL 452207, 2002 N.Y. Slip Op. 40033 (N.Y. Civil Ct., N.Y. Co. 2002); *Grand Liberte Co-op, Inc. v. Bilhaud*, 487 N.Y.S.2d 250, 487 N.Y.S.2d 250 (App. Term, 1st Dep't 1984).

In properly drawn commercial leases, monetary defaults give rise *both* to summary nonpayment proceedings under Real Property Actions and Proceedings Law § 711(2) (RPAPL) *and* summary holdover proceedings under RPAPL § 711(1), at the landlord's election.[4] We note in passing that since the Supreme Court *Yellowstone* action is already slower than the local court summary proceeding, many practitioners throughout the State opt to counterclaim in a tenant's Supreme Court action with an ejectment cause of action, so that once all *Yellowstone* issues in the case are adjudicated, the eviction can proceed apace in the same proceeding, if the landlord prevails.

[48.1] II. COMMON PROVISIONS OF THE DEFAULT CLAUSE

[48.2] A. Events of Default

The commercial lease should specify all of the foreseeable circumstances where the landlord would want to protect its property interests and regain possession and control of the leased premises in order to remedy or forestall any condition, caused by a material act or omission of the tenant, or by a third party to whom the tenant is indebted, that is prejudicial to the landlord's property interests. Therefore, the most essential part of the default clause is a provision listing all of the situations that will be deemed to be an event of default under the lease.

Every lease negotiation is *sui generis* and dependent upon facts and circumstances relevant only to the particular premises and the parties involved. Nevertheless, there are several categories or "events" of default, other than property-specific defaults, that are common to most commercial leases.

1. Failure to pay rent in a particular month or months;

2. Having a pattern of late rent payments;

3. Failure to comply with any other lease term;

4. Third party action against tenant under bankruptcy or insolvency laws;

4 See discussion *infra* about default clauses that *appear* to give a landlord a summary holdover proceeding (RPAPL art. 7), but actually only allow for the normally longer, slower ejectment action (RPAPL art. 6).

5. Tenant's failure to use premises for Permitted Uses;

6. Illegal use of the premises or nuisance at the premises;[5]

7. Tenant's abandonment of the premises prior to the lease expiration date;

8. Guarantor in breach of its obligations under its guaranty of tenant's obligations or the death or insolvency of the Guarantor and Tenant's failure to furnish a suitable substitute;

9. Tenant's failure to provide an estoppel certificate;

10. Tenant's failure to comply with assignment or subleasing provisions; and

11. Tenant's misrepresentation regarding USA Patriot Act certification.

Each of these events of default should be negotiated for inclusion in most commercial leases.

[48.3] B. Conditional Limitation and Condition Subsequent

A conditional limitation is a lease provision that, upon the nonpayment of rent[6] or upon the occurrence of any other event of default specified in the lease, gives the landlord the contractual right, before the expiration date specified in the lease, to prematurely terminate the lease on a specific date set forth in a written notice of termination. By exercising this right, the landlord effectively terminates the lease prior to the date on which it would otherwise expire, as if the new termination date were the expiration date otherwise specified in the lease.

It is not the particular conduct of the tenant constituting the event of default that acts to terminate the lease.

> Rather, it is by the passage of time—the period of time specified in the termination notice—that the lease auto-

5 RPAPL § 715, the so called "bawdy house law," gives the district attorney and a large variety of other persons (including the owner) the statutory right to bring a proceeding to cancel a tenancy, regardless of the legal rights of the parties to the tenancy, if the premises are notoriously used for any kind of illegal business.

6 In many leases, monetary defaults are specifically carved out of the conditional limitation clause. Such clauses disfavor landlords and favor tenants. Thus, whether the practitioner wants such a clause depends on who his client is.

> matically comes to an end; without service of a notice specifying the date of expiration of the lease there can be no termination and the lease remains in effect.[7]

The following is one example of a conditional limitation provision:

> If a Default occurs,[8] this lease is subject to the conditional limitation that Landlord may, at any time during the continuance of the Default, give notice to Tenant that this lease shall terminate on the date specified in that notice, which date shall not be less than five (5) days after Landlord gives such notice to Tenant. If Landlord gives that notice, this lease and the Term shall expire and come to an end on the date set forth in that notice as if said date were the date originally fixed in this lease as the Expiration Date and Tenant shall quit and surrender the Premises to Landlord (but Tenant shall remain liable as provided in this lease).

The service of a notice of termination in accordance with the terms of a proper conditional limitation provision enables the landlord to maintain a summary holdover proceeding under RPAPL § 711(1) against a tenant who remains in possession beyond the expiration date specified in the notice of termination.[9] The fact that the landlord, at its option, could bring a nonpayment proceeding in which tenant would have the right, under RPAPL § 751(1), to deposit the amount of the final judgment into court prior to the issuance of a warrant, does not preclude the landlord from ter-

7 *TSS-Seeman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, 1027, 534 N.Y.S.2d 925, 926 (1988)(Conditional limitation provision in commercial lease, which required the landlord to give written notice to the tenant specifying the default and stating that the lease shall expire and terminate on a prescribed date "which must be at least five days after the giving of the notice [of termination]," permitted the tenant to cure the default within a separate five-day grace period in which to pay the rent, as otherwise provided in the lease, and the landlord's service of a notice of termination, *after accepting the tenant's rent payment within that separate five-day grace period*, was "ineffective" because the termination notice was sent after the tenant had cured the default in accordance with the lease terms). *See also Midco Nowash LLC v. #1 Travel, Inc.,* 29 Misc. 3d 254, 905 N.Y.S.2d 765 (District Court, Nassau Co., 2010).

8 In more conservatively drawn leases, conditional limitation clauses like this one rely on "Default" being a lease-defined situation that persists after the expiration of the cure period specified in the Notice to Cure. See *Yellowstone* discussion *infra* as to the advantages and disadvantages of this conservative drafting.

9 *See Perrotta v. Western Reg'l Off-Track Betting Corp.*, 98 A.D.2d 1, 469 N.Y.S.2d 504 (4th Dep't 1983).

minating the lease in accordance with its terms and maintaining the holdover proceeding instead.[10]

Nevertheless, because a summary holdover proceeding is entirely statutory in origin, "there must be strict compliance with the statute to give the court jurisdiction."[11] It is therefore important that the notice of termination be given in connection with an act or omission, for which the landlord may invoke the *conditional limitation* provision of the lease and specify the date on which the lease shall *automatically expire*, and not be given for an act or omission constituting a breach of a *condition* of the lease that subjects the lease to termination only *at the option of the landlord*, for which an action of ejectment against a holdover tenant would be required.[12]

In other words, if the commercial lease provision is deemed a "condition subsequent,"[13] instead of a conditional limitation, a judge may dismiss the summary proceeding in the Commercial Part of landlord-tenant court or civil court and decide that the case must be brought in State Supreme Court in an ejectment action.[14] Generally, summary proceedings in the Commercial Part of landlord-tenant court proceed more quickly than do landlord-tenant cases brought in State Supreme Court. In com-

10 *See Grand Liberte Coop v. Bilhaud*, 126 Misc. 2d 961, 487 N.Y.S.2d 250 (App. Term, 1st Dep't 1984). However, in residential proceedings, termination clauses based upon monetary defaults have been held to be void as against public policy.

11 *Perrotta,* 98 A.D.2d 1.

12 *Id.*

13 The literature renders this all the more confusing by sometimes referring to conditions subsequent simply as "conditions." A "condition subsequent" or "condition" (or even more rarely a "condition of the lease") can be defined as a situation that gives the landlord the *option* to cancel the lease, but not until the landlord's exercise of that option will the cancellation be actually effected. A condition subsequent may also be the unknown future occurrence of an event that will automatically cancel the lease, such as a clause which provides that, in the event of a Congressional declaration of war, the lease shall be automatically canceled. By contrast, in the event of the invocation of a "conditional limitation," after a lease default, the expiration of the period of time specified in the notice of termination, automatically effects the cancellation of the lease. In such cases, the only question at issue may be whether the landlord's notice of termination was given with or without first giving the tenant a notice of default specifying a time within which to cure the default. Some decisions have sought to cut through all the theory to hold that, where there is a notice to cure requirement, there is a conditional limitation, and, where there is no notice to cure requirement, there is a condition subsequent. *See, e.g., VNO 100 W. 33rd St. LLC v. Square One Manhattan, Inc*., 22 Misc. 3d 560, 874 N.Y.S.2d 683 (NYC Civil Ct., 2008).

14 Some local courts, like the New York City Civil Court, actually do have jurisdiction to hear ejectment actions, but typically only if the assessed value of the real property is within the monetary jurisdiction of the Court. *See* N.Y.C. Civil Court Act § 203(j). Since such monetary values are so low, such ejectment actions are exceedingly rare.

mercial lease cases brought in landlord-tenant court, discovery is rarely permitted, and in cases where no motions are made in the Commercial Part in New York City on the return date of the petition, those matters are immediately sent out to any judge who is available to hear or try the case. Most commercial landlord-tenant cases will be concluded in a number of months in New York City and weeks in some other parts of the State.[15] By contrast, the proceedings in commercial landlord tenant actions brought in State Supreme Court can extend for several years. This highlights the importance of why a proper notice of termination should be deemed given for violation of a conditional limitation of the lease and not merely for a condition subsequent thereof.

[48.4] C. Notice Provisions

A landlord's notice of default[16] is distinct from a landlord's notice of termination. A notice of default specifies the particular lease provision that the tenant has violated and the period, if any, within which the tenant is obliged to cure the default before the lease becomes subject to termination under its conditional limitation provision.

The notice of default "must be sufficiently specific to demonstrate what remedial action is being required and what lease provision requires it."[17] Unless the landlord demonstrates what remedial action is required by the lease, "the omission in the notice must be considered a fatal defect."[18]

However, even where the notice of default is not sufficiently specific on its face, the landlord may still be able to demonstrate, from the correspondence and communications between the parties prior to the notice, that the tenant fully appreciated the nature of the breach stated in the notice of

15 In some regions of the State, the greatest source for delay in summary proceedings is the limited number of days the Court is sitting to hear such proceedings in any given week. Practitioners should acquaint themselves with the appropriate calendar practice of the court where they are bringing their proceeding. Also, in most parts of the State, State Supreme Court sits in the County Seat while the courts hearing summary proceedings are local to the location of the property in question. In those many parts of the state where there is a Village or a City contained within the boundaries of a Town, there can be two local courts, each of which has *statutory* jurisdiction to hear a summary proceeding, but only one of which actually entertains them, typically the Town Court.

16 It is also commonly known as a "Notice to Cure."

17 *White Angel Realty v. Asian Bros. Corp.*, 183 Misc. 2d 674, 676, 706 N.Y.S.2d 583, 585 (District Court, Nassau Co., 2000) *citing Chinatown Apts. Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86 (1980).

18 *Chinatown Apts., Inc.,* 51 N.Y.2d 786.

default. Therefore, in an appropriate case, "evidence extrinsic to the notice may be considered in assessing the notice's sufficiency."[19] Nevertheless, attorneys should always strive to make the notice of default sufficiently specific on its face, to avoid ever having to persuade a court to admit evidence extrinsic to the notice to determine its sufficiency.

The lease usually specifies various permissible methods for landlord's service of a notice of default upon the tenant—hand delivery, registered or certified mail, and/or recognized overnight courier. For each method of service, the lease should also specify how and when service is considered to have occurred.

> The point of specifying methods by which a notice of default is to be given is, fundamentally, to ensure that the putative defaulter has actual notice and an opportunity to protest the claim of default or, if so provided, to avail itself of an opportunity to cure the default, if any.[20]

Any ambiguity concerning the effective date on which the notice of default is deemed received by the tenant is resolved against the drafter of the lease.[21]

If the tenant wishes to preserve the right to cure a default under the lease by commencing a *Yellowstone* declaratory judgment action,[22] the tenant must obtain a stay of the period within which the default may be cured by seeking an injunction in State Supreme Court. "The existence of a period in which a violation may be cured does not depend on the con-

19 *White Angel Realty*, 183 Misc. 2d 674.

20 *Gucci Am., Inc. v. Sample Sale Wholesalers, Ltd.*, 39 A.D.3d 271, 272-273, 835 N.Y.S.2d 26 (1st Dep't 2007).

21 *See Solow Bldg. Co., LLC v. Frelau LLC*, 27 Misc. 3d 32, 899 N.Y.S.2d 794 (1st Dep't App. Term, 2010).

22 In form, a *Yellowstone* action is an action seeking a declaratory judgment declaring that the Tenant is *not* in default of the requirements of the lease. However, under the doctrine enunciated in the *Yellowstone* decision, if the action does not include an application for a Temporary Restraining Order and a motion for Preliminary Injunction against terminating the lease, the demand for the declaration will be rendered moot because the remedy will necessarily be too late to be effective. The standards for obtaining such a TRO and Preliminary Injunction in *Yellowstone* litigation are much more liberal than otherwise required in New York Civil Practice. Most courts require little more than a showing that there are a commercial lease and a notice to cure, the application made prior to the expiration of the notice to cure, and the formal requirement of a desire and ability to cure. Rarely are such applications denied, and if they are denied, but the denial is reversed on appeal, the appellate reversal is *nunc pro tunc* to the date of the application for the emergency relief.

tents of the notice of default, but upon the terms of the lease."[23] Thus, although the landlord's failure to state a cure period in the notice of default may render the notice defective, "it does not vitiate the cure period itself."[24] However, the failure of a tenant to toll the curative period specified in the lease divests a court of its power to grant a temporary stay under *Yellowstone*.[25] The period between a notice of termination and the lease expiration date specified in accordance with the conditional limitation provision is not one within which the tenant can cure a default.[26] Conditions subsequent do not give rise to *Yellowstone* actions, but they also do not give rise to summary holdover proceedings.

[48.5] III. TOOLS OF THE EFFECTIVE DEFAULT CLAUSE

[48.6] A. Additional Rent

It is important that all monies the lease requires the tenant to pay during the term of the lease, other than the rent itself, be expressly designated as "additional rent." Additional rent can include late charges, taxes, various building expenses, attorney's fees, letters of credit, insurance, and any other items specific to the particular premises involved that the landlord requires the tenant to pay. If such items are designated as "additional rent" in the lease, the landlord may initiate a summary proceeding to recover possession of the premises for the tenant's failure to make a required payment of additional rent, whether or not the tenant has paid the requisite monthly base rent.[27]

If the lease requires the tenant to pay the particular charge but does not expressly designate the item as "additional rent," it will not be deemed additional rent by the court.[28]

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23 *Empire State Bldg. Assocs. v. Trump Empire State Partners*, 245 A.D.2d 225, 228, 667 N.Y.S.2d 31, 34 (1st Dep't 1997).

24 *Id.*; *see also TSS Seeman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, 534 N.Y.S.2d 925 (1988).

25 *See Health 'N Sports, Inc. v. Providence Capitol Realty Group, Inc.*, 75 A.D.2d 884, 428 N.Y.S.2d 288 (2d Dep't 1980).

26 *Id.*

27 *See Melick v. Ken's Serv. Station, Inc.*, 44 Misc. 3d 143(A), 998 N.Y.S.2d 307 (Table) (Sup Ct. App. Term, 2d Dep't 2014).

28 *See*, *e.g.*, *Perrotta v. Western Reg'l Off-Track Betting Corp.*, 98 A.D.2d 1, 469 N.Y.S.2d 504 (4th Dep't 1983); *Rector, Churchwardens & Vestrymen of Trinity Church in City of N.Y. v. Chung King House of Metal, Inc.*, 193 Misc. 2d 44, 747 N.Y.S.2d 292 (NYC Civil Court 2002).

Where the lease itself is reasonably susceptible of more than one interpretation as to how the additional rent is to be calculated, the court may properly consider evidence of the parties' course of conduct, including the methodology used by the landlord in its annual billing for additional rent and the tenant's payment of such additional rent since the beginning of the tenancy.[29] Nevertheless, attorneys should strive to eliminate all ambiguities concerning the calculations required to accurately determine the amounts that will become due as additional rent under the lease.

It should be noted that General Obligations Law § 103(1) (GOL) provides that a tenant's security deposit, until repaid to the tenant at the termination of the lease *or applied to payments due under the lease*,

> shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same.

It has been held, therefore, that the tenant's security deposit itself is not "rent," and it cannot be recovered in a nonpayment proceeding.[30] Nor does the New York City Civil Court or any Local Court have jurisdiction to order a tenant to replenish a security deposit that has been applied to payments due under the tenant's lease obligations.[31] However, the failure to maintain the security deposit is a breach of a substantial obligation of the lease and is therefore a proper basis for a conditional limitation and ensuing holdover proceeding.[32]

[48.7] B. Rent Acceleration

As the most powerful weapon ever devised for a lease, aside from the guarantee provision, rent acceleration clauses provide a wonderful way to ensure that rent payments are not only made, but are made timely. Upon a default in the payment of rent, a properly drafted acceleration clause permits the landlord to seek recovery of the total balance of rent due under the lease without having to wait until the lease's expiration date. Without

29 *One Hundred Grand, Inc. v. Chaplin*, 70 A.D.3d 513, 895 N.Y.S.2d 68, 69 (1st Dep't 2010).

30 *See, e.g., 225 Holding Co., LLC v. Beal*, 12 Misc. 3d 136(A), 820 N.Y.S.2d 846 (2d Dep't App. Term 2006).

31 *930 Fifth Ave. Corp. v. Shearman*, 17 Misc. 3d 1126(A), 851 N.Y.S.2d 71 (NYC Civil Court 2007) (Lebovitz, J.).

32 *See 225 Holding Co., LLC,* 12 Misc. 3d 136(A).

a properly drafted acceleration clause, the right of the landlord to sue for damages for the breach of the lease accrues, generally, upon the termination date of the lease.[33]

> [I]n rare cases, agreements providing for the acceleration of the entire debt upon the default of the obligor may be circumscribed or denied enforcement by utilization of equitable principles. In the vast majority of instances, however, these clauses have been enforced at law in accordance with their terms. * * * * Absent some element of fraud, exploitive overreaching or unconscionable conduct on the part of the landlord to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties.[34]

However, as discussed at length below, the Court of Appeals' recent decision in *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association*[35] casts some doubt on the full collectability of accelerated rent. In *Van Duzer*, the Court held that a hearing on the landlord's *actual* damages may be necessary to determine what portion of accelerated rent, undiscounted, will not constitute an otherwise forbidden penalty. Under "penalty" jurisprudence, a lease that provides for acceleration for breach of any of its terms, no matter how trivial or inconsequential, is likely to be considered an unconscionable penalty and will not be enforced by a court of equity.[36] For example, acceleration will not be permitted for a tenant's failure to comply with a covenant collateral to the primary obligation of the tenant. In such circumstances, acceleration will be held to constitute a forfeiture, as the damages reserved in the lease are likely to be disproportionate to any actual loss that could possibly accrue to the landlord from such breach.[37]

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33 *See Muss v. Daytop Vill., Inc*., 43 A.D.2d 945, 352 N.Y.S.2d 28 (2d Dep't 1974).

34 *Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc*., 46 N.Y.2d 573, 577, 415 N.Y.S.2d 800 (1979).

35 24 N.Y.3d 528, 2014 WL 7177502 (2014). Author Bailey has his doubts about *Van Duzer* being good law and sees it as an anomaly. Since it is a new decision, there is no track record with which to evaluate this position. The doctrine announced in the case is discussed, *infra*.

36 *Fifty States Mgmt. Corp.,* 46 N.Y.2d 573.

37 *Id*.

However, a covenant to pay rent at a specified time "is an essential part of the bargain as it represents the consideration to be received for permitting the tenant to remain in possession of the property of the landlord."[38] Therefore, acceleration is permitted as liquidated damages if the sum to be recovered is no greater than the amount the tenant would have paid had it fully performed and been entitled to possession upon payment.[39] Further, it has been held that a single default in the payment of rent is sufficient to effectuate an acceleration clause.[40] Moreover, where the lease terms can be construed to allow it, the tenant's guarantor can also be held liable for the accelerated sum due under the lease.[41]

It should be noted that the Second Department has held that "accelerated rent" is not "rent due."[42] As the Court explained, "accelerated rent" is "contractual damages not recoverable in a summary proceeding." Accordingly, upon a default by the tenant, the landlord can use summary proceedings to regain possession of the premises with a judgment of eviction and a monetary judgment for past rent due. But, to recover the monies due upon the contractual claims for accelerated rent and other monetary obligations that survive the termination of the lease, the landlord must commence a plenary action.[43] The judgment entered for the landlord in the summary proceeding is neither res judicata nor an election of remedies and therefore does not bar the landlord from seeking contractual damages in the plenary action. As the Second Department further explained,

> [r]es judicata is inapplicable where a party is unable to seek a certain remedy or form of relief in the first action because of limitations on the subject matter jurisdiction of the court or restrictions on its authority to entertain multiple remedies or form of relief in a single action.[44]

38 *Id.* at 578.

39 *Id.,* subject to *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

40 *GAB Management, Inc. v. Blumberg*, 226 A.D.2d 499, 641 N.Y.S.2d 340 (2d Dep't 1996).

41 *See Madison Ave. Leasehold, LLC v. Madison Bentley Assocs.. LLC,* 8 N.Y.3d 59, 861 N.Y.S.2d 254 (2006).

42 *Ross Realty v. V & A Fabricators, Inc.*, 42 A.D.3d 246, 836 N.Y.S.2d 242 (2d Dep't 2007).

43 *Id.*; *see also 930 Fifth Ave. Corp. v. Shearman*, 17 Misc. 3d 1126(A), 851 N.Y.S.2d 71 (NYC Civil Court 2007); *Marketplace v. Smith*, 181 Misc. 2d 440, 694 N.Y.S.2d 893 (Justice Ct., Monroe Co. 1999).

44 *Ross Realty*, 42 A.D.3d 246.

[48.8] C. Late Charges

Commercial lease clauses that impose late charges for failing to pay rent or other additional rent obligations in a timely manner, and which specify that the late charges shall also be deemed additional rent, are generally enforced by the courts.[45] However, late charges, as additional rent, may be sought only for rent that is past due. At the time of a default, where a lease does not contain a rent acceleration clause, the landlord may sue only for the amount of late charges past due at the time the action or proceeding is commenced.[46] In such cases, the landlord's entitlement for damages for the remaining installments of rent will ripen and may be sued for at the end of the lease term.[47]

Whether or not the particular late charge specified in any commercial lease, or the formula used to calculate such late charge, as negotiated between sophisticated business people, may be found to be "unconscionable" will depend upon whether there is evidence suggesting that the late charge was unreasonable or against public policy.[48] The late fee must bear some reasonable relationship to the landlord's additional administrative expense by reason of the lateness. If the late fee is too high, the courts regard it as an unenforceable penalty.[49]

[48.9] D. Chronic Nonpayment

A necessary part of an effective default clause is a provision enabling the landlord to cancel the lease for the frequent delinquency of rent payments, commonly referred to as a "chronic nonpayment" of rent due termination clause. It often happens that a landlord who is forced to commence a nonpayment proceeding in New York City Civil Court, or other local court with summary jurisdiction, is faced with a tenant who is either chronically late in paying the rent or does not pay the rent at all, thus causing the landlord to have to institute repeated legal proceedings to procure the timely payment of rent.[50]

45 *See, e.g., Goldman v. MJI Music, Inc*., 17 Misc. 3d 1127 (A), 2007 WL 3378369 (NYC Civil Ct., Kings Co., 2007).

46 *See, e.g., Barr v. Country Motor Car Group, Inc*., 15 A.D.3d 985, 789 N.Y.S.2d 350 (4th Dep't 2005).

47 *Id.*

48 *See*, *e.g.*, *K.I.D.E. Assocs., Inc. v. Garage Estates Co.*, 280 A.D.2d 251, 720 N.Y.S.2d 114 (1st Dep't 2001).

49 *Wilsdorf v. Fairfield Northport Harbor, LLC,* 34 Misc. 3d 146(A), 950 N.Y.S.2d 494 (Sup. Ct. App. Term 9 & 10 2012).

Including the time it takes to obtain a court date, to request shortened adjournment periods, and a resolution by settlement, trial, or default in the case of a non-appearance, the earliest a landlord can expect to obtain an eviction will be no less than three to five months after commencement of the nonpayment process.[51] Even after an eviction is scheduled, RPAPL § 751(1) mandates that the tenant be given ten days to pay the amount of rent owed to stay the issuance of a warrant and avoid eviction.

For many landlords, the cycle of late payments or nonpayment is repeated continuously and, in many cases, perennially. To further exacerbate their frustration, in addition to the wasted energy, time, and money they expend in participating in the process, many cases result in empty tenancies with thousands of uncollectible dollars. Accordingly, although "[a] history of repeated nonpayment proceedings brought to collect chronically late rental payments supports an eviction proceeding on the ground that the tenant has violated a 'substantial obligation' of the tenancy,"[52] attorneys should strive to draft into any default clause a provision by which the tenancy is terminated for the chronic nonpayment of rent.

A chronic nonpayment provision terminates the tenancy upon the happening of multiple defaults in the timely payment of rent. A typical clause will terminate the tenancy once a tenant fails to timely pay the rent at least three times within a 12 consecutive month period. Even where the lease contains a grace period (typically five days) within which the tenant is normally permitted to cure a default for nonpayment after issuance of a notice of default, the chronic nonpayment provision can prescribe that, after two consecutive defaults, the landlord, prior to serving the notice of termination, is not required to serve the tenant with a notice of default for a third consecutive default, but may, after the expiration of the five-day grace period, immediately serve the notice of termination. Therefore, the third consecutive default triggers the termination of the lease automatically.[53] At this point the commercial tenant cannot ward off eviction by paying the rent in full. As a result of the chronic nonpayment clause, the landlord has the option of evicting the tenant, so long as the requirements

50 *See, e.g., National Shoes v. Annex Camera & Elecs., Inc*., 114 Misc. 2d 751, 452 N.Y.S.2d 537 (NYC Civil Ct. 1982).

51 Some less urban areas of the State report shorter periods, but not by a lot.

52 *Adam's Tower Ltd. P'ship v. Richter*, 186 Misc. 2d 620, 757 N.Y.S.2d 825 (App. Term, 1st Dep't 2000); *see also Sharp v. Norwood*, 89 N.Y.2d 1068, 659 N.Y.S.2d 834 (1997).

53 *See*, *e.g.*, *Midco Nowash LLC v. #1 Travel, Inc.,* 29 Misc. 3d 254, 905 N.Y.S.2d 765 (District Court, Nassau Co., 2010); *see also Estate of Birnbaum v. Yankee Whaler*, 75 A.D.2d 708, 427 N.Y.S.2d 1291 (4th Dep't 1980).

of the chronic nonpayment provision have been followed and proven in court. This is one instance where the precedents are clear both that a summary holdover proceeding lies and that it does *not* require an antecedent notice to cure.[54]

[48.10] E. Self-Help Evictions

Upon termination of the lease or upon the commercial tenant's defaulting on payment of rent or other lease terms, a landlord may reenter the leased premises peaceably without resort to court process, when the right to do so is expressly reserved in a commercial lease.[55] A commercial landlord's common law right to use "self-help" to reenter its property peaceably to evict a defaulting tenant or other person with no right to possession has been recognized from time immemorial.[56] Nevertheless, although the common law right of self-help reentry is not abrogated by the statutory remedy of summary proceedings,[57] it is a remedy that is rarely used and in many municipalities throughout the state abolished or restricted. The extent of self-help available also varies by Judicial Department.[58]

Attorneys who represent commercial landlords are often reluctant to advise their clients to use this neglected self-help remedy to regain possession of leased premises from defaulting commercial tenants.[59] This

54 *Definitions Personal Fitness, Inc. v. 133 E. 58th St.*, 107 A.D.3d 617, 967 N.Y.S.2d 647 (A.D.1 2013); *Adam's Tower LP*, 186 Misc. 2d 620.

55 *See Bozewicz v. Nash Metalware Co., Inc.*, 284 A.D.2d 288, 725 N.Y.S.2d 671 (2d Dep't 2001); *110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc.*, 265 A.D.2d 415, 696 N.Y.S.2d 490 (2d Dep't 1999); *Jovan Spaghetti House, Inc. v. Heritage Co. of Massena*, 189 A.D.2d 1041, 592 N.Y.S.2d 879 (3d Dep't 1993).

56 *See Bliss v. Johnson*, 73 N.Y. 529, 534 (1878) ("The true owner of land wrongfully held out of possession may watch his opportunity, and if he can regain possession peaceably may maintain it—and lawfully resist an attempt by the former occupant to retake possession, nor will he be liable to be proceeded against under the statute of forcible entry and detainer. There can be no wrongful detainer by the true owner when the entry was both lawful and peaceable."); *Fults v. Munro*, 202 N.Y. 34, 39 (1911) ("Statutes relating to forcible entry and to forcible detainer, which are separate and distinct wrongs, have existed for centuries."); *see also Mayes v. UVI Holdings, Inc*., 280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dep't 2001).

57 *See Cohen v. Carpenter*, 128 A.D. 862, 113 N.Y.S. 168 (2d Dep't 1908); *Liberty Indus. Park Corp. v. Protective Packaging Corp.*, 71 Misc. 2d 116, 335 N.Y.S.2d 333 (Special Term, Kings Co., 1972), *affirmed*, 43 A.D.2d 1020, 351 N.Y.S.2d 944 (2d Dep't 1974).

58 Practitioners should be certain to know the local ordinances on the subject prior to expressing an opinion.

59 Self-help is limited to the commercial context only. New York City Administrative Code § 26-521 prohibits the use of self-help in the residential context.

reluctance stems, in part, from the perception that courts are generally hostile to a commercial landlord's use of self-help, because self-help renders a forfeiture of the premises before a tenant can litigate its right to remain in possession.[60] In addition, because of the lack of use of self-help many attorneys are unfamiliar with this body of law and are hesitant to employ such an aggressive measure. Courts also refuse to approve use of self-help where there is ambiguity in the lease terms or factual questions concerning the expiration of the lease.[61] Moreover, under RPAPL § 853, a tenant wrongfully ejected from real property by force or other unlawful means may sue to recover treble damages from the landlord and be restored to possession if ejected before the end of the lease term.[62]

As a result of the combination of general court hostility and attorney reluctance to recommend the use of proper self-help measures, commercial tenants have been allowed to violate their leases or extend them based on technical or frivolous defenses, sometimes for months or years at a time, in blatant disregard of the lease terms.[63] In addition to the loss of rental income that often accompanies such disputes, landlords faced with this situation lose valuable time to repair, renovate, and relet their premises to responsible tenants. These circumstances also adversely affect any effort by the landlord to sell the leased premises to potential buyers.

Landlords have every incentive to insist on including a proper and effective self-help provision in their commercial leases. With appropriate drafting and proper execution of the self-help measures provided in their leases, commercial landlords should be able to exercise their right to peaceable reentry whenever such action is warranted. With the availability of self-help written into the lease, tenants are likely to be more careful to avoid any action that will place themselves in default and thereby become subject to immediate peaceable eviction. Thus, commercial landlords may both (a) provide an incentive for their tenants to comply with the lease terms, and (b) be able, when compelled to use self-help, to timely relet the

60 Courts created the so-called "*Yellowstone*" injunction to allow the parties to dispute their differences while the tenant remains in possession and to prevent forfeiture. *See, e.g., Stuart v. D&D Assocs.*, 160 A.D.2d 547, 545 N.Y.S.2d 197 (1st Dep't 1990).

61 *See Sol De Ibiza, LLC v. Panjo Realty, Inc*., 26 Misc. 3d 331, 890 N.Y.S.2d 806 (NYC Civil Ct., 2009), *reversed remanded on undeveloped record*, 29 Misc. 3d 72, 911 N.Y.S.2d 567 (App Term, NY Co., 2010).

62 *See Suffolk Sports Ctr., Inc. v. Belli Constr. Corp*., 212 A.D.2d 241, 628 N.Y.S.2d 952 (2d Dep't 1995).

63 *See*, *e.g.*, *Million Gold Realty Co. v. S.E. & K. Corp.*, 4 A.D.3d 196, 772 N.Y.S.2d 271 (1st Dep't 2004).

premises without first having to await the outcome of costly and lengthy litigation before doing so.

Nevertheless, landlords who use self-help will not necessarily be able to avoid all litigation. There is always a possibility that the landlord will be required to litigate (a) whether the tenant was in default at the time of the landlord's reentry, and/or (b) whether the self-help used was peaceable and otherwise lawful.[64] Therefore, landlords should (a) carefully document a tenant's default before reentering the leased premises and (b) ensure that reentry is accomplished peaceably. Where it is not crystal clear that the lease term has expired or that the tenant is in default, the landlord should not use self-help, but should resort only to summary proceedings or other legal process. However, recognizing that the outcome of any litigation is always uncertain, a landlord may view the possibility of a future, adverse treble damages judgment as a risk worth taking in order to obtain the real, current ability to relet the premises to a responsible tenant who will pay rent during the litigation that ensues between the landlord and the evicted tenant. Also, it is wise to remember that three times zero is still zero. If there are no genuine damages, trebling them is not going to hurt the landlord.

In deciding whether or not to run that risk, the landlord should consider the kind of damages that the evicted tenant will have a right to claim, i.e., whether any injury caused by the reentry will be limited to property damage only or whether the evicted tenant will be able to claim and prove damages measured by the loss of the value of the leasehold.[65] Where the lease has expired or been terminated by reason of the default, the tenant is not entitled to possession.[66] In that situation, the tenant's damage is likely to be limited to such property damage as may occur during the course of the reentry only—the sum of which a landlord may be more than willing to bear—but a judgment that the landlord may also be able to avoid by taking care to see that the tenant's property is carefully removed from the premises by persons other than the landlord itself, such as a bonded moving company, and placed in a reputable storage facility.

64 *See Maracina v. Shirrmeister*, 105 A.D.2d 672, 673, 482 N.Y.S.2d 14, 16 (1st Dep't 1984) ("RPAPL 853 no longer requires that the use of physical force be demonstrated.").

65 *See Mayes v. UVI Holdings, Inc*., 280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dep't 2001).

66 *See 110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc.*, 265 A.D.2d 415, 696 N.Y.S.2d 490 (2d Dep't 1999).

Whether a landlord's reentry is deemed peaceable or not will depend on whether it is made in a "forcible" manner. For a reentry to be forcible, the force used:

> must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner or with personal violence, or with the threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger or personal injury if he stood up in defense of his possession.[67]

In the absence of force that tends to breach the peace, hiring trucks and workers and even a garbage company to evict a tenant does not constitute forcible entry,[68] even if, in the case of a municipal landlord, the eviction is performed with the assistance of armed police.[69] However, to ensure that its use of self-help is indeed "peaceable" and that there is no confrontation during the eviction, the landlord should arrange for the reentry to occur during late night/early morning hours when the tenant's business is closed and when the landlord's agents are certain that no one is present on the leased premises before entering. When conducting the eviction, if there is any conflict with the tenant or its representatives, the attempted eviction should be abandoned and accomplished at a later date or under court order.

Upon reentry, when the peaceable self-help eviction is successful, the landlord may then change the locks or padlock the doors. To thwart any potential damage claims, the entire reentry operation should be videotaped, and all items of tenant property removed from the property should be photographed and inventoried. The tenant's property should then be placed in storage, for a reasonable period of time,[70] in accordance with a lease provision that contemplates such action in the event of an eviction.

Ultimately, whether or not the landlord is permitted to use self-help to regain possession of the leased premises will depend on whether the land-

67 *Fults v. Munro*, 202 N.Y. 34, 39 (1911).

68 *See Liberty Indus. Park Corp. v. Protective Packaging Corp.*, 71 Misc. 2d 116, 335 N.Y.S.2d 333 (Special Term, Kings Co., 1972), *affirmed*, 43 A.D.2d 1020, 351 N.Y.S.2d 944 (2d Dep't 1974).

69 *See Paulino v. Wright*, 210 A.D.2d 171, 620 N.Y.S.2d 363 (1st Dep't 1994).

70 Universal custom supported by no case law whatsoever, deems "reasonable time" to be thirty days.

lord's right to do so is reserved in the lease. The lease should expressly provide (a) that, if the tenant defaults in the payment of rent or commits any other violation of the lease constituting a default, the lease shall terminate automatically, (b) that the landlord may thereafter recover possession in accordance with its common law rights, (c) that the landlord may do so without any duty, requirement, or necessity to provide due process or to seek prior court approval, through summary dispossess proceedings or any other action or proceeding at law, before evicting the tenant and removing tenant's property and/or any person from the premises, and (d) that the term "re-entry" is not used in its technical or narrow sense but in the sense that the landlord may effect *physical* entry of the premises.[71] Such a provision does not preclude the landlord from initiating summary proceedings if it chooses to do so. However, the landlord should exercise its options carefully. If the landlord does not use self-help initially, but commences a summary proceeding in the first instance, the right to use self-help thereafter may be considered waived.[72]

The lease terms should also obligate the tenant to pay the landlord all monies owed by the tenant up to the time of the landlord's recovery of possession, whether the landlord recovers possession through self-help or summary proceedings. In addition, the lease should reserve the landlord's right to sue after reentry for any damages incurred as a result of the tenant's actions, such as an unlawful holdover that causes the landlord to lose an opportunity for reletting the premises. The lease should provide that the landlord need not assert such claims against the tenant in summary proceedings only, but may do so in a separate plenary action.

While there are decided risks involved in using self-help measures, the careful landlord and the careful landlord's attorney should generally be able to avoid the pitfalls that exist and make self-help work to the landlord's benefit in the long run.

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71 This clause is essential because much case law continues to define "re-entry" simply as the right to bring a summary proceeding.

72 *See Sol de Ibiza, LLC v. Panjo Realty, Inc*., 26 Misc. 3d 331, 890 N.Y.S.2d 806 (NYC Civil Ct., 2009), *reversed remanded on undeveloped record*, 29 Misc. 3d 72, 911 N.Y.S.2d 567 (App Term, NY Co., 2010).

[48.11] IV. COMMON ISSUES WITH DEFAULT CLAUSES

[48.12] A. Attorney Fees

Commercial leases generally provide that the landlord may recover the attorney fees the landlord incurs if the landlord prevails in a litigation with the tenant. However, unlike the situation in residential lease disputes, where a residential tenant who prevails over a residential landlord in an action or a summary proceeding, is enabled, by statute,[73] to recover the tenant's attorney fees from the landlord, the commercial tenant has no such reciprocal right to recover the tenant's attorney fees if it prevails over its commercial landlord.[74] While most attorney fees clauses allow the landlord to recover its attorneys' fees in the event the landlord sues the tenant under the lease, better drafted clauses also allow the landlord to recover its attorneys' fees for a successful defense of a suit brought by the tenant.

A reciprocal requirement for attorney fees will not be implied for the benefit of a tenant where a commercial lease does not contain a provision authorizing the tenant to recover its attorney's fees from a defeated landlord.[75] However, although a lease issued under the Loft Law[76] may be commercial in form, when, for example, it provides for limited occupancy of the premises as an artist's studio, it has nevertheless been held that "where the intent of the parties, or the effect of the lease or of applicable law, was to create or accede to a residential use, the attorney fee recovery clause becomes a reciprocal, mutual obligation."[77]

[48.13] B. Liquidated Damages Provisions: Avoiding the Penalty

Besides a guarantee, liquidated damages provisions provide the greatest incentive for commercial tenants to comply with the lease. Below, we attempt to guide the practitioner in drafting an enforceable clause that will

73 N.Y. Real Property Law § 234 (RPL).

74 *See, e.g., Reade v. Stonybrook Realty, LLC*, 63 A.D.3d 433, 882 N.Y.S.2d 8 (1st Dep't 2009).

75 *See, e.g., NSB Abatement Servs., Inc. v. Detailing Café, Inc*., 7 Misc. 3d 1025(A), 801 N.Y.S.2d 237 (Mt. Vernon City Ct., 2005).

76 N.Y. Multiple Dwelling Law, Article 7C, Sec. 286(11).

77 *Feierstein v. Moser*, 124 Misc. 2d 369, 371, 477 N.Y.S.2d 545, 548 (Special Term, NY Co., 1984).

withstand the scrutiny of a judge. Liquidated damages provisions in commercial leases are enforceable if not deemed to be a penalty that renders a forfeiture. As the New York Court of Appeals has explained:

> As a general matter parties are free to agree to a liquidated damages clause "provided that the clause is neither unconscionable nor contrary to public policy." Liquidated damages that constitute a penalty, however, violate public policy, and are unenforceable. A provision which requires damages "grossly disproportionate to the amount of actual damages provides for a penalty and is unenforceable."[78]

A contractual provision fixing damages in the event of a breach will be sustained "if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation."[79] Liquidated damages provisions have their basis in the principle of just compensation for loss, and "a clause which provides for an amount plainly disproportionate to real damages is not intended to provide fair compensation, but to secure performance by the compulsion of the very disproportion."[80] The burden is on the party seeking to avoid liquidated damages to show that the stated liquidated damages are in fact a penalty.[81]

"Whether a provision in an agreement is 'an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances."[82] Where there is doubt as to whether a liquidated damages provision constitutes an unenforceable penalty or a proper liquidated damages clause, it will be resolved in favor of a construction that holds the provision to be a penalty.[83] It is immaterial whether the parties have called the provision one

78 *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Assoc., Inc*., 24 N.Y.3d 528, 2014 WL 7177502 (2014) (Internal citations omitted)); *see also Truck Rent-A-Center, Inc. v. Puritan Farms 2d, Inc*., 41 N.Y.2d 420 (1977).

79 *Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 425; *City of Rye v. Public Serv. Mut. Ins. Co.*, 34 N.Y.2d 470, 473, 358 N.Y.S.2d 391 (1974).

80 *Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 424.

81 *172 Van Duzer Realty Corp*., 24 N.Y.3d 528.

82 *Id*.

83 *Pyramid Ctrs. & Co. v. Kinney Shoe Corp.*, 244 A.D.2d 625, 663 N.Y.S.2d 711 (3d Dep't 1997).

for "liquidated damages."[84] The provision is to be interpreted as of the date it was created, not as of the date of its breach.[85] Thus, courts "must look to the anticipated loss discernible at the time of contracting and not the actual loss incurred by the breach to determine whether the liquidated damages are reasonable or whether the damages are capable of calculation."[86] Where one party establishes that the stated liquidated damages is a penalty, the other party's proper recovery is the amount of that party's actual provable damages.[87]

In cases where an acceleration clause provides for recovery of all future rent due as liquidated damages, the New York Court of Appeals has distinguished between (a) cases where the tenant remains in possession after being compelled to pay the total accelerated rent (where the total amount of accelerated rent is no greater than the amount that would otherwise have been paid, if timely paid by the tenant over the term of the lease),[88] and (b) cases where the tenant has vacated the premises and the landlord remains in possession.[89]

In the latter case, the Court held that, "on its face," the tenant's argument, that permitting the landlord "to hold possession *and* immediately collect all rent due," gives the landlord a windfall, was "compelling" because:

> arguably the ability to obtain all future rent due in one lump sum, undiscounted to present-day value, and also enjoy uninterrupted possession of the property provides the landowner with more than the compensation attendant to the losses flowing from the breach—even though such compensation is the recognized purpose of a liquidated damages provision.

Accordingly, the Court determined that the defaulting tenant "should have had the opportunity to present evidence that the undiscounted accelerated rent amount is disproportionate to [the landlord's] actual losses,

84 *See Truck Rent-A-Ctr., Inc.*, 41 N.Y.2d 420.

85 *Vernitron Corp. v. CF 48 Assocs.*, 104 A.D.2d 409, 478 N.Y.S.2d 933 (2d Dep't 1984).

86 *Id.*

87 *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

88 *See Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 577, 415 N.Y.S.2d 800 (1979).

89 *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

notwithstanding that the landowner had possession, and no obligation to mitigate."[90] The Court did *not* hold that the landlord would not be entitled to recover *any* accelerated contractual damages. The Court acknowledged it had previously held, in *Holy Properties Limited, L.P. v. Kenneth Cole Productions, Inc.*,[91] "that once a tenant abandons the property prior to expiration of the lease, a 'landlord [is] within its rights under New York law to do nothing and collect the full rent due under the lease,"'[92] where "the parties have freely agreed to bind [the tenant] to pay rent after termination of the landlord-tenant relationship."[93] Nevertheless, after *172 Van Duzer Realty Corp.*, determining the measure of those damages in such cases (whether "discounted" or not) will be subject to case by case development.

[48.14] 1. Representative Cases Where the Liquidated Damages Provision Was Not Enforced

Pyramid Ctrs. & Co. v. Kinney Shoe Corp.
244 A.D.2d 625, 663 N.Y.S.2d 711 (App. Div. 3d Dep't 1997)

- Default provision in the lease provided that if tenant vacated the premises, tenant still remained liable to pay rent for the remainder of the lease period. Additionally, if tenant ceased operation prior to termination date, landlord could require tenant to "pay as liquidated damages and not as a penalty . . . double the fixed minimum rent for the remainder or unexpired portion of the term."

- The Court determined that the provision was disproportionate to any subsequent loss suffered by the landlord and thus it was intended to coerce tenant's performance rather than compensate landlord for tenant's breach, and, therefore, its purpose was not to provide just compensation.[94]

90 *Id.*

91 87 N.Y.2d 130 (1995).

92 *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

93 *Id.*

94 Of course, such coercion is precisely what many landlords hope to achieve, but there is simply no way to draft a "coercive" provision in accordance with the law.

- In the interest of justice, the Court afforded the landlord the opportunity to present evidence of actual damages as a result of tenant's decision to close its store before the expiration of the lease.

Vernitron Corp. v. CF 48 Associates
104 A.D.2d 409, 478 N.Y.S.2d 933 (App. Div. 2d Dep't 1984)

- Lease had a clause which called for liquidated damages in a sum equivalent to one year's rent for a default under the lease. The lease defined the term "default" to include any breach of the covenants of the lease.

- The lease contained numerous covenants of varying degrees of importance.

- Because the court looked at the anticipated losses discernible at the time of contracting and not the actual loss incurred by the breach to determine whether the liquidated damages were reasonable, the provision was determined to be an unenforceable penalty.

  - Loss attributable to certain defaults such as late payment of rent is clearly readily ascertainable and is inappropriate for application of liquidated damages.

  - Loss which might occur as a result of certain minor defaults under the lease (i.e., for a two-day delay in payment of rent) would be disproportionate to the amount of liquidated damages. That is to say that where there is an obvious contrast in the seriousness of the breaches, there should be a concomitant contrast in the consequences thereof.

Irving Tire Co. v. Stage II Apparel Corp.
230 A.D.2d 772, 646 N.Y.S.2d 528 (App. Div. 2d Dep't 1996)

- Prior to termination of the lease, tenant became dissatisfied and entered into negotiations with landlord for early termination.

- Tenant agreed to pay landlord $50,000 for early termination agreement, which included a provision authorizing the landlord, in the event of a default, to enter judgment against the tenant in the sum of $140,000.

- After paying landlord $37,500, tenant stopped making payments because landlord had leased the store to a new tenant.

- Landlord commenced action to recover $102,500 in damages under the liquidated damages clause of the early termination agreement.

- Provision was deemed unenforceable because the actual damages arising from tenant's breach of the early termination agreement were readily ascertainable and the $140,000 fixed sum was disproportionate to the landlord's loss.

[48.15] 2. Representative Cases Where the Liquidated Provision Was Enforced

New 24 W. 40th St. LLC v. XE Capital Management, LLC
104 A.D.3d 513, 961 N.Y.S.2d 139 (App. Div. 1st Dep't 2013)

- Provision in lease stated that if the tenant breached its duties under the lease, the landlord was entitled to recover as liquidated damages "an amount equal to the rent reserved hereunder for the unexpired portion of the term demised."

- Court determined the provision did not constitute a penalty because the provision did not allow recoupment of damages disproportionate to any loss which could possibly accrue to the landlord.

Bates Advertising. USA, Inc. v. 498 Seventh, LLC
291 A.D.2d 179, 739 N.Y.S.2d 71 (App. Div. 1st Dep't 2002)

- Both parties were highly sophisticated business entities, represented by accomplished and experienced real estate attorneys.

- The lease provided that if certain renovation work to be done by the landlord was not completed by the time the tenant had taken full occupancy of the initial demised premises and was conducting its ordinary business therein, then the tenant would be entitled to either a one-half day or one full day delay in the occurrence of the rent Commencement Date for each day from January 2, 1999 until the landlord substantially completed the work.

- Testimony established that this was a situation where it would be difficult, if not impossible, to calculate plaintiff's damages resulting from a breach, since there would be no way of knowing whether tenant's loss of an advertising client had been caused by construction conditions in the building.

- The parties made every reasonable effort to provide appropriate compensation in the event the landlord breached its obligations by breaking down the contemplated nine improvements into two categories; (1) those which if not completed would entitle the plaintiff to a half-day rent abatement for each day; and (2) those which if not completed would entitle the plaintiff to a full day rent abatement for each day left uncompleted.

- "By imposing this one-to-one proportionality between the days the breach continued and the value of the compensation, the parties successfully avoided the possibility that the tenant would obtain a benefit in gross disproportion to the injury it suffered."

- Although the trial court ruled the provision an unenforceable penalty because the half-day abatement was applied whether one item or all nine items were lacking, the First Department determined this reasoning takes the concept of proportionality to the extreme:

  > - "To require that a liquidated damages amount be set for each individual work item with the type of specificity this ruling requires, would be contrary to the concept of liquidated damages."

Feyer v. Reiss
154 A.D. 272, 138 N.Y.S. 964 (App. Div. 2d Dep't 1912)

- Case involved a three-year lease of eight tenement houses that housed sixty different tenants.

- The contract provided that: "It being expressly understood and agreed that if the lessees surrender the said premises or are dispossessed therefrom prior to the expiration of this lease in 1914, then and in that event the said eight hundred ($800) dollars, together with any subsequent installments which shall be paid by the lessees as hereinbefore provided, shall belong to the lessor as liquidated and stipulated damages, and the parties hereto agree to stipulate such deposit as liquidated damages because they cannot ascertain the exact amount of damage which the lessor would sustain in the event of any breach or violation hereunder."

- Court determined liquidated damages clause was valid because:

- Lease was clear and definite as to the character of the deposit.

- Formal expression that deposit was liquidated damages.

- Affirmative provision that the parties had agreed that deposit was liquidated damages because they could not ascertain the exact amount of damages that the landlord would sustain in the event of a breach.

- There was no excessive disproportion between the deposit and the possible damages.

Tenber Associates. v. Bloomberg L.P.
51 A.D.3d 573, 859 N.Y.S.2d 61 (App. Div. 1st Dep't 2008)

- Landlord commenced a commercial holdover proceeding based upon tenant's continued possession of office space following the expiration of the parties' lease agreement.

- Liquidated damages clause, which provided for **two times** the existing rent in the event of a holdover, was not an unenforceable penalty.

- Tenant failed to establish that the actual amount of damages could have been anticipated in 1995, when the lease was executed.

- Tenant also failed to establish that the amount fixed was "plainly or grossly disproportionate to the probable loss."

Parsons & Whittemore, Inc. v. 405 Lexington L.L.P.
299 A.D.2d 156, 753 N.Y.S.2d 36 (App. Div. 1st Dep't 2002)

- Lease provided that if the tenant did not vacate the property within two days after the expiration of the lease, the landlord was entitled to a sum equal to *two times* the average rent and additional rent which was payable per month under the lease during the last six months of the lease.

- Court determined that the liquidated damages clause was not an unenforceable penalty since the damages could not have been anticipated in 1983, when the lease was executed and the amount fixed is not plainly or grossly disproportionate to the probable loss.

Federal Realty Ltd. Partnership v. Choices Women's Medical Center
289 A.D.2d 439, 735 N.Y.S.2d 159 (App. Div. 2d Dep't 2001)

- Provision in lease stated that in the event of a failure to timely surrender the premises, the tenant "shall pay to the Owner for each month

and for each portion of any month during which Tenant holds over a sum equal to *three times* the aggregate of that portion of the fixed rent and additional rent which was payable under this lease during the last month of the term hereof."

- Provision also stated that "the damage to the Owner resulting from any failure by Tenant to timely surrender possession of the demised premises will be substantial and will be impossible to accurately measure."

- Court determined this was a valid liquidated damages provision because the parties' lease contained provisions which clearly and unambiguously permitted the landlord to recover a reasonable amount of damages for any injuries which resulted from the failure to timely surrender the premises:

- Furthermore, the record was devoid of evidence that the amount of liquidated damages to which the parties agreed was grossly disproportionate to the landlord's actual loss.

Thirty-Third Equities Co. v. Americo Group., Inc.
294 A.D.2d 222, 743 N.Y.S.2d 10 (App. Div. 1st Dep't 2002)

- Provision in lease allowed landlord to collect **two and one-half times** the rent for each month that tenant was on the premises after the expiration of the lease.

- Court determined this was a valid liquidated damages clause since there was no evidence that the projection of a 250% increase in rent was unreasonable.

- Premises were in fact rented to a new tenant in an amount approximating a 250% increase.

Montgomery Trading Co. v. Cho
22 Misc. 3d 135(A), 880 N.Y.S.2d 874 (App. Term 2009)

- Provision in lease allowed landlord to collect **1.5 times** the existing rent in the event of a holdover.

- Court determined this was a valid provision since tenants failed to establish that damages could be anticipated in 1998 when the lease was executed or that the amount fixed was plainly or grossly disproportionate to the probable loss.

319 Fifth Ave. Realty v. 319 Smile Corp.
21 Misc. 3d 139(A), 875 N.Y.S.2d 824 (App. Term 2008)

- Liquidated damages clause providing for use and occupancy at **two times** the rent in the event of a holdover was not an unenforceable penalty because damages could not be anticipated in 1997 when the lease was executed and the amount fixed was not plainly or grossly disproportionate to the loss.

[48.16] C. Monetary and Non-Monetary Defaults

Monetary events of default, such as failure to pay the rent or any of the items designated as additional rent in the lease, clearly entitle the landlord to serve a notice of default and/or a notice of termination under a conditional limitation clause. However, landlords may also serve notices of default and/or notices of termination for any designated non-monetary event of default specified in the lease.[95]

In a properly drawn commercial lease, the landlord's right to terminate a lease and seek to evict a defaulting tenant, for a non-monetary event of default, rests on equal ground with the right to terminate for a monetary event of default. As previously noted, (a) so long as the non-monetary event of default is expressly defined in the lease, and (b) so long as the notice of default has specified the particular lease provision that the tenant has violated and the period, if any, during which the tenant is obliged to cure the default, the landlord may then serve a notice of termination after the expiration of the cure period.

Non-monetary events of default can also provide the basis upon which a court may deny a tenant's application for a *Yellowstone* injunction. As noted *infra*, one of the prime factors that a commercial tenant must demonstrate, in order to be eligible for obtaining a *Yellowstone* injunction, is to show that the tenant "is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." However, in those unusual cases where the tenant is clearly not prepared or willing to cure the default, the courts will not grant a *Yellowstone* injunction.

In *330 Hudson Owner, LLC v. Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York*,[96] the Court found that the tenant had stopped construction on a mixed-use building it had contracted

95 *See* "Events of Default," *supra*.

96 23 Misc. 3d 1131(A), 889 N.Y.S.2d 884 (Sup, Ct,, N.Y. Co. 2009).

to build, as provided in its lease, and that the tenant had "no present intention to resume construction." The Court said that "the evidence indicates that [tenant] is attempting to use its shutdown in construction as leverage to force Trinity to renegotiate its lease." Accordingly, the Court held that a *Yellowstone* injunction was not warranted.

A similar situation occurred in *Gristede's Operating Corp./Namdor Inc. v. Centre Financial LLC,*[97] where the Court found that the supermarket tenant's primary interest was "in closing its store, selling its assets and assigning the lease" with no indication of "any interest, inter alia, in remaining at the premises and curing the alleged violation of the Continuous Operation provision" of the lease. Given the facts, there was no basis for granting a *Yellowstone* injunction after the expiration of the notice to cure and the service of the notice of termination.

[48.17] D. Notices to Cure and Avoiding the *Yellowstone* Injunction

The so-called "*Yellowstone*" injunction, or other similar relief, when obtained by a commercial tenant in a Supreme Court plenary action, prohibits a property owner from terminating a tenancy for a non-monetary event of default and freezes any eviction efforts that may have already commenced in a local court summary proceeding. The *Yellowstone* injunction also tolls any corrective period stated in the lease until the parties have fully litigated whether a non-monetary violation of the lease has occurred.[98] "The purpose of the *Yellowstone* injunction is to maintain the status quo so that the tenant served with a notice to cure an alleged non-monetary lease violation may challenge the propriety of the landlord's notice while protecting a valuable leasehold interest."[99]

In order to obtain a *Yellowstone* injunction, the courts require the tenant to show (a) the existence of a commercial lease, (b) receipt from the landlord of a notice of default thereunder, a notice to cure such default, or a threat of termination of the lease, (c) application for the issuance of an injunction made prior to the termination of the cure period specified in the lease, and (d) the tenant's ability and desire to cure the alleged non-monetary default by any means short of vacating the premises.[100]

97 16 Misc. 3d 1132(A), 847 N.Y.S.2d 901 (Sup. Ct., Nassau Co. 2007).

98 *See First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968).

99 *Garland v. Titan West Assocs. and M.G.R.E. Co.*, 147 A.D.2d 304, 307, 543 N.Y.S.2d 56, 58 (1st Dep't 1989).

The availability of the *Yellowstone* injunction provides an invaluable defensive tool to a commercial tenant. At the same time, it is one of the most paralyzing tenant weapons that the judiciary has ever created; first, because it permits tenants to cure any lease violations after the litigation is completed; second, the case is brought and tried in Supreme Court where it may take years before completion and permit an excessive period of time to cure any violation; and third, the tolling of the "cure" period gives tenants the opportunity to commit knowingly blatant transgressions of the lease during the pendency of the action.[101]

However, a cure period is not required in a commercial lease. In a case in which the commercial lease had no cure period, the tenant argued that the clause was unconscionable because the absence of a cure period precluded the tenant from seeking a *Yellowstone* injunction to stay the lease's forfeiture. The court held that a cure period was not required and noted that "while it might have precluded defensive tactics such as seeking a *Yellowstone* injunction prior to the expiration of the lease, it was part of the fully negotiated contract between represented parties. It would not be contrary to public policy to enforce the provisions of the lease under such circumstances."[102]

In *New Eagle, Inc. v. H.R. Neumann Associates, Inc*.,[103] a case in which a commercial lease lacked a cure period, the Court determined that the tenant could not satisfy the elements necessary to invoke the protection of a *Yellowstone* injunction. As the Court explained:

> Although the plaintiff has established that it held a commercial lease and that the thirty-day eviction notice served as a threat of termination of the lease, said notice is not susceptible to a cure. Even if its application for a temporary restraining order was made prior to the termination of the lease, the plaintiff does not have the ability

100 *See*, *e.g.*, *Garland*, 147 A.D.2d 304; *Continental Towers Garage Corp. v. Contowers Assocs. Ltd. Partnership*, 141 A.D.2d 390, 529 N.Y.S.2d 322 (1st Dep't 1988); *see also Health 'N Sports, Inc. v. Providence Capitol Realty Group, Inc.,* 75 A.D.2d 884, 428 N.Y.S.2d 288 (2d Dep't 1980).

101 Although, theoretically, if they are brazen enough, the Defendant-Landlord can move the court for relief.

102 *Queen Art Publishers, Inc., v. Animazing Gallery Inc.,* 2002 WL 452207, 2002 N.Y. Slip Op. 40033 (U).

103 4 Misc. 3d 1005(A), 791 N.Y.S.2d 871 (Sup. Ct., Kings Co. 2004).

> to effect a cure in this case: it would appear that it has not. The purpose of a *Yellowstone* injunction is to toll the running of the cure period in the landlord's notice to cure so that, after determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold. In the case at hand, there is simply no "cure" period for this Court to toll or stay.

If the cure period is eliminated from a commercial lease, tenant transgressions will decrease as the tenant's contemplation of the reality of the possibility of a swift termination and eviction, in the event of a default, is ever present. Moreover, the basis for injunctive action in the Supreme Court is also eliminated, and, when injunctive relief is denied, the question of whether or not the lease has been violated will be tried in a Civil Court proceeding, without the time impediments of discovery and the lengthy time-line of a Supreme Court matter.

Nevertheless, the omission of a cure period may be resisted in lease negotiations, and, even where the omission of a cure period is successfully negotiated, it is still possible that some judges will seek ways to insert an equitable cure period into the lease agreement. Therefore, as an alternative to entirely omitting a cure period from the lease, we recommend devising a scenario whereby time limits and other handcuffs are placed on the *Yellowstone* action within the terms of commercial lease: first, the tenant should be required to place a substantial bond, in a specified amount upon the granting of the *Yellowstone* application; second, the scope of discovery in any resulting litigation should be limited with specific procedures pre-agreed upon to foster an expedited hearing or trial; and third, the parties should agree that all resulting proceedings should be placed on an expedited court schedule (presuming that the court will enforce such commercial lease provisions).

[48.18] V. LICENSES

The legal relationship established between the property owner-landlord and a tenant, by a lease, is entirely distinct from the legal relationship established, by a license, between the property-owner-licensor and a licensee. Under a bona fide license agreement, the tenant-licensor owns no estate in the premises and has no right to possession. Common law principles apply, and the owner-licensor has the absolute right to use peaceable self-help, at any time, to remove a licensee from the licensed premises for any reason or no reason.[104] The landlord thus avoids having

to endure months or years of lengthy and frustrating litigation to regain possession of valuable real estate.

To obtain the benefit of a license agreement, the property owner must ensure that its agreement with the prospective user of the premises is indeed a license and not a lease. This is not necessarily an easy task to accomplish. Merely calling the agreement a "license" will not make it so. Whether an agreement is held to be a "license" and not a lease will depend on the presence or absence in the agreement of the three essential characteristics of a real estate license: (1) a clause allowing the licensor to revoke "at will,"[105] (2) the retention by the licensor of absolute control over the premises,[106] and (3) the licensor's supplying to the licensee all of the essential services required for the licensee's permitted use of the premises.[107]

Courts have found "licenses" to be leases where any one or more of these characteristics is either missing from the agreement altogether or not sufficiently vested in the powers retained by the licensor.[108] However, the less control given the licensee, the more likely the agreement is to be a held a license, because a license offers no autonomy, but merely allows a party "to render services within an enterprise conducted on premises owned or operated by another, who has supervisory power over the method of rendition of the services."[109] Nevertheless, it has been held that the licensor's retention of control over prices charged by the licensee, times of operation with the licensed space, and even the choice of the licensee's employees, is no guarantee that the agreement will be held to be a license and not a lease, as such controls may be deemed "no more than would reasonably be demanded by a careful owner as against a lessee for [any] business."[110]

104 *See P & A Bros., Inc. v. City of N.Y. Dep't of Parks & Rec.*, 184 A.D.2d 267, 585 N.Y.S.2d 335 (1st Dep't 1992). Provided the license really is a license, there are *no* municipal restrictions on self help in a commercial license.

105 *See Ark Bryant Park Corp. v. Bryant Park Restoration Corp*., 285 A.D.2d 143, 730 N.Y.S.2d 48 (1st Dep't 2001) upholding the license even though the at will revocation had a built in delay period.

106 *See Karp v. Federated Dep't Stores*, 301 A.D.2d 574, 754 N.Y.S.2d 27 (2d Dep't 2003).

107 *See Nextel of N.Y. v. Time Mgmt. Corp.*, 297 A.D.2d 282, 746 N.Y.S.2d 169 (2d Dep't 2002).

108 *See Miller v. City of New York*, 15 N.Y.2d 34, 255 N.Y.S.2d 78 (1964).

109 *Lordi v. County of Nassau*, 20 A.D.2d 658, 659, 246 N.Y.S.2d 502, 505 (2d Dep't 1964).

Therefore, careful drafting of appropriate license agreements will be required, and, for this purpose, there must be close cooperation between attorneys and their clients who wish to implement a license regime. Communications to the client of the risks, as well as the benefits, of utilizing a license agreement will be essential. In addition, attorneys will need to give close attention to the objectives of the client and determine how much initial cost the client is willing to accept in order to provide the kind of "full service" agreement that will pass a court's "license" test.

Owners will also have to make judgments about the commercial feasibility of obtaining licensees who are willing to accept license agreements with "at will" revocation clauses. Whether potential licensees are willing to sign such agreements may depend upon the type of premises that the owner is making available for licensed use; whether the licensed space is a warehouse, an office suite for multiple users, or simple storage space. To attract licensees concerned about making a substantial investment in space subject to a revocable license, owners may create new financing incentives or build into the agreement a mechanism to compensate a non-defaulting licensee for the remaining unamortized value of its investment at such time as the licensor invokes the "at will" clause of the agreement.

At present, real estate license agreements appear to be utilized primarily by owners of properties licensed to short term users of office space and to users of certain types of storage. That there is a market for such agreements is clearly apparent. Whether there is a market for real estate license agreements for other types of occupancy may not be so apparent, but, given the need of landlords to be relieved of the onerous burdens and frustrations of traditional landlord-tenant litigation, the time is fast approaching when landlords my need to test the market by striving to transform the commercial rental landscape into a true license regime.

[48.19] VI. DRAFTING FOR THE COMMERCIAL TENANT

[48.20] A. Introduction

At common law, the doctrine of "caveat emptor" governed commercial leasing. By the 1970's New York courts, relying on equitable principles,

110 *Miller,* 15 N.Y.2d 34; *but see Union Sq. Park Community Coalition, Inc. v. N.Y.C. Dep't of Parks and Rec.*, 22 N.Y.3d 648, 985 N.Y.S.2d 422 (2014).

began to carve out exceptions to caveat emptor.[111] Equity gained greater currency and judicial decisions softened commercial lease provisions that potentially endangered or evicted tenants.[112] In recent years, courts at all levels have moved away from finding equitable solutions to prevent harsh results or evictions and have applied the terms of negotiated lease provisions. Past judicial activism by judges protecting commercial tenants' rights has evolved into a consistent enforcement and implementation of commercial leases.[113] In many cases, no matter how draconian the lease provision, New York courts have been enforcing the contents of commercial leases.[114]

In this judicial environment, many tenants have suffered severe financial consequences or lost their leases as a result of poorly drafted leases. Although temporary tenant victories providing endless delays resulting from technical mistakes and jurisdictional defect defenses are still used regularly, tenant attorneys have reason to be prudent and avoid overreliance upon such tactics. It is possible that, in a given case, their holdover commercial tenant client might be found liable, for damages suffered by the third-party incoming tenant, by reason of their client's failure to vacate after its lease term expired.[115]

It is imperative, therefore, that commercial tenants negotiate better leases in order to protect their interests. The topics covered below contain suggestions on how commercial tenants should attempt to do so.

[48.21] B. Mitigation of Damages

Since the Court of Appeals decided the seminal case of *Holy Properties v. Kenneth Cole Productions*,[116] in 1995, landlords have not been required to mitigate damages when a commercial tenant defaults on its

111 *See* David Frey, *The* Yellowstone *Injunction, or How to Vex Your Landlord Without Really Trying*, 58 Brooklyn L. Rev. 155, 161-162; *see also* Curtis J. Berger, *Hard Leases Make Bad L*aw, 74 Columbia L. Rev. 791 (1974) (under subsection entitled "Doctrines Openly Hostile to the Landlord and the Lease").

112 *See* Notices to Cure and Avoiding the *Yellowstone* Injunction, *supra.*

113 *See Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave.*, 1 A.D.3d 65, 767 N.Y.S.2d 99 (1st Dep't 2003).

114 *See, e.g., Four Cees Jewelry Inc. v. 1537 Realty LLC*, 11 Misc. 3d 1056(A), 815 N.Y.S.2d 494 (Sup. Ct., N.Y. Co. 2005).

115 *See Kronish Lieb Weiner & Helman, LLP v. Tahari*, *Ltd.*, 11 Misc. 3d 1057(A), 815 N.Y.S.2d 494 (Sup. Ct., N.Y. Co. 2006).

116 87 N.Y.2d 130, 637 N.Y.S.2d 964 (1995).

lease and surrenders or is removed from the premises. As the tenant of record remains liable for all rents due during the remainder of its lease term, a landlord has no incentive to even attempt to re-rent or alleviate a defaulting tenant of its duty to pay rent. Landlords are not obligated to mitigate prospective losses in the event of default on rent payments.[117] This has produced exceedingly harsh results.[118]

Therefore, from a tenant's interest, every commercial lease should contain a clause which provides that, upon a default in the lease that results in the surrender or eviction from the premises, the landlord agrees to mitigate its losses and to use reasonable efforts to re-lease the demised premises. If it can be negotiated, such a clause should include a requirement by the landlord to advertise weekly and to employ a qualified real estate broker to find a new tenant to whom to lease the premises. This clause should also include a duty by the landlord to attempt to rent the premises for at least the same rent, in order to reduce any remaining rent liability.

Negotiating a mitigation of damages clause may provide a commercial tenant with a life preserver in an ocean of financial devastation.

[48.22] C. Prevailing Party Clause

Most commercial leases include a provision that a tenant must pay a landlord's legal expenses and attorney's fees in connection with any default in the lease.

Although state law mandates that such an attorney's fees clause in a residential lease is deemed to be reciprocal, the statutory mandate in residential cases does not apply to commercial leases. Despite many failing arguments to the contrary, attorney's fees provisions providing payment to the landlord in connection with a legal proceeding will not provide the same rights to a commercial tenant unless specifically stated in the tenant's commercial lease.[119]

Accordingly, a prevailing party clause should be negotiated into the commercial lease agreement. The provision should require the losing

117 *See*, *e.g.*, *Syndicate Bldg. Corp. v. Lorber*, 128 A.D.2d 381, 512 N.Y.S.2d 674 (1st Dep't 1987).

118 Even *Holy Properties* acknowledged the results to be harsh, but held that it was better to have a reliable old rule than to break new precedential ground.

119 *See*, *e.g.*, *Huron Assocs., LLC v. 210 East 86th St. Corp.*, 18 A.D.3d 231, 794 N.Y.S.2d 360 (1st Dep't 2005).

party to any action to pay the prevailing party's legal fees and expenses. Such a clause should prevent, or at least lessen, the number of frivolous and harassing lawsuits initiated by both landlords and tenants. As neither party will be able to commence a legal action without the threat of being required to fund the victorious party's legal bill, parity should prevail and thereby preclude attempts to exploit any inequitable leveraging position.

[48.23] D. Right of Expansion Clause

An expansion clause is the right or option to lease a specific additional space in the demised premises for a defined term in the future. Such an option becomes significant when a company has outgrown its space and wishes to avoid having to move to a new location and save the cost and inconvenient time delays that relocation necessitates. Financially, it saves the tenant from being forced to lease additional space if its financial situation does not dictate growth when the option becomes available.

The expansion clause allows a tenant the flexibility of either (a) taking an entirely new and larger space in the building without any financial consequences for vacating its present space, or (b) permits the tenant to simply expand its tenancy taking additional floor space or additional square feet. The expansion option also benefits the landlord by allowing it the flexibility to deliver different floors or rental space to the tenant at different times. The expansion clause also requires communication between the landlord and the tenant at certain fixed times which might not otherwise occur without a lease provision dictating such contact.

As the landlord knows when existing leases expire, it will be able to determine vacancy dates before the execution of the initial lease. As such, the negotiated expansion clause should address different possibilities for potential expansion. The expansion clause should be expressly negotiated to include: (a) a detailed description of specific potential expansion spaces, (b) the yearly rent due or an agreement to use fair market rent, and (c) any increases in taxes and/or operating expenses. In addition, a provision requiring the landlord to sue reasonable efforts to recover possession from a holdover tenant in the chosen expansion space should be included. Commercial tenants should also attempt to negotiate a right of first refusal to protect their long term interests in the premises.

[48.24] E. The Option to Renew

The option to renew has been used in practice for hundreds of years.[120] The option permits a tenant to sign on for another five or ten years at a

negotiated rent. The renewal rent negotiated at the time of the initial lease is often only three to five percent above the rent for the last year of the original lease period. Since the tenant is not required to exercise the option, it can vacate the space without any liability after the initial lease term. Furthermore, after investing heavily to turn raw space into an office or store, a tenant will be more comfortable signing a lease with a shorter term with the knowledge that, at its option, it can remain for one or more renewal periods. In fact, a shorter term with option periods may be beneficial for a smaller company without the ability to forecast financial success. Finally, if the market calls for a lower rent than the renewal option specifies, negotiation may result in a decreased rent when it is time to renew.

The option to renew is beneficial to the landlord as a result of the incentives supplied and its importance as a negotiating tool. By making the option contingent on the tenant's good standing with its lease obligations during the current term, the tenant shall have an important incentive to be on its best behavior, and to comply with all of its lease obligations, to avoid losing the right to renew. Granting the option can also give the landlord an important negotiating tool that may overcome any stalemate has impeded lease negotiations.

[48.25] F. Ownership and Use

The Internet has provided a cost efficient way to provide additional protection for a tenant for the most basic foundations of the tenancy. First, when receiving a draft of a landlord's lease, the ownership interests of the entity or person listed in the agreement should be investigated. Property ownership and tax information should be checked by visiting the appropriate governmental website. Second, determine whether the commercial tenant's anticipated use of the premises is permitted by law by also visiting the relevant government website. For example, in New York City, the legal use for the premises and the certificate of occupancy can be viewed by searching the Department of Buildings website. In New York City, any premises constructed after 1938, or where significant renovations occurred in the interim, require a certificate of occupancy.

The certificate of occupancy will report the legal uses of the premises, and, if a tenant's proposed business is not listed, a competent expediter or architect should be able to determine whether legalization is possible. To legalize a new use for the premises, the architect or expediter must have

120 *See Crosby v. Moses*, 92 N.Y. 634 (1883).

all building violations corrected, and then proceed with an application for an amendment to the certificate of occupancy approving the new use.

Every tenant should attempt to include in the description of its business in the lease the catch-all phrase "any lawful use." However, obtaining a favorable use clause will not guarantee that the business will also be able to function as such. If there is any doubt about whether the premises can be lawfully used for the tenant's particular business, a provision should be negotiated giving the tenant the ability to cancel the lease upon a determination that the planned use of the premises cannot be legalized or that it cannot be made so within a reasonable time after submitting a proper application to the relevant governmental authority. During this waiting period, the lease should require that no rent become due. To facilitate the process, a provision requiring the landlord to complete any necessary forms to legalize the use or proposed alterations should be negotiated. If the lease is canceled due to non-approval of the tenant's proposed use, the landlord should be required to return all monies forwarded to the landlord as well as to reimburse any expenses incurred by the tenant in attempting to legalize the premises.

A tenant should also retain the ability to cancel the lease if the tenant is unable to take possession on the move-in date or soon thereafter. A representation should be added whereby the landlord agrees to make a good faith effort to complete and legalize the premises, as well as to evict a holdover tenant. In an alternative to canceling the lease, the tenant should be granted a rent abatement for each day that the landlord fails to deliver possession. Upon the delayed commencement of the lease, the expiration dates of the lease should be extended, and the commencement date should be contingent on the issuance of the various approval and permits necessary to complete construction.

[48.26] G. Signage and Alterations

A disproportionate amount of commercial lease litigation derives from disputes over signs and alterations.[121] In an attempt to decrease the amount of litigation involving such items, attorney should learn a tenant's business needs and carefully adapt the lease to them. In addition, before the lease signing, negotiate the advance or pre-approval of any alteration changes and signage requests as well as any foreseeable alteration changes during the term of the lease. Specific plans, measurements, draw-

121 *See, e.g., Marshall v. Ahamed*, 5 Misc. 3d 136(A), 799 N.Y.S.2d 161 (App. Term, 2d Dep't 2004).

ings and pictures should be provided and attached to the lease agreement. If possible, obtain the right to make non-structural alterations without the landlord's approval, including any alterations that are insignificant or do not require building permits. Also, include a representation by the landlord that it will remove any existing violations against the premises, so that any permit applications needed to perform the work will not be rejected. For all other alterations requiring the landlord's permission, ensure that such authorization will not be unreasonably[122] withheld.

[48.27] H. Repairs and Self-Help

Commercial tenants should attempt to make the landlord liable for all structural repairs to the demised space and to the building, as well as non-structural repairs occasioned by the landlord's negligence.[123]

Commercial tenants should also strive to include a self-help provision. Such a provision allows the tenant to complete any repairs that the landlord neglects to complete within an allotted time period after notification from the tenant. This clause should allow the tenant to seek reimbursement by obtaining a rent credit for the cost of repair or by obtaining reimbursement directly from the landlord. Besides eliminating the perennial tenant's dilemma of whether it can withhold rent until necessary repairs are done, the clause will also provide a mechanism that should assist in keeping the premises free of conditions requiring necessary repairs.[124] The self-help clause will also resolve the "independent covenant" dilemma, where any rental amounts due to the landlord are deemed independent of the landlord's obligation to do repairs. Any lease provision specifying that each provision is independent of every other provision should be modified to include the tenant self-help provision.

122 "Unreasonably" is a term of art. It means a cause for which a specific reason can be articulated. *See Conrad v. Third Sutton Realty Co.*, 81 A.D.2d 50, 439 N.Y.S.2d 376 (1st Dep't 1981).

123 *See* GOL § 5-322.1.

APPENDIX
SAMPLE DEFAULT CLAUSES

Conditions of Limitation

1.01 This lease and the term and estate hereby granted are subject to the limitation that whenever Tenant, or any guarantor of Tenant's obligations under this lease, shall make an assignment for the benefit of creditors, or shall file a voluntary petition under any bankruptcy or insolvency law, or an involuntary petition alleging an act of bankruptcy or insolvency shall be filed against Tenant or such guarantor under any bankruptcy or insolvency law, or whenever a petition shall be filed by or against Tenant or such guarantor under the reorganization provisions of the United States Bankruptcy Code or under the provisions of any law of like import, or whenever a petition shall be filed by Tenant, or such guarantor, under the arrangement provisions of the United States Bankruptcy Code or under the provisions of any law of like import, or whenever a permanent receiver of Tenant, or such guarantor, or of or for the property of Tenant, or such guarantor, shall be appointed, then Landlord (a) if such event occurs without the acquiescence of Tenant, or such guarantor, as the case may be, at any time after the event continues for XXXX (XX) days, or (b)

124 *See Green 440 Ninth LLC v. Duane Reade*, 10 Misc. 3d 75, 809 N.Y.S.2d 756 (App. Term., 1st Dep't 2005).

in any other case at any time after the occurrence of any such event, may give Tenant a notice of intention to end the term of this lease at the expiration of five (5) days from the date of service of such notice of intention, and upon the expiration of said five-day period this lease and the term and estate hereby granted, whether or not the term shall theretofore have commenced, shall terminate with the same effect as if that day were the expiration date of this lease, but Tenant shall remain liable for damages as provided in Article 24 hereof.

1.02 This lease and the term and estate hereby granted are subject to the further limitations that:

> (a) if Tenant shall default in the payment of any Fixed Rent or Additional Charges, and such default shall continue for five (5) days after written notice thereof has been given to Tenant, or
>
> (b) if Tenant shall, whether by action or inaction, be in default of any of its obligations under this lease (other than a default in the payment of Fixed Rent or Additional Charges) and such default shall continue and not be remedied as soon as practicable and in any event within XXXX (XX) days after Landlord shall have given to Tenant a notice specifying the same, or, in the case of a default which cannot with due diligence be cured within a period of XXXX (XX) days and the continuance of which for the period required for cure will not (i) subject Landlord or any Superior Lessor or any Superior Mortgagee to prosecution for a crime or any other fine or charge, (ii) subject the Premises or any part thereof or the Building or Land, or any part thereof, to being condemned or vacated, (iii) subject the Building or Land, or any part thereof, to any lien or encumbrance which is not removed or bonded within the time period required under this Lease, or (iv) result in the termination of any Superior Lease or foreclosure of any Superior Mortgage, if Tenant shall not within said XXXX day period advise Landlord of Tenant's intention to take all steps reasonably necessary to remedy such default, (y) duly commence within said XXXX (XX) day period, and thereafter diligently prosecute to completion all steps reasonably necessary to remedy the default and (z) complete such remedy, or

(c) if any event shall occur or any contingency shall arise whereby this lease or the estate hereby granted or the unexpired balance of the term hereof would, by operation of law or otherwise, devolve upon or pass to any person, firm or corporation other than Tenant, except as expressly permitted by Article XXXX (xx) hereof, or

(d) if Tenant shall abandon the Premises, or

(e) if there shall be any default by Tenant under any other lease with Landlord (or any person which, directly or indirectly, controls, is controlled by, or is under common control with, Landlord) covering space in the Building which shall not be remedied within the applicable grace period, if any, provided therefor under such other lease, or if Tenant holds over in the premises demised under such other lease,

Then, in any of said cases in clauses (a) through (e) of this Section, Landlord may give to Tenant a notice of intention to end the term of this lease at the expiration of five (5) days from the date of the service of such notice of intention, and upon the expiration of said five days this lease and the term and estate hereby granted, whether or not the term shall theretofore have commenced, shall terminate with the same effect as if that day was the day herein definitely fixed for the end and expiration of this lease, but Tenant shall remain liable for damages as provided in Article 24 hereof.

Chronic Nonpayment

1.03 Notwithstanding anything in this Lease to the contrary, and without limiting Landlord's other rights and remedies provided for in this Lease or at law or equity, if Tenant fails to pay by the due date any Base Rent, Additional Rent, or any other charges owing under this Lease more than [INSERT, e.g., two (2) times within any consecutive twelve (12) month period], then Landlord, at its sole election and in its sole discretion, may do one or more of the following:

(a) If Landlord shall elect, Landlord shall have the right to terminate this Lease, in the manner provided in Section 1.02 hereof, and evict Tenant from the Premises;

(b) Require that, beginning with the first monthly installment of Base Rent next due, the Base Rent shall no longer be paid in monthly installments, but shall be payable in advance, on a quarterly basis, on the first day of the first month of each following three-month period, with the first three-month period beginning when payment of the Base Rent is next due, in the total amount of all Base Rent due for each such three-month period;

(c) Require Tenant to direct its bank or other financial institution or securities broker(s) to automatically and electronically transfer, in accordance with Section XXXX [INSERT AUTOMATIC TRANSFER LEASE CLAUSE] of this Lease, all Base Rent, Additional Rent, and/or other charges due under this Lease, to a bank account, or other financial or securities/brokerage account, chosen and identified by Landlord for such purpose. Landlord shall provide Tenant with written notice of the bank or other financial or securities/brokerage account information necessary to effectuate such transfers; and/or

(d) Increase the Security Deposit by an amount that Landlord determines, in its sole and absolute discretion, to be necessary to protect Landlord's interests, provided that such amount does not exceed [INSERT, e.g., an amount equal to three (3) months of the then-applicable monthly Base Rent]. Such increase of the Security Deposit shall be paid by Tenant immediately upon demand by Landlord.

Bankruptcy

1.04 (a) If Tenant shall have assigned its interest in this lease, and this lease shall thereafter be disaffirmed or rejected in any proceeding under the United States Bankruptcy Code or under the provisions of any federal, state or foreign law of like import, or in the event of termination of this lease by reason of any such proceeding, the assignor or any of its predecessors in interest under this lease, upon request of Landlord given within XXXX (XX) days after such disaffirmance or rejection, Tenant shall (a) pay to Landlord all Fixed Rent and Additional Charges then due and payable to Landlord under this lease to and including the date of such disaffirmance or rejection and (b) enter into a new lease as lessee with Landlord

of the Premises for a term commencing on the effective date of such disaffirmance or rejection and ending on the Expiration Date, unless sooner terminated as in such lease provided, at the same Fixed Rent and Additional Charges and upon the then executory terms, covenants and conditions as are contained in this lease, except that (i) the rights of the lessee under the new lease, shall be subject to any possessory rights of the assignee in question under this lease and any rights of persons claiming through or under such assignee, (ii) such new lease shall require all defaults existing under this lease to be cured by the lessee with reasonable diligence, and (iii) such new lease shall require the lessee to pay all Additional Charges which, had this lease not been disaffirmed or rejected, would have become due after the effective date of such disaffirmance or rejection with respect to any prior period. If the lessee shall fail or refuse to enter into the new lease within ten (10) days after Landlord's request to do so, then in addition to all other rights and remedies by reason of such default, under this lease, at law or in equity, Landlord shall have the same rights and remedies against the lessee as if the lessee had entered into such new lease and such new lease had thereafter been terminated at the beginning of its term by reason of the default of the lessee thereunder.

(b) If pursuant to the Bankruptcy Code Tenant is permitted to assign this lease in disregard of the restrictions contained in Article XXXX hereof (or if this lease shall be assumed by a trustee), the trustee or assignee shall cure any default under this lease and shall provide adequate assurance of future performance by the trustee or assignee including (a) the source of payment of rent and performance of other obligations under this lease (for which adequate assurance shall mean the deposit of cash security with Landlord in an amount equal to the sum of one year's Fixed Rent then reserved hereunder plus an amount equal to all Additional Charges payable under Article XXXX for the calendar year preceding the year in which such assignment is intended to become effective, which deposit shall be held by Landlord, without interest, for the balance of the term as security for the full and faithful performance of all of the obligations under this lease on the part of Tenant yet to be performed) and that any such assignee of this lease shall have a net worth exclusive of good will, computed in accordance with generally accepted accounting principles, equal to at least ten (10) times the aggregate of the annual Fixed Rent reserved hereunder plus all Additional Charges for the preceding calendar year as aforesaid, and (b) that the use of the Premises shall in no way diminish the reputation of the Building as a first-class office building or impose any additional burden upon the Building or increase the services to be provided by Landlord. If all defaults are not cured and such

adequate assurance is not provided within sixty (60) days after there has been an order for relief under the Bankruptcy Code, then this lease shall be deemed rejected, Tenant or any other person in possession shall vacate the Premises, and Landlord shall be entitled to retain any rent or security deposit previously received from Tenant and shall have no further liability to Tenant or any person claiming through Tenant or any trustee. If Tenant receives or is to receive any valuable consideration for such an assignment of this lease, such consideration, after deducting therefrom (a) the brokerage commissions, if any, and other expenses reasonably incurred by Tenant for such assignment and (b) any portion of such consideration reasonably designed by the assignee as paid for the purchase of Tenant's Property in the Premises, shall be and become the sole exclusive property of Landlord and shall be paid over to Landlord directly by such assignee. If Tenant's trustee, Tenant or Tenant as debtor-in-possession assumes this lease and proposes to assign the same (pursuant to Title 11 U.S.C. Section 365, as the same may be amended) to any person, including, without limitation, any individual, partnership or corporate entity, who shall have made a bona fide offer to accept an assignment of this lease on terms acceptable to the trustee, Tenant or Tenant as debtor-in-possession, then notice of such proposed assignment, setting forth (x) the name and address of such person, (y) all of the terms and conditions of such offer, and (z) the adequate assurance to be provided Landlord to assure such person's future performance under this lease, including, without limitation, the assurances referred to in Title 11 U.S.C. Section 365(b)(3) (as the same may be amended), shall be given to Landlord by the trustee, Tenant or Tenant as debtor-in-possession no later than twenty (20) days after receipt by the trustee, Tenant or Tenant as debtor-in-possession of such offer, but in any event no later than ten (10) days prior to the date that the trustee, Tenant or Tenant as debtor-in-possession shall make application to a court of competent jurisdiction for authority and approval to enter into such assignment and assumption, and Landlord shall thereupon have the prior right and option, to be exercised by notice to the trustee, Tenant or Tenant as debtor-in-possession, given at any time prior to the effective date of such proposed assignment, to accept an assignment of this lease upon the same terms and conditions and for the same consideration, if any, as the bona fide offer made by such person, less any brokerage commissions which may be payable out of the consideration to be paid by such person for the assignment of this lease.

Reentry by Landlord

1.05 If Tenant shall default in the payment of any Fixed Rent or Additional Charges, and such default shall continue for ten (10) days after written notice thereof has been given to Tenant, or if this lease shall terminate as provided in Article XXXX hereof, Landlord or Landlord's agents and employees may immediately or at any time thereafter reenter the Premises, or any part thereof, either by summary dispossess proceedings or by any suitable action or proceeding at law, or by force or otherwise, including self-help, without being liable to indictment, prosecution or damages therefor, and may repossess the same, and may remove any person therefrom, to the end that Landlord may have, hold and enjoy the Premises. The word "reenter," as used herein, is not restricted to the narrow sense of its technical or legal meaning, but instead in the sense that the Landlord may effect physical entry of the Premises in accordance with its common law rights.

1.06 In the event of a breach or threatened breach by Tenant of any of its obligations under this lease, Landlord shall also have the right of injunction. The special remedies to which Landlord may resort hereunder are cumulative and are not intended to be exclusive of any other remedies to which Landlord may lawfully be entitled at any time and Landlord may invoke any remedy allowed at law or in equity as if specific remedies were not provided for herein.

1.07 If this lease shall terminate under the provisions of Article XXXX hereof, or if Landlord shall reenter the Premises under the provisions of this Article XXXX, or in the event of the termination of this lease, or of reentry, by or under any summary dispossess or other proceeding or action or any provision of law by reason of default hereunder on the part of Tenant, Landlord shall be entitled to retain all monies, if any, paid by Tenant to Landlord, whether as advance rent, security or otherwise, but such monies shall be credited by Landlord against any Fixed Rent or Additional Charges due from Tenant at the time of such termination or reentry or, at Landlord's option, against any damages payable by Tenant under Article XXXX hereof or pursuant to law.

Damages

2.01 If this lease is terminated under the provisions of Article XXXX hereof, or if Landlord shall reenter the Premises under the provisions of Article XXXX hereof, or in the event of the termination of this lease, or of reentry, by self-help or under any summary dispossess or other proceeding or action or any provision of law by reason of default hereunder on the

part of Tenant, Tenant shall pay to Landlord as damages, at the election of Landlord, either:

> (a) a sum which at the time of such termination of this lease or at the time of any such reentry by Landlord, as the case may be, represents the then value of the excess, if any (assuming a discount at a rate per annum equal to the interest rate then applicable to seven-year Federal Treasury Bonds), of (i) the aggregate amount of the Fixed Rent and the Additional Charges under Article XXXX hereof which would have been payable by Tenant (conclusively presuming the average monthly Additional Charges under Article XXXX hereof to be the same as were payable for the last twelve (12) calendar months, or if less than twelve (12) calendar months have then elapsed since the Commencement Date, all of the calendar months immediately preceding such termination or reentry) for the period commencing with such earlier termination of this lease or the date of any such reentry, as the case may be, and ending with the date contemplated as the expiration date hereof if this lease had not so terminated or if Landlord had not so reentered the Premises, or (ii) the aggregate fair market rental value of the Premises for the same period, or
>
> (b) sums equal to the Fixed Rent and the Additional Charges under Article XXXX hereof which would have been payable by Tenant had this lease not so terminated, or had Landlord not so reentered the Premises, payable upon the due dates therefor specified herein following such termination or such reentry and until the date contemplated as the expiration date hereof if this lease had not so terminated or if Landlord had not so reentered the Premises, *provided*, *however*, that if Landlord shall relet the Premises during said period, Landlord shall credit Tenant with the net rents received by Landlord from such reletting, such net rents to be determined by first deducting from the gross rents as and when received by Landlord from such reletting the expenses incurred or paid by Landlord in terminating this lease or in reentering the Premises and in securing possession thereof, as well as the expenses of reletting, including, without limitation,

altering and preparing the Premises for new tenants, brokers' commissions, reasonable legal fees, and all other expenses properly chargeable against the Premises and the rental therefrom, it being understood that any such reletting may be for a period shorter or longer than the remaining term of this lease; but in no event shall Tenant be entitled to receive any excess of such net rents over the sums payable by Tenant to Landlord hereunder, nor shall Tenant be entitled in any suit for the collection of damages pursuant to this subdivision to a credit in respect of any net rents from a reletting, except to the extent that such net rents are actually received by Landlord. If the Premises or any part thereof should be relet in combination with other space, then proper apportionment on a square foot basis shall be made of the rent received from such reletting and of the expenses of reletting. If the Premises or any part thereof be relet by Landlord for the unexpired portion of the term of this lease, or any part thereof, before presentation of proof of such damages to any court, commission or tribunal, the amount of rent reserved upon such reletting shall, prima facie, be the fair and reasonable rental value for the Premises, or part thereof, so relet during the term of the reletting. Landlord shall not be liable in any way whatsoever for its failure or refusal to relet the Premises or any part thereof, or if the Premises or any part thereof are relet, for its failure to collect the rent under such reletting, and no such refusal or failure to relet or failure to collect rent shall release or affect Tenant's liability for damages or otherwise under this lease.

2.02 Suit or suits for the recovery of such damages, or any installments thereof, may be brought by Landlord from time to time at its election, and nothing contained herein shall be deemed to require Landlord to postpone suit until the date when the term of this lease would have expired if it had not been so terminated under the provisions of Article XXXX hereof, or had Landlord not reentered the Premises. Nothing herein contained shall be construed to limit or preclude recovery by Landlord against Tenant of any sums or damages to which, in addition to the damages particularly provided above, Landlord may lawfully be entitled by reason of any default hereunder on the part of Tenant. Nothing herein contained shall be construed to limit or prejudice the right of Landlord to prove for and

obtain as damages by reason of the termination of this lease or reentry on the Premises for the default of Tenant under this lease an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, such damages are to be proved whether or not such amount be greater than any of the sums referred to in Section XXXX hereof.

2.03 In addition, if this lease is terminated under the provisions of Article XXXX hereof, or if Landlord shall, reenter the Premises under the provisions of Article XXXX hereof, Tenant agrees that:

(a) the Premises then shall be in the condition in which Tenant has agreed to surrender the same to Landlord at the expiration of the term hereof;

(b) Tenant shall have performed prior to any such termination any covenant of Tenant contained in this lease for the making of any Alterations or for restoring or rebuilding the Premises or the Building, or any part thereof; and

(c) for the breach of any covenant of Tenant set forth above in this Section XXXX, Landlord shall be entitled immediately, without notice or other action by Landlord, to recover, and Tenant shall pay, as and for liquidated damages therefor, the cost of performing such covenant (as estimated by an independent contractor selected by Landlord).

2.04 In addition to any other remedies Landlord may have under this lease, and without reducing or adversely affecting any of Landlord's rights and remedies under Article XXXX, if any Fixed Rent, Additional Charges or damages payable hereunder by Tenant to Landlord are not paid within seven (7) days after the due date thereof, the same shall bear interest at the rate of one and one-half percent (1½%) per month or the maximum rate permitted by law, whichever is less, from the due date thereof until paid, and the amount of such interest shall be an Additional Charge hereunder. For the purposes of this Section XXXX, a rent bill sent by first class mail, to the address to which notices are to be given under this lease, shall be deemed a proper demand for the payment of the amounts set forth therein (but nothing contained herein shall be deemed to require Landlord to send any rent bill or otherwise make any demand for the payment of rent except in those cases, if any, explicitly provided for in this Lease).

Affirmative Waivers

3.01 Tenant, on behalf of itself and any and all persons claiming through or under Tenant, does hereby waive and surrender all right and privilege which it, they or any of them might have under or by reason of any present or future law, to redeem the Premises or to have a continuance of this lease after being dispossessed or ejected therefrom by process of law or under the terms of this lease or after the termination of this lease as provided in this lease.

3.02 If Tenant is in arrears in payment of Fixed Rent or Additional Charges, Tenant waives Tenant's right, if any, to designate the items to which any payments made by Tenant are to be credited, and Tenant agrees that Landlord may apply any payments made by Tenant to such items as Landlord sees fit, irrespective of and notwithstanding any designation or request by Tenant as to the items which any such payments shall be credited.

3.04 Landlord and Tenant hereby waive trial by jury in any action, proceeding or counterclaim brought by either against the other on any matter whatsoever arising out of or in any way connected with this lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Premises, including, without limitation, any claim of injury or damage, and any emergency and other statutory remedy with respect thereto.

3.05 Tenant shall not interpose any counterclaim of any kind in any action or proceeding commenced by Landlord to recover possession of the Premises (other than compulsory counterclaims).

No Waivers

4.01 The failure of either party to insist in any one or more instances upon the strict performance of any one or more of the obligations of this lease, or to exercise any election herein contained, shall not be construed as a waiver or relinquishment for the future of the performance of such one or more obligations of this lease or of the right to exercise such election, and such right to insist upon strict performance shall continue and remain in full force and effect with respect to any subsequent breach, act or omission. The receipt by Landlord of Fixed Rent or partial payments thereof or Additional Charges or partial payments thereof with knowledge of breach by Tenant of any obligation of this lease shall not be deemed a waiver of such breach.

4.02 If there be any agreement between Landlord and Tenant providing for the cancellation of this lease upon certain provisions or contingencies

and/or an agreement for the renewal hereof at the expiration of the term, the right to such renewal or the execution of a renewal agreement between Landlord and Tenant prior to the expiration of the term shall not be considered an extension thereof or a vested right in Tenant to such further term so as to prevent Landlord from canceling this lease and any such extension thereof during the remainder of the original term; such privilege, if and when so exercised by Landlord, shall cancel and terminate this lease and any such renewal or extension; any right herein contained on the part of Landlord to cancel this lease shall continue during any extension or renewal hereof; any option on the part of Tenant herein contained for an extension or renewal hereof shall not be deemed to give Tenant any option for a further extension beyond the negotiated renewal or extended term continued therein.

Curing Tenant's Defaults

5.01 If Tenant shall default in the performance of any of Tenant's obligations under this lease, Landlord, any Superior Lessor or any Superior Mortgagee without thereby waiving such default, may (but shall not be obligated to) perform the same for the account and at the expense of Tenant, without notice in a case of emergency, and in any other case only if such default continues after the expiration of the applicable grace period, if any. If Landlord effects such cure by bonding any lien which Tenant is required to bond, Tenant shall obtain and substitute a bond for Landlord's bond at its sole cost and expense and reimburse Landlord for the cost of Landlord's bond.

5.02 Bills for any expenses incurred by Landlord or any Superior Lessor or any Superior Mortgagee in connection with any such performance by it for the account of Tenant, and bills for all costs, expenses and disbursements of every kind and nature whatsoever, including reasonable counsel fees, involved in collecting or endeavoring to collect the Fixed Rent or Additional Charges or any part thereof or enforcing or endeavoring to enforce any rights against Tenant or Tenant's obligations hereunder, under or in connection with this lease or pursuant to law, including any such cost, expense and disbursement involved in instituting and prosecuting summary proceedings or in recovering possession of the Premises after default by Tenant or upon the expiration or sooner termination of this lease, and interest on all sums advanced by Landlord or such Superior Lessor or Superior Mortgagee under this Section 27.02 and/or Section 27.01 (at the Interest Rate or the maximum rate permitted by law, whichever is less) may be sent by Landlord or such Superior Lessor or Superior Mortgagee to Tenant monthly, or immediately, at its option, and

such amounts shall be due and payable as Additional Charges in accordance with the terms of such bills. Notwithstanding anything to the contrary contained in this Section, Tenant shall have no obligation to pay Landlord's costs, expenses, or disbursements in any proceeding in which there shall have been rendered a final judgment against Landlord, and the time for appealing such final judgment shall have expired.

***Yellowstone* Injunction**

6.01 Landlord and Tenant, after due consideration and negotiation at arms length, and being fully advised by their respective counsel, hereby agree that the cure period for any event of default under this Lease shall not be the subject of any application or motion by the Tenant to a Court of law for a so-called "*Yellowstone*" injunction to enjoin Landlord from maintaining a summary proceeding against Tenant, and Tenant hereby expressly and knowingly waives and relinquishes all rights it might otherwise have to seek a "*Yellowstone*" injunction or other comparable equitable relief, if and when Landlord should have occasion to issue a Notice of Default and/or a Notice to Cure under the terms of this Lease after any Event of Default, as defined in this Lease.

6.02 In the event that a Court of law should (a) declare any part of this "*Yellowstone* Injunction" provision null and void, (b) issue a "Yellowstone" injunction or other comparable equitable relief in contravention of Section "6.01" above, or (c) issue any other order inconsistent with Section "6.01" above, which results in a plenary proceeding to adjudicate whether an Event of Default has occurred under this Lease, then Landlord and Tenant hereby further agree:

(a) That Tenant shall make current all of its Rent and/or Additional Rent obligations then due under this Lease;

(b) That Tenant shall secure a bond in the amount of no less than One (1) Million ($1,000,000.00);

(c) That both parties shall cooperate in seeking to have said plenary action placed on an expedited court schedule for the purpose of obtaining an early pre-trial hearing of the case;

(d) That discovery in any such plenary action shall be limited to (i) production of copies of the Lease, any

correspondence between the parties, and any other written, photographic, video and/or electronic evidence, and any expert reports and exhibits, relating to the claimed Event of Default, and (ii) no more than three depositions of party and/or non-party witnesses representing the Landlord's interests and no more than three depositions of party and/or non-party witnesses representing the Tenant's interests; and

(e) That Tenant, within the time specified in this Lease for the payment of its monthly rent, shall pay all Rent and/or Additional Rent due each month, during the pendency of such plenary action.

ADAM LEITMAN BAILEY, P.C.
NEW YORK REAL ESTATE ATTORNEYS

Defining the Limits Of Liquidated Damages Clauses

New York Law Journal

By: Adam Leitman Bailey & Dov Treiman

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Real estate leases are, by their nature, bets the parties are placing on what the future may hold. Both landlord interests and tenant interests try to hedge their bets by inserting clauses to produce certain results in the event of an uncertain future. Chief among these mechanisms are liquidated damages clauses that seek to give to the event of breach of the contract at an unpredictable time with unpredictable consequences, certain quantification. The importance of liquidated damages clauses are two-fold: They make the tenant think twice before breaching the lease or overstaying it, thus reducing the traffic in landlord-tenant court; and they allow the landlord an award of its full damages as it envisioned them at the time of the writing of the lease.

Pushing the Limits

Any attorney drafting contracts on a regular basis knows two different client goals for liquidated damages clauses.

First, the client may genuinely not know how to compute its damages in the event of breach and wants the contract to create compensation for such an event. While some other areas of the law allow for arbitrarily assigning dollar figures to unquantifiable events (automobile accidents, for example), the liquidated damages doctrine insists that there be some nexus between the agreed-upon damages and the foreseeable loss. If the landlord writes at that time what it reasonably believes the damages will be, the court will not judge the lease by later events, but rather by how the landlord originally explained its understanding of the future damages.

Second, the client may want the consequences of breach so draconian as to be unthinkable to the breacher, giving the protected party security that the breach will never occur. As to this latter common goal, the law refuses to provide a mechanism. Penalty clauses are unenforceable and it is the foolish attorney who uses the word “penalty” in drafting a contract—except in the phrase “not a penalty.”[1]

The contract's language will not control the courts.[2] Although the parties assert that the consequences are "not a penalty," the courts will look to their severity and determine "whether a provision in an agreement is an enforceable liquidation of damages or an unenforceable penalty (as) a question of law, giving due consideration to the nature of the contract and the circumstances."[3] The burden is on the party seeking to avoid liquidated damages to show that they are really a penalty,[4] but doubts will be resolved in finding it to be penalty.[5]

Explaining Damages

Although not required for enforceability that a liquidated damages clause explain in its own language what it is that makes the damages so difficult to calculate,[6] it is required that the damages actually be difficult to calculate at the time the parties execute the lease.[7] However, the careful drafter should set forth an explanation of the difficulty in calculating the damages, not necessarily to define them, but at least recognizing them on sight, like the pornography in Jacobellis v. Ohio.[8]

There are three salutary effects to having a clause that fulsomely sets forth the factors causing the difficulty.

First, it can convince the court that at the time of execution, it really was difficult.

Second, it brings the contract explicitly within the common law requirement that "There must be some attempt to proportion these damages to the actual loss. The parties must not lose sight of the principle of compensation."[9]

There is no clear statement in the law about just how proportionate the liquidated damages must be, but the standard appears to be that the clause is "reasonably proportionate" stated affirmatively10 or not "plainly disproportionate," stated negatively.[11]

Third, it forces the parties to confront the possibility that calculation is not difficult at all, and the drafters should instead of a liquidated damages clause, set forth a clause that gives the calculation's methodology. Courts will enforce a liquidated damages clause if the damages are difficult to calculate at the time of signing the lease,[12] even if they are easy to calculate once the breach actually takes place.[13]

Staying Inside the Boundaries

While largely focused on what happens if the tenant abandons the lease prior to its expiration, leases may call for liquidated damages in other events as well, such as, for example, when the tenant fails to vacate at the end of the lease.

Montgomery Trading Co. v. Cho,[14] upholds a clause calling for one and a half times the rent in a holdover.

Like RPL §229, Tenber Assoc. v. Bloomberg[15] allows for double rent for tenants holding over after notice. [16]Thirty-Third Equities Co. v. Americo Group, upholds a lease clause calling for two and a half times the rent and Federal Realty v. Choices Women's Medical. Center[17] upholds triple rent in a holdover.

Although there are any number of breaches that can give rise either to a penalty clause or a liquidated damages clause, the two most common categories of tenant misconduct are: when the tenant leaves too early—when the tenant abandons the tenancy; and when the tenant stays too long—when the tenant holds over after the natural conclusion of the lease. The case law uniformly tolerates best those clauses penalizing the tenant for staying too long and shows least indulgence for those clauses penalizing the tenant for leaving too soon.

New 24 W. 40th St. v. XE Capital Mgmt.[18] permits as liquidated damages a lease clause that accelerates the rent (making all the rent for the rest of the lease instantly collectible) but discounts it at the rate of 4 percent per annum. (In other words, next year's rent is recoverable at 96 percent of the full rent, succeeding years 92 percent, 88 percent, etc.) We do not believe 4 percent is the appropriate discount rate, but cannot predict what the minimum discount would be required before the acceleration of full rent would be considered a forbidden penalty. Bates Adver. USA v. 498 Seventh, LLC [19] suggests the wisdom of specific liquidated damages clauses for specific breaches, but the reasoning behind the liquidation should be included for each predicted breach. The law does not require a perfect prediction of the future, just a good faith explanation of what factors went into trying to account for it.

Going Too Far

Acceleration clauses were the one area where a landlord could literally collect the entire rent in the event of a breach, like a "get out of jail free card.

While historically, cases had permitted the landlord to accelerate the entirety of the rent for the remainder of the lease in the event of premature termination and had permitted double rent or more for holdovers, accelerating double the rent was found an unenforceable penalty.[20]

Where the lease calls for the same supposed liquidated damages for any of a variety of breaches by the tenant, the courts uniformly find it to be an unenforceable penalty.[21] Similarly unenforceable is the same penalty applied over an entire period, during which predictable actual damages will range from extremely low to approaching the landlord's actual loss.[22]

Key to any liquidated damages clause is the difficulty in computing the actual damages. Where the damages are easy to compute and it is easy to show that the supposed liquidation is significantly higher than the actual damages, the court will only award the actual damages.[23]

Penalty Clauses

That party that believed itself to have a liquidated damages clause but finds instead to have an "unenforceable" penalty still has a remedy. The court simply ignores the supposed liquidation and holds a hearing as to the actual damages.[24] However, if such party was right about the difficulty of proof of the actual damages, it may find itself with a judgment for liability with an actual dollar award that is negligible or absent altogether. Thus, in acceleration cases, if the landlord has already rented out the premises to someone else, the most that the court will award the landlord will be the rent for the period the premises stood empty,

which, could come to a month or three instead of the 360-months award typical of the historical awards of the full future rent undiscounted in a large scale commercial lease. Or, the court could award the difference between the higher rent that was being charged to the breaching tenant and the lower rent being paid by the new tenant.

Sample Clauses

Although a lease for personal property rather than real property, we see the outlines of a perfect liquidated damages clause in Truck Rent-A-Center v. Puritan Farms 2d. [25]

In arriving at said liquidated damages, the parties have considered, among other factors, the following (enumerating factors that would lead to a calculation).

From the same source, a solid rent acceleration clause would say:

Upon termination of this agreement by reason of the lessee's breach, Lessor shall be entitled to damages, herein liquidated for all purposes as follows: The sum of all rents which would have become due under the normal operation of this agreement from the date of the said termination less a credit to the lessee for lessor's spared expense (as follows).

'Van Duzer'

On Dec. 18, 2014, in 172 Van Duzer v. Globe Alumni,[26] the Court of Appeals cast doubt on the doctrine of liquidated damages. While paying lip service to all of the major pronouncements cited above, Van Duzer leaves one wondering how much continued effect they may have—author Bailey believes Van Duzer is a mere aberration to be honored more in the breach than the observance and author Treiman believes Van Duzer's chaos immediately effective.

Van Duzer guts rent acceleration clauses by taking their most common form—immediate capture of all of the future unpaid rent—and sending it to the trial court for a hearing on what the actual damages will be. It holds that such a clause is a penalty. Most disturbingly, the Van Duzer clause or its equivalent is very common[27] in both commercial and residential leases.[28] By specious reasoning, Van Duzer seeks to distinguish Fifty States Mgmt. Corp. v. Pioneer Auto Parks29 upholding such clauses on the basis that the landlord gets to enforce the penalty in Pioneer because the tenant gets to remain in possession. If Van Duzer really means what it says, then the landlord should accelerate the rent in full and tender possession upon its payment.

Conclusion

Real estate law has long recognized the value of stability in the law and stability in the contractual relations of the parties.30 Review of every single reported liquidated damages clause of the past 100 years revealed their wide New York acceptance as they advance both these goals as well as the overarching goal to encourage people to abide by their contractual obligations. Destabilizing them, particularly with regard to an extremely widespread practice in the industry does little to advance well-attested policies.

.....

ENDNOTES:

1. Bagley v. Peddie, 16 NY 469 (1857).

2. Truck Rent-A-Ctr v. Puritan Farms 2nd, 41 NY2d 420 (1977).

3. Van Duzer, discussed at length, infra.

4. Id.

5. Pyramid Centres & Co. v. Kinney Shoe Corp., 244 AD2d 625 (3d Dept 1997).

6. Bates Advertising. USA v. 498 Seventh, 291 AD2d 179 (1st Dept 2002).

7. Irving Tire v. Stage II Apparel, 230 AD2d 772 (1996).

8. 378 U.S. 184 (1964).

9. Seidlitz v. Auerbach, 230 NY 167 (1920). Seidlitz is the leading case on liquidated damages.

10. City of Rye v. Public Service Mutual Insurance, 34 NY2d 470, 473 (1974).

11. Truck Rent-A-Ctr.,supra.

12. Tenber Associates v. Bloomberg L.P., 51 AD3d 573 (2008)

13. Parsons & Whittemore v. 405 Lexington, 299 AD2d 156, 753 (2002); Vernitron Corp. v. CF 48 Associates, 104 AD2d 409 (2d Dept. 1984).

14. 22 Misc.3d 135(A) (AT 2009).

15. 51 AD3d 573 (AD1 2008); accord, Parsons & Whittemore v. 405 Lexington, 229 AD2d 156 (AD1 2002); 319 Fifth Ave. Realty v. 319 Smile Corp., 21 Misc.3d 139(A) (AT 2008).

16. See also, Montgomery Trading v. Cho, 22 Misc.3d 135(A) (AT 2009) (1.5x rent); 319 Fifth Ave. Realty v. 319 Smile Corp., 21 Misc.3d 139(A) (AT 2008) (double rent).

17. 289 AD2d 439 (AD2 2001).

18. 104 AD3d 513 (2013).

19. 291 AD2d 179 (2002).

20. Pyramid Centres, supra.

21. Vernitron Corp. v. CF 48 Associates., 104 AD2d 409 (AD2 1984).

22. LeRoy v. Sayers, 217 AD2d 63 (1995). Presumably LeRoy would have approved a clause with a sliding scale in the liquidation of the damages, set against a calendar measurement.

23. Irving Tire Co. v. Stage II Apparel Corp., 230 AD2d 772, 646 NYS.2d 528 (2d Dept 1996).

24. Irving Tire, supra.

25. 41 NY2d 420 (1977).

26. 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association, Inc., 2014 WL 7177502 (Dec. 18. 2014).

27. For example, Feyer v. Reiss, 154 AD 272 (AD2 1912); New 24 W. 40th St. v. XE Capital Management, 104 AD3d 513 (AD1 2013).

28. These writers, as the authors of all of the most widely circulated lease forms, are now revising those leases to account for Van Duzer.

29. 46 NY2d 573 (1979). See discussion in Bailey & Desiderio, Default Clauses, NYLJ Jan. 11, 2006.

30. Holy Properties v. Kenneth Cole, 87 NY2d 130 (1995).

Original content **here.**

Defining the Limits of Liquidated Damages Clauses

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NEW YORK REAL ESTATE ATTORNEYS

Right of First Refusal: In Pursuit of an Effective, Litigation-Proof Provison

New York Law Journal

By: Adam Leitman Bailey & John M. Desiderio

May 10th, 2006

Since biblical Abraham's purchase of his wife Sarah's burial plot in Hebron from Ephron the Hittite, the transfer of land has been creative, predictable and repetitive.1 Despite the familiarity of such transactions, land transfers have been the subject of an inordinate amount of litigation. Of course, the importance and value of land and the necessity for shelter assists in explaining many of the battles.

However, an analysis and survey of right-of-first-refusal litigation, during the past quarter-century, provides a different conclusion ? litigation has ensued mainly as a result of faulty draftsmanship, and disputes over the meaning of the clauses in particular agreements. In fact, since 2001, 31 New York judicial decisions have been published involving a right of first refusal; 25 of them arose from the inability of the parties to agree on the implementation of the provision and/or the failure of the provision to provide adequate guidance.2 This includes 24 cases decided on appeal.

To find further support for this theory, the interests of each of the parties provides more than a clue. The right of first refusal is one of those clauses in real estate that rarely breeds disagreement. First, the seller only transfers its land at its option. Second, the seller should never maintain a strong preference for a particular buyer as all potential buyers will be paying the same asking price. Unlike government-created turf wars such as succession battles or desires to increase rent in rent-regulated properties in landlord-tenant disputes, a transaction involving a holder of a right of first refusal includes two sides with mutual goals.

As long as real estate practitioners use the court system to strive for results unobtainable without the leverage of a lawsuit, it may not be possible to eliminate all potential disputes over right-of-first-refusal clauses.3

Background

The Right of First Refusal (ROFR) to purchase a parcel of real property is often included in real estate contracts and leases.In its simplest form, the ROFR contained in a contract or lease generally requires:

Enforcing the Actual Terms

Upon receipt of a bona fide offer to purchase from a third-party,4 the property owner subject to an ROFR clause must notify the right holder of the material terms and conditions of the bona fide offer. Upon the right holder's acceptance of the material terms and conditions of the offer stated in the notice, the owner must then provide the right holder with a proposed contract of sale the material terms and conditions of which must match those stated in the notice. (Alternatively, the owner may simply enclose a copy of the proposed contract of sale to the third-party with the notice and refer to the terms and conditions listed in the contract.) Similarly, the right holder's acceptance of the offer must unequivocally confirm that it agrees to the material terms and conditions listed in the notice. (If the proposed contract of sale is the "notice," then the right holder must accept the material terms and conditions stated in the proposed contract.)

Neither buyer or seller may vary the terms of the proposed contract from the terms of the bona fide third-party offer. For example, a right holder may not "accept" by agreeing to purchase the property at the price offered by the third-party but propose to continue negotiating other terms of the offer, such as financing and the closing date. Such action on the part of the right holder does not constitute a proper exercise of an ROFR.5 "[A] right of first refusal does not give a party a right to purchase the property on any terms so long as the price offered by the third party is met. [citations omitted]."6

Similarly, when the right holder has accepted the terms and conditions stated in the notice of the bona fide offer, the property owner may not then vary the material terms and conditions contained in the proposed contract of sale from those stated in the notice of the bona fide offer. For example, in one case where a right holder exercised its ROFR on the basis of a notice from the owner-seller stating that a third-party's offer included a ten-year mortgage, but the owner's final contract said that the mortgage would amortize over a 30-year period, this constituted a material variance from the accepted offer of sale, as the additional amortization period would have increased the right holder's actual purchase cost by $80,000. The owner's "creative financing" justified the right holder's refusal to sign an agreement that materially altered the terms of the parties' contract.7

Likewise, where an ROFR clause stated (a) that the purchase price was to be payable in full at closing, and (b) that the seller shall be obligated to offer the property to the right holder on the same terms and conditions as made in a bona fide third-party offer to the seller, a buyer-right holder was granted specific performance. The court granted the seller specific performance because the buyer accepted an offer to purchase a property for $1,150,000 but did not make a simultaneous down payment of ten percent or $115,000 upon acceptance of the offer as demanded by the seller, and because the down payment term was not authorized or required by the ROFR, and the third party's offer contained no such down payment requirement.8

Restraints on Alienation

Some ROFR clauses contain a pre-set ROFR price, or a formula by which the ROFR price will be set, when and if the owner decides to sell. Attorneys need to negotiate and draft such agreements very carefully. The price (or the formula the parties adopt to set the price) at the time they enter into their agreement may unreasonably undervalue the property at such time in the future when the ROFR is triggered by the then owner's decision to sell. An ROFR with an unreasonably low price "cap" will preclude an owner from obtaining a favorable market price for his property.

Attorneys should therefore be aware that New York retains the common law rule against unreasonable restraints on alienation and that invocation of the rule in the appropriate case will render an ROFR null and void and unenforceable.9 The common law rule evaluates the reasonableness of the restraint based on its duration, purpose, and designated method for fixing the purchase price. An ROFR will generally not be unlawful when conditioned on payment of "market value" or a sum equal to a third party offer.10 The common law rule against unreasonable restraints on alienation is applicable to ROFR clauses contained in the by-laws of condominiums.11 However, condominium ROFR's are usually viewed as "beneficially related to the peculiar characteristics of condominium ownership."12 An ROFR "generally used in connection with condominium management" granting a condominium board the right to purchase, at the same price and terms, a unit offered for sale by an owner, "does not constitute an unreasonable restraint on the alienation of such unit" and "has been held to serve a valid interest."13

Drafting the Right of First Refusal

An ROFR provision may not violate either New York's Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation. The invocation of those rules in the appropriate case will render an ROFR null and void and unenforceable.14

As noted above, an ROFR is enforceable when the price of the property, the time the holder has to accept the ROFR and the ROFR's purpose are deemed reasonable. ROFRs specifying a fair market or market-produced sales price have been upheld, as well as ROFRs that have designated a 90-day period for exercising or accepting the ROFR.15

The practitioner drafting an ROFR should require that the election to exercise the ROFR be completed within a narrow time frame, that the election be written, and that it be delivered by certified or other mail tracking device. A closing date scheduled a certain amount of days from delivery of the executed contract should be required, but only against the ROFR holder.

A signed contract of sale with terms that are identical to those contained in any offer received from a third party should be due along with a 10 percent down payment within a short time (e.g. 10 day business days from the date of delivery). The ROFR provision should specifically state that the purchase shall not be contingent on a mortgage or any financing contingency.16

The ROFR is already a deterrent to potential buyers who see the ROFR as an impediment to closing a deal, so these tight, strict provisions should assist in selling the property without any major impediments. For verification purposes, the ROFR provision should also include a requirement that the Seller provide written proof of any offers including the interested party's name upon a timely written request. This should eliminate the frequent disputes that cause litigation where the ROFR holder believes that the Seller does not have an actual buyer and is using the ROFR to raise the sale price.17

To provide an incentive for good behavior by a lease holder, the ROFR provision should state that it may only be exercised if the tenant has been in good standing and in compliance with the lease provisions throughout the term of the lease and at the time of the exercise of the ROFR.

The provision or agreement should include another much litigated topic ? the revocability of the ROFR. The provision should note that the ROFR is revocable at any time until a fully executed contract of sale has been delivered so long as the third-party bid is rejected.18 The agreement should include a provision that the ROFR is terminated on the day the lease ends to avoid unnecessary litigation.19

Other methods to reduce the risk of litigation and to forge a sealed deal may include providing for a one time right to exercise the ROFR, the prohibition of assigning the ROFR, the ability to exclude companies in which the seller is more than a half owner from the ROFR, and proof of financing from the ROFR holder to demonstrate the ability to purchase the property. The seller should have sole discretion to decide whether the ROFR holder has provided satisfactory evidence of its financial ability to close. The ROFR should also immediately be deemed terminated upon the assignment or sublet of the lease.

When drafting the ROFR, it should be noted that a court will not enforce an ROFR against any seller that conditions acceptance on terms that are impossible to fulfill.20 In addition, unless written into the ROFR, courts will not allow the landlord a carte blanche menu of conditions added to the terms of the deal.21 Of course, by requiring the ROFR holder to execute the same contract and conditions as an interested third party, this will not become an issue.

A Right of First Refusal in the Deed

Attorneys need to be particularly careful in any transaction involving both a contract for the sale of real property, which contains an ROFR clause, and a deed for the sale that the parties intend to contain the same ROFR. Where the ROFR in the deed inadvertently may contain a more limited right than that contained in the contract, the ROFR of the contract is merged into the deed, unless the contract expressly provides that its provisions shall survive the transfer of title.22

Similarly, where a parcel of property was conveyed by deed to the buyer "and assigns forever," but a separate ROFR to purchase an adjacent parcel of property was given to the buyer without such language, the ROFR was held to be personal to the buyer alone, and the assigns of the property the buyer had purchased from the seller could not exercise the ROFR given to the buyer. Had the parties intended otherwise, "such could have been accomplished by the inclusion of the appropriate language."23

Conclusion

The right of first refusal creates an incentive for a tenant to take better care of an owner's property in the hope of future ownership. It also provides a valuable negotiating tool. A tenant may agree to pay a higher rent or make other concessions in exchange for the right of first refusal. However, the right of first refusal provides a barrier between the seller and an interested third party. A carefully drafted document will tend to resolve most of the disputed issues that are currently being litigated. As the courts will enforce whatever reasonable terms the parties themselves agree to include in a ROFR clause,24 practitioners who draft a proper right of first refusal will be much less prone to trigger unexpected litigation disputes over the meaning of their agreements.

Endnotes: 1. Genesis: Chapter 23. 2. The referenced data has been provided using numbers from the Lexis Nexis New York Real Estate Database. In 2001, five reported decisions were published opinions involving the right of first refusal; In 2002, two published decisions were reported; in 2003, six published decisions were reported; in 2004, seven published decisions were reported; in 2005, nine published decisions were reported; and in 2006, to date, two published decisions were reported. 3. Sometimes litigation will not spring from faulty drafting but from a buyer attempting to garner more time to find the funds to make a purchase. See , 4 AD3d 196, 772 NYS2d 271 (1st Dept. 2004). 4. A bona fide offer is a genuine outside offer that the seller is honestly willing to accept, and not one made solely to extract a more favorable purchase price from the right holder. See Story v. Wood, 166 AD2d 124 569 NYS2d 487 (3d Dept. 1991). 5. See, e.g., , 24 AD3d 519, 806 NYS2d 244 (2d Dept. 2005). 6. Id. 7. See Danyluk v. Glashow, 2 Misc.3d 1005A, 784 NYS2d 919 (NYC Civ. Ct., NY County, 2004) (the owner in this case also attempted to change the terms of the deal by requiring the personal guarantee of the right holder and by adding a no-prepayment clause, neither of which were included in the original notice of the bona fide offer); see also , 22 AD3d 6, 798 NYS2d 416 (1st Dept. 2005)(concerning the peculiar effects of a "last right of refusal"). 8. See Degree Sec. Sys., Inc. v. FAB Land Corp., 302 AD2d 555, 756 NYS2d 248 (2d Dept. 2003). 9. , 1 Misc3d 586, 765 NYS2d 232 (Sup. Ct., Westchester Co., 2003), aff'd, 8 AD3d 619, 779 NYS2d 560 (2d Dept. 2004)). 10. Id. 11. , 18 AD3d 383, 796 NYS2d 62 (1st Dept. 2005) (citing Anderson v. 50 East 72nd St. Condo., 119 AD2d 73, 505 NYS2d 101 (1st Dept. 1986)). 12. See Anderson, 505 NYS2d 101. 13. Id.; but see , 6 Misc3d 246, 783 NYS2d 453 (Sup. Ct., NY Co., 2004), aff'd, 22 AD3d 350, 801 NYS2d 893 (1st Dept. 2005) (held lease agreement under which residential cooperative was effectively required, indefinitely, to retain the services of a laundry room services provider constituted unreasonable restraint on alienation of property). 14. See Metro. Transp. Auth. v. Bruken Realty Corp., 67 NY2d 156, 163, 501 NYS2d 306, 309 (1986); see also Wildenstein & Co. v. Wallis, 79 NY2d 641, 584 NYS2d 753 (1992). 15. Id.; see also Hermann, 765 NYS2d 232 (the refusal right was an unreasonable and unenforceable restraint on the alienation of property). 16. See Danyluk, 784 NYS2d 919 (the terms of a mortgage are generally "held to be an essential and material elements of a contract"). 17. See Jeremy's Ale House Also, Inc., 798 NYS2d 416, 419 (party has a right to be provided with proof of a third party offer); see also Danyluk, 784 NYS2d 919. 18. See M&A Motors, Inc., 806 NYS2d 244 (the right holder commenced an action for specific performance after defendant was no longer interested in selling the property); see also LIN Broad. Corp. v. Metromedia, Inc., 74 NY2d 54, 60, 544 NYS2d 316, 319 (1989) 19. See Hercules Corp. v. Monaco Equities, 2006 NY Slip Op

50430U (NY Sup. Ct. 2006). 20. See H.G. Fabric Discount v. Pomerantz, 130 AD2d 712, 515 NYS2d 823 (2nd Dept. 1987) (offer was conditioned upon the tenant vacating the premises, and as the condition was impossible, the tenant was not required to exercise his right of first refusal as to that offer). 21. See Danyluk, 784 NYS2d 919. 22. See Spiegel v. Rickey, 285 AD2d 879, 727 NYS2d 549 (3d Dept. 2001). 23. Sniezyk v. Stocker, 188 Misc2d 582, 729 NYS2d 264 (Sup. Ct., Fulton Co., 2001); See also, Tarallo v. Norstar Bank, 144 Ad2d 157, 534 NYS2d 485 (3d Dept. 1988). 24. See Concert Radio, Inc. v. GAF Corp., 108 AD2d 273, 488 NYS2d 696 (1st Dept. 1985), aff'd, 73 NY2d 76 (1988) (he requirements of the ROFR are determined by the terms of the agreement itself).

Adam Leitman Bailey Right of First Refusal- In Pursuit of an Effective, Ligitation-Proof Proviso Articles

IV. INSURANCE ISSUES IN COMMERCIAL LEASING

Insurance Issues in Commercial Leasing

Powerpoint - Insurance Issues in Commercial Leases

by

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Buffalo

Certificate Law Fact Sheet
Prepared by
Independent Brokers Insurance
Agents & Brokers of New York, Inc.

Insurance Issues in Commercial Leases

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1. Who Insures What

    a. This will depend on how the lease is structured. The landlord typically insures the building for both property and liability exposures, and the tenant insures its own Business Personal Property (BPP) and obtains its own liability coverage.
    b. The Tenant is also frequently required to insure any Tenants Improvements and Betterments (TI or TIB) – Permanent additions or changes made to a building by the tenant at its own expense that may not legally be removed.
    c. Tenant may also be required to carry Business Interruption / Business Income coverage. This is a commercial property coverage covering loss of income suffered by a business when damage to its premises by a covered cause of loss causes a slowdown or suspension of its operations.
    d. For smaller businesses, these coverages can be combined in a package policy (the Business Owners Policy).
    e. Insurance requirements work in conjunction with indemnification and casualty clauses in the lease.
    f. When negotiating a lease – involve the insurance agent/broker before the lease is signed.
        i. Many insurance requirements in leases that can't be met.
        ii. Cost considerations.

2. Certificates of Insurance and Insurance Law § 502

    a. What they are: documents that provide information about one or more insurance policies – snapshots of coverage.
    b. What they are not: not insurance policies; not a way to change or extend any terms of an insurance policy. Policies can only be changed by endorsement or rider.
    c. Common certificate requests:
        i. Certificate of Liability Insurance (ACORD 25)
        ii. Evidence of Commercial Property Insurance (ACORD 28)

d. ACORD – Association for Cooperative Operations Research and Development – non-profit organization that creates standardized forms for the insurance industry.
e. ACORD certificates are updated periodically and have changed over the years. Insurance agents/brokers are required to use the most current version of these forms.
f. Disclaimer at the top of the ACORD 25:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

g. Also:

> THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES.

h. In 2013, NY Insurance Law § 502 was passed, which provides that certificate holders cannot require a certificate to include terms and conditions in the certificate that are not provided in the insurance policy.
i. Requests that certificates contain obligations that aren't found in the policy or its endorsements cannot be met.
j. These requests put your client's insurance agent in a very difficult position. Certificates are one of the main areas where insurance agents get sued for errors and omissions.
k. Even if an agent can be talked into modifying a certificate to represent that the insurance company will take on various obligations, that modified certificate isn't going to bind the insurance company.
l. Best practice may be to request a copy of the policy and review it carefully.

3. Additional Insureds

    a. An entity that is included or added as an insured under the policy at the request of the named insured. Usually must be added by endorsement to the policy. The carrier will require that the additional insured have an insurable interest.
    b. "Additional insured is a recognized term in insurance contracts, and the well-understood meaning of the term is an entity enjoying the same protection as the named insured." *Kassis v. The Ohio Casualty Ins. Co.*, 12 N.Y.3d 595 (2009).
    c. In some policies there is a charge for adding additional insureds, but in many, there is no charge for this.
    d. Client should understand that putting additional insureds on the policy means that it is sharing its policy limits with the additional insured. May wish to consider increasing limits.
    e. This is a way for the landlord to back up the tenant's promise of indemnification.
    f. Agent needs to be provided with the exact wording of how the additional insured wishes to be named and the address it wants used.

4. Waiver of Subrogation

    a. Subrogation – the insurer assumes the rights of the insured to recover for a loss from another party that is liable for the loss. Can be by operation of policy terms or by law.
    b. Waiver of subrogation - agreement by which one party agrees to waive subrogation rights against another if a loss occurs; intended to prevent one party's insurer from subrogating against the other party. Waiver may be written to apply only to extent of insurance recovery.
    c. Unilateral vs. mutual waivers
    d. Insurance company may add waiver of subrogation by endorsement to the policy; may or may not charge for adding it.
    e. May be a hidden cost for tenant – if property loss caused by leaking pipes in building, for example, and the insurer cannot subrogate against the landlord, this will affect the tenant's claims history more negatively (i.e., potential for non-renewal or premium increase).

5. Request for 30-day Notice of Cancellation to Landlord
    a. In most liability insurance policies, the insurer agrees to notify only the first named insured of cancellation. Policy may also contain notice provision for mortgagee.
    b. In most property insurance policies, the insurer agrees to notify the mortgage holder of cancellation.
    c. Generally no one else is required to be notified (including a landlord) unless the policy is endorsed to this effect, if the insurance company will do this.
    d. Some insurers won't endorse a policy to provide notice to all parties that might be requested. Substitute course might be to negotiate requirement that if either party's insurance is cancelled, that party must inform the other party within a specified number of days.
    e. ACORD changes effective September 2010 – changed the cancellation text on the pre-printed form.

        i. Old Version

Should any of the above described policies be cancelled before the expiration date thereof, the issuing insurer will endeavor to mail ____ days written notice to the certificate holder named to the left, but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.

        ii. New Version

Should any of the above described policies be cancelled before the expirations date thereof, notice will be delivered in accordance with the policy provisions.

    f. Requests for notice of changes to insurance – problematic.
    g. This notice of cancellation issue fails to recognize that the insurance companies don't issue certificates – the agent/broker does. Many insurance companies tell agents not to send them copies of certificates.

6. Examples of Insurance Requirements that Can't Be Met

    a. "Such policy shall contain a provision that no act or omission of Tenant shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained."
    b. That a certificate provide that "the insurance shall not be invalidated by any action or inaction of the [Insured] or any other Person and shall insure the [Additional Insured] regardless of, and any losses shall be payable notwithstanding."

7. Other Considerations

    a. Limits of Liability Insurance
        i. Combined single limit vs. split limits
            1. More common to now see combined single limit – e.g. $3,000,000. This is the amount available for any one occurrence and for the policy period.
            2. Split limits – show a limit per occurrence and in the aggregate for the policy term.
        ii. May be met through combination of underlying coverage and an umbrella liability policy
    b. Insurance Carriers
        i. Admitted vs. Non-Admitted Carriers
        ii. Financial Stability Ratings – AM Best, e.g.
        iii. "Acceptable to Landlord"
    c. Occurrence basis vs. claims-made basis
        i. Some leases specifically require that liability coverage be written on an occurrence basis. Almost all liability insurance is written on an occurrence basis.
        ii. Occurrence policies – covers claims that arise out of damage or injury that took place during the policy period, regardless of when claims are made.
        iii. Claims-made policies – cover claims that are first made against the insured during the period in which the policy is in force.
    d. Deductibles/ Retentions – may wish to specify maximums
    e. Covered Causes of Loss
        i. All Risk / Special Form – all causes of loss covered unless they are excluded in the policy
        ii. Named Peril Coverage – coverage only for causes of loss listed in policy.
            1. Basic causes of loss form – coverage for the perils of fire, lightning, explosion, smoke, windstorm, hail, riot, civil commotion, aircraft, vehicles, vandalism, sprinkler leakage, sinkhole collapse, volcanic action
            2. Broad causes of loss form – basic plus these additional perils: falling objects; weight of snow, ice, or sleet; water damage (in the form of leakage from appliances); and collapse from specified causes.
    f. Insure for replacement cost (as opposed to value) when possible.

8. Additional Considerations When Lease Involves a Buildout/Renovation

    a. Both property and liability exposures are different on a renovation site than in an operating business.
        i. Property – Builders' Risk policy
        ii. Liability – Owners and Contractors Liability or Tenants and Contractors Liability
    b. Obtaining the correct insurance becomes more complicated – insurance requests to tenant's insurance agent may be coming from landlord, bank, and IDA. Contractors' insurance agent usually also needs to be involved.
    c. Get the insurance agent involved as early as possible! Policies that are needed when doing renovations are often not available on standard markets and can take longer to place.
    d. The timing of the placement of various insurance needs to be coordinated here. For example, the tenant shouldn't be required to provide proof of workers compensation insurance on its employees on day one of lease if the renovation will take 90 days.

9. Remember that insurance is for more than satisfying the lease requirement

    a. Take a step back from what is required in the lease and consider whether your client has the property and liability coverage it needs.
    b. Encourage your client to review and update coverage as time goes on.

10. Resources

    a. IRMI.com – Insurance Glossary
    b. www.acord.org – To check on the latest ACORD form versions
    c. ambest.com/ratings/entities/search - to search insurance carrier financial strength ratings
    d. dfs.ny.gov/insurance/insurers/cert_ins_approved – list of certificate forms approved by the NY Division of Financial Services

Insurance Issues in Commercial Leases

Kathleen Sellers, JD, CLU
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Charles J. Sellers & Co., Inc.

April 27, 2017

Who Insures What

- Depends on the lease
- Landlord – building & liability
- Tenant – property & liability
- Tenants Improvements & Betterments
- Business Interruption / Business Income
- Insurance requirements work in conjunction with indemnification and casualty clauses
- Involve the insurance agent/broker before the lease is signed.

Certificates of Insurance and Insurance Law § 502

- What certificates are and are not
- Certificate of Liability Insurance (ACORD 25)
- Evidence of Commercial Property Insurance (ACORD 28)
- NY Insurance Law § 502 - certificate holders cannot require a certificate to include terms and conditions in the certificate that are not provided in the insurance policy

Additional Insureds

- Entity that is added as an insured under the policy at the request of the named insured
- Enjoys the same protection as the named insured
- Usually must be added by endorsement
- Sharing limits

Waiver of Subrogation

- Subrogation - the insurer assumes the rights of the insured to recover for a loss from another party that is liable for the loss
- Waiver of Subrogation - Agreement by which one party agrees to waive subrogation rights against another if a loss occurs
- Possible costs

Request for 30-day Notice of Cancellation to Landlord

- Most policies -- the insurer agrees to notify only the first named insured. Some policies may also contain notice provision for mortgagee.
- Policies don't require notice to landlord unless endorsed to this effect – if the carrier will endorse.
- ACORD changes effective September 2010 – changed the cancellation text on the pre-printed form.

Insurance Requirements that Can't Be Met

"Such policy shall contain a provision that no act or omission of Tenant shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained."

Other Considerations

- Limits of Insurance
- Insurance Carriers
- Occurrence basis vs. claims-made basis
- Deductibles/ Retentions
- Covered Causes of Loss

Additional Considerations When Lease Involves a Buildout/Renovation

- Property and liability exposures are different
- Property – Builders' Risk policy
- Liability – Owners and Contractors Liability or Tenants and Contractors Liability
- Get the insurance agent involved as early as possible.

Questions/Comments?

Kathleen Sellers, JD, CLU

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Certificates of Insurance

Effective on July 28, 2015, an amendment to the insurance law will go into effect that makes it illegal to require a certificate of insurance to include language of any kind, including warranties of coverage, not found in the underlying policy.

Penalties

The Department of Financial Services may fine violators (including issuers & requestors)

$1,000 for the first offense & $2,000 for each subsequent.

What Is A Certificate of Insurance?

- Description of an organization's insurance coverage at a specific point in time
- Document for conveying information, not for guaranteeing coverage
- A certificate cannot change a policy's coverage or confer additional rights on the certificate holder

Who Does The Law Apply To?

- Individuals, businesses, associations and other entities
- Public entities (the State of New York, counties, cities, towns, villages, school districts, public libraries, public corporations & similar entities)
- New York State, local, interstate and international public authorities and their employees, officers and elected officials

What Does the Law Change?

Certificate holders may still request minimum insurance requirements for coverage limits, terms and other conditions. However they CANNOT REQUIRE their certificate to include any of the following IF THE ITEMS ARE NOT PROVIDED within the insurance policy:

- Terms
- Conditions
- Language
- Warranties
- Guarantees

What Are Acceptable Certificate Forms?

Certificate holders can only request a certificate that is:

- A form issued by the insurer providing the coverage
- A standard certificate form issued by an insurance industry standard-setting organization (such as ISO or ACORD) and approved by the New York State Department of Financial Services, or
- Any other form approved by the DFS

Prohibitions

Certificate holders may not require a certificate as a condition to:

- Award contracts;
- Permit work to start; or
- Pay for work completed

Unless their requested certificate is one of the three acceptable forms indicated above.

Prepared by

Independent Insurance Agents & Brokers of New York, Inc.

5784 Widewaters Parkway, 1st Floor
Dewitt, NY 13214 | 800.962.7950

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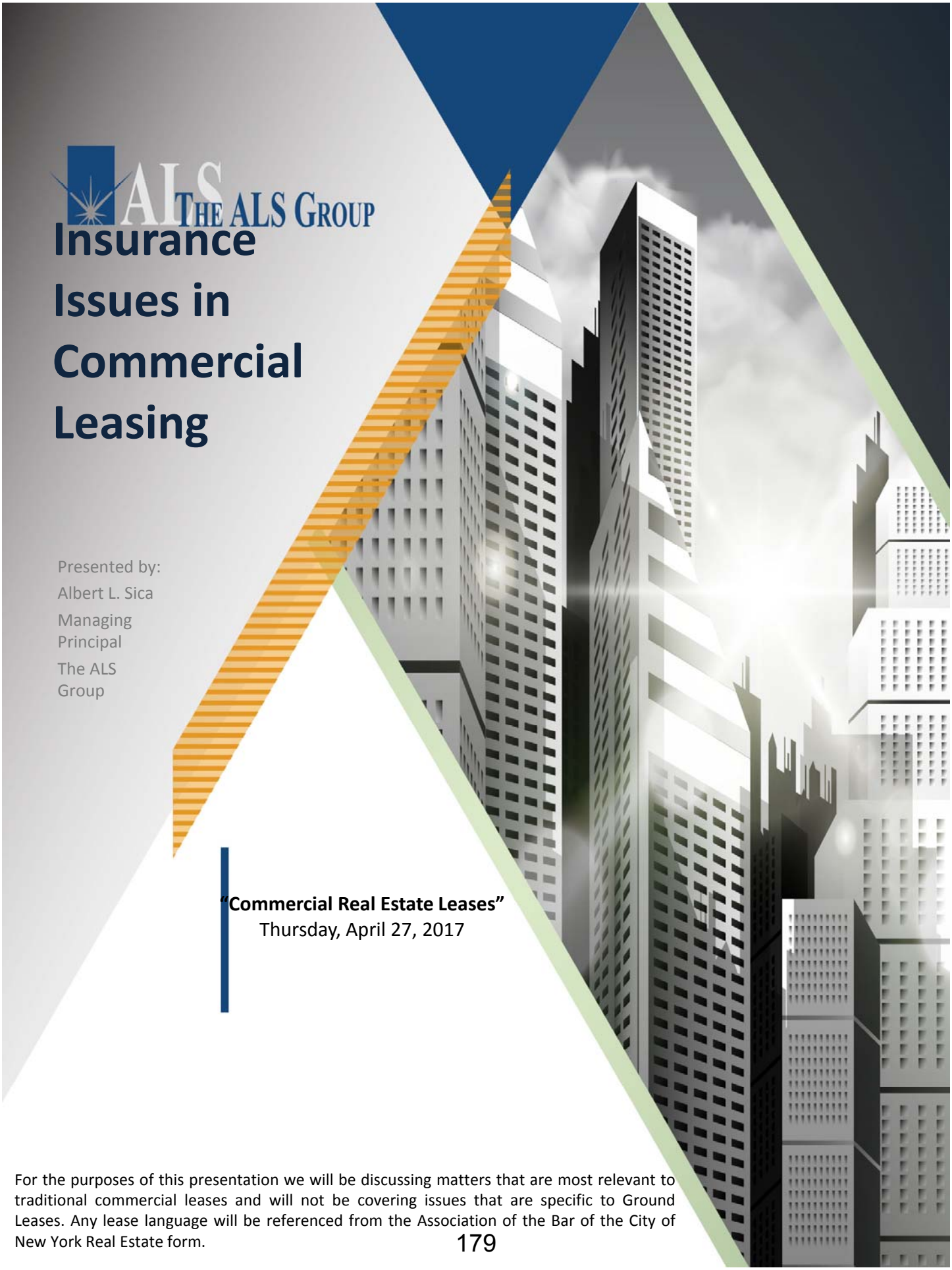
Insurance Issues in Commercial Leasing

by

Albert L. Sica, Esq.

The ALS Group
Edison, New Jersey



Insurance Issues in Commercial Leasing

Presented by:
Albert L. Sica
Managing Principal
The ALS Group

"Commercial Real Estate Leases"
Thursday, April 27, 2017

For the purposes of this presentation we will be discussing matters that are most relevant to traditional commercial leases and will not be covering issues that are specific to Ground Leases. Any lease language will be referenced from the Association of the Bar of the City of New York Real Estate form.

Who We Are and Our Perspective

- Independent Insurance & Risk Management Consultants
- Real Estate Practice Primarily Advises Owners
- Firm Founded 1993

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The ALS Group founder Albert Sica leads the firm's advisory practice providing unbiased third-party expertise on risk-management and insurance issues. Al brings more than 25 years of experience to his role, combining the strategic vision of Enterprise Risk Management (ERM) with decades of hands-on experience implementing strategies at the tactical level, working with executive leaders and front-line operational managers alike, bringing needed change management to risk-exposed organizations trapped in old-game paradigms.

Al's professional experience spans numerous verticals and geographies across the globe, including real estate, construction, retail, manufacturing, distribution, private equity/venture capital, M&A due diligence, and Public/Private Partnerships (P3). He routinely supports clients with risk and coverage analysis, including OCIP vs. CCIP evaluations, broker RFPs, and enterprise-wide risk assessments.

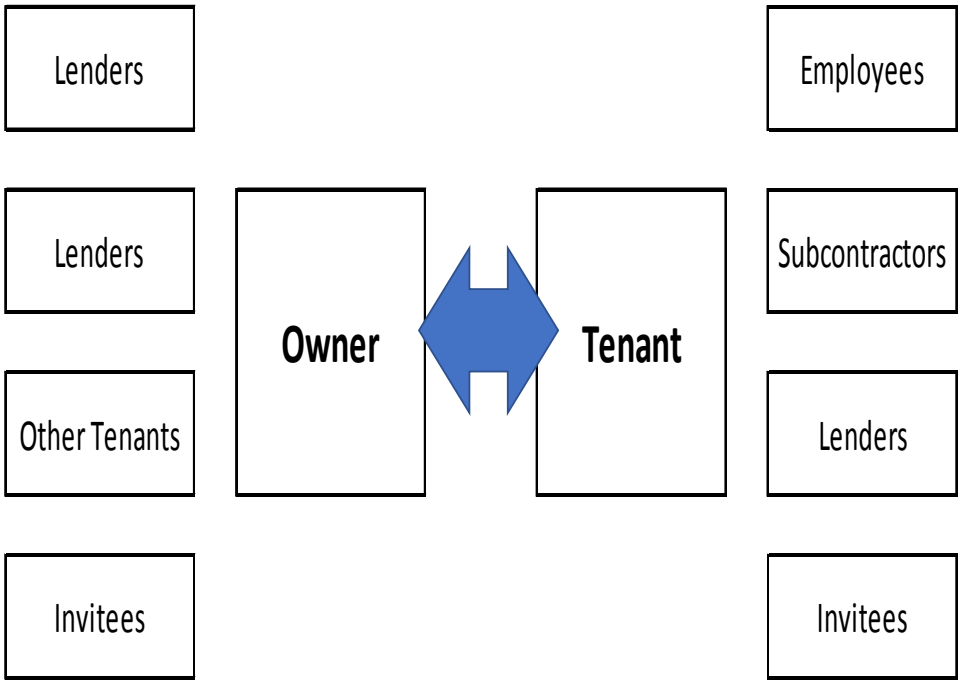
Parties in the Transaction – What's the Risk and Who Insures What

When thinking about the objectives of Landlord and Tenant, it is relatively easy to consider the goals of each, an uninterrupted and predictable experience that is supported by commercially reasonable contract terms. Both parties seek to minimize unexpected occurrences and mitigate the risk of loss. There is a great deal of alignment of interest between the parties and establishing reasonable insurance provisions that both can satisfy is important to the agreement.

Risk Areas

- ***Real Property Risk***
- ***Insurance Policy Deductible Risk***
- ***Improvements to Space***
- ***Key Money for Tenant***
- ***Personal Property of Tenant***
- ***Premises Liability for Demised Premises***
- ***Premises Liability for Common Area***

Generally, there are two parties in the main transaction, the Landlord and the Tenant which appears simple in nature however each of these parties have "stakeholders" who are concerned with the risk of the transaction and whose interests need to be considered.



What Are The Key Risk Transfer Provisions

There are several key provisions that need to be considered when drafting agreements between Landlords and Tenants that fundamentally start with the Indemnity Provision and Insurance Requirements-Provisions.

Indemnity Provisions – At the heart of the relationship is for one party to protect and indemnify the other party from certain activities that would cause the other party harm. This is the overriding protection in the contract which should be supported by insurance where possible.

Insurance Provisions – Robust insurance requirements that are commercially reasonable are at the core of the financial support that either party look for to support risk transfer provisions. Insurance coverage changes on occasion so any provisions should be as ***"timeless"*** as possible with a focus on intent.

Exculpatory Provisions – These provisions are generally sought by the Landlord and need to be carefully considered since they can provide complete transfer of risk.

Damage and Destruction Provisions – These provisions are critical as they define the rights and remedies for a destruction of the premises and how that destruction may effect rebuilding, lease cancellation, use of insurance proceeds, etc.

Subrogation Provisions – Agreements need to be clear to manage the ability of a third party [insurer] to subrogate against the other party for damage/loss caused by that party. Generally, we see there are full and mutual waivers of subrogation in lease agreements so the party carrying the insurance looks to their insurer for recourse/indemnity.

Sample Waiver of Subrogation Clause

Landlord and Tenant shall have no liability to one another, or to any insurer, by way of subrogation or otherwise, on account of any loss or damage to their respective property, the Premises or its contents, the Building or the Project, regardless of whether such loss or damage is caused by the negligence of Landlord or Tenant, arising out of any of the perils or casualties insured against by the property insurance policies carried, or required to be carried, by the parties pursuant to this Lease. The insurance policies obtained by Landlord and Tenant pursuant to this Lease shall permit waivers of subrogation which the insurer may otherwise have against the non-insuring party. In the event the policy or policies do not allow waiver of subrogation prior to loss, either Landlord or Tenant shall, at the request of the other party, deliver to the requesting party a waiver of subrogation endorsement in such form and content as may reasonably be required by the requesting party or its insurer. [1]

[1] – IRMI Contractual Risk Transfer

Additional Insured – What Does It Mean?

A person or entity (Landlord-Lender) that is added to another's (Tenant-Contractor) liability policy as an additional Insured enjoys protection for the vicarious liability of the policyholder. Additional Insured obligations (in the insurance provisions) are generally used with indemnity obligations n leases or agreements.

Additional Insured protection is viewed as "backing up" the indemnity obligation and each trigger two separate sections of the [Insured's] liability policy.

It is important to note that most (if not all) additional insured endorsements are "triggered" based on there being a requirement to add that person or entity by contract or agreement. If one does not exist, it is foreseeable the carrier will question the obligation to extend additional insured status to another.

There are many additional insured endorsement that are used buty generally these are the ones that you will see most often.

- **CG 20 10 – Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization**

  The endorsement makes a project owner and insured under a general contractor's CGL policy or a general contractor an insured under a subcontractor's CGL policy. It modifies the"Who Is an Insured" section of the CGL policy to add a scheduled person organization but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

  1. Your [i.e., the named insured's' acts or omissions; or
  2. The acts or omissions of those acting on you [i.e., the named insured's] behalf;

- **CG 20 37– Additional Insured – Owners, Lessees or Contractors – Completed Operations**

  The endorsement provides additional insured status with respect to the products-completed operations hazard in connection with Named Insured's work or products after they have been put to their intended use or left the premises. (a restaurant tenant will need CG 24 07 products-completed operations redefined.

Additional Insured – What Does It Mean?

- **CG 20 11– Additional Insured – Managers or Lessors of Premises**

  This endorsement adds as an additional insured the owner of premises (CG 20 24 is for Land) from whom the named insured leases property or the owner's real estate manager. The coverage provided to such additional insured is limited to liability arising out of the ownership, maintenance, or use of that part of the premises leased to the named insured and specifically described in the endorsement. There are several limitations to this (coverage ceases when tenancy does; no products or completed operations, no coverage for structural alterations.

Obtaining Additional Insured status on an agreement is a fundamental part of the risk transfer but care must be taken to obtain the right coverage and to see the endorsement. Many carriers have crafted their own endorsements which attempt to provide the coverage.

* 30-day Notice to Landlord – The Unicorn of Insurance Obligations
* Use of Proceeds – Rebuild or Pay Down Loans
* Evidence of Insurance – Satisfactory to Landlord – Certificate of Insurance
* 3rd Party Over Action and Subcontractor Issues – Discuss Exclusion

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V. ANCHOR TENANT OR MAJOR RETAIL TENANT LEASING

by

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New York City

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ANCHOR TENANT OR MAJOR RETAIL TENANT LEASING
Deborah Goldman, Esq.

This chapter will focus on special leasing provisions that an anchor tenant or major retail tenant in a shopping center or building would want in its lease. An anchor tenant (or major tenant) typically refers to a large store in a retail shopping center (usually a department store or a movie theatre), which the landlord has strategically rented space to in order to draw in large crowds and funnel them to other stores in the shopping center. It can also refer to stores that have major brand name recognition rather than a large floor plan, like a Starbucks or an Apple Store, which tend to be less than 8,000 square feet. Name recognition and prestige of these tenants are the appealing factors that will drive in other tenants and shoppers. Because of the value that an anchor tenant can provide the landlord as far as appeal to other smaller tenants and heavy traffic draw, these anchor tenants can negotiate discounted rental rates as well as better lease terms. For example, it's not uncommon for an anchor tenant to reserve the right to approve the selection of the shopping center's other tenants in order to prevent competing (and much smaller) tenants from taking away customers.

Anchor tenants may lease an in-line space in the shopping center or a stand-alone retail space with a large open floor plan of at least 20,000 square feet (usually referred to as a "**big box**"). A big box lease will typically be a ground lease for a pad site where the tenant will construct its own building, and although this discussion does not delve into ground lease provisions, many of the lease terms set forth in the rider below will also apply to the big box lease.

Although retail tenants usually will pay a proportionate share of CAM (common area maintenance) charges, this author has been seeing a trend to move away from CAM charges and move towards a fixed percentage increase per year of the lease term. Many tenants prefer this as it provides certainty on the rent and, apparently, landlords do as well since it simplifies the billing procedure and not needing to negotiate countless exceptions to what landlord is allowed to push through to the tenant.

The easiest way to document the negotiated provisions that any lease for a major tenant should contain is to attach to this chapter a standard rider (the "**Rider**") that tenant's counsel for an anchor tenant should, whenever possible, attach to a landlord's form of lease. Ideally an anchor tenant will have their own form of lease, which includes many of the concepts included in this Rider. However, many shopping center owners and REITs prefer to use their own form. This Rider collects in one place all anchor tenant-specific provisions that an anchor tenant should seek to obtain in any lease it signs. These provisions supplement ordinary "reactive" negotiations of the landlord's form of Lease.. These leases would be similar to triple-net leases in that there is little landlord responsibilities, but one common difference is that the tenant might be governed not only by the Lease, but also by a shopping center declaration or reciprocal access and easement agreement, which tenant's counsel must also review carefully.

Comments. In using this standard rider, consider these issues, among others:

- *Timing.* We recommend presenting this Rider to landlord early in discussions, ideally as soon as (or even before) the parties sign a letter of intent. Anchor tenants should proactively make this Rider the agenda for discussion before

landlord makes its Lease the agenda. Even if landlord rejects the whole idea of this Rider, it offers a reliable source for standard language to add to landlord's Lease.

- *Reference to Rider.* In landlord's lease form, typically just before the signature blocks, include a reference to this Rider, such as this:

  See attached Lease Rider (the "Rider"), which supplements and modifies this Lease. To the extent inconsistent with this Lease, the Rider governs. The Rider is part of this Lease.

- *Defined Terms.* The Rider defines some terms specific to the Rider. The Rider assumes that landlord's Lease defines all other capitalized terms. Check that assumption and conform or adjust the Rider as appropriate. For example, the Rider refers to the "Project." If landlord's Lease refers instead to the "Center," adjust accordingly.

- *Exhibits.* The Rider requires some exhibits, all self-explanatory. Work on those exhibits should start as soon as possible during Lease negotiations.

- *Footnotes.* See footnotes for a few specific comments on some provisions in this Rider. The footnotes cannot possibly highlight every provision of this Rider that require thought. Anyone using this Rider should review and adjust everything in it to reflect the business deal for this particular location.

- *Due Diligence.* To the extent that due diligence discloses any issues (e.g., insufficient electric capacity), the Rider can also address them.

LEASE RIDER

This **LEASE RIDER** (the "**Rider**") is attached to and modifies the _____ Lease dated _____ ("**Landlord's Lease**"; with this Rider, the "**Lease**") between _____, a _____ ("**Landlord**") and [_____], a _____ ("**Tenant**"). Landlord and Tenant modify and supplement Landlord's Lease as this Rider states.

1. **Rider**. In the event of any inconsistency between Landlord's Lease and this Rider, this Rider governs and binds the parties. Capitalized terms (a) not defined in this Rider shall have the same meanings as in Landlord's Lease, as modified here; and (b) may be used in before being defined.

2. **Commencement Date**. (A) The "**Commencement Date**" means the date on which all of the following conditions have been satisfied or waived by Tenant in writing[1]:

(i) Landlord has substantially completed Landlord's Work as set forth on Exhibit __ attached hereto and made a part hereof[2];

(ii) Landlord has delivered actual possession and control of the Premises to Tenant, broom clean, vacant and free of all tenancies;

(iii) Landlord and Tenant have executed and delivered a written notice of delivery and acceptance of the Premises in the form attached hereto as **Exhibit __**;

(iv) Tenant has received all Government Approvals (as defined below);

(v) **[if there are Hazardous Substances present, add "Landlord has abated all Hazardous Substances from the Property and Premises and provided evidence thereof from the applicable government agency or certified environmental consultant."]**

(vi) **[if new construction, add "Landlord has completed the Common Areas (hereinafter defined) and all improvements thereto, including without limitation the grading and surfacing of all parking lots, driveways and sidewalks serving the [Building/Shopping Center] and the installation of all parking lot lighting and landscaping[3]."]**

As used in this Lease, "**substantially completed**" means that minor "punch list" items remain to be performed, and can be completed without interfering with Tenant's initial alterations or Tenant's opening for business at and use of the Premises.

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1 Everything that must occur before the Commencement Date should be included here. For example, if SNDAs are required to be delivered prior to the Commencement Date, add that condition here.

2 The concept of Landlord's Work is not addressed in this Rider, other than with respect to timing. See below.

3 Check with tenant to see if there are more detailed requirements for the premises and the common areas that tenant requires prior to accepting delivery. Some of these may be added as "post-delivery work" rather than as Landlord's Work.

(B) The parties anticipate that the Commencement Date will occur on or about _____ days after a fully executed counterpart of this Lease is delivered by Landlord and Tenant (the "**Scheduled Delivery Date**"). Landlord shall keep Tenant apprised on a bi-monthly basis of the status of Landlord's Work.

3. **Delay In Delivery Of Possession**. Landlord shall satisfy all conditions listed in order for the Commencement Date to occur on or before the Scheduled Delivery Date. Landlord acknowledges that Tenant intends to start construction of Tenant's improvements on the Scheduled Delivery Date, and that a delay beyond such date will cause Tenant to suffer certain losses which are difficult to quantify including, by way of illustration and not of limitation, lost profits, construction delay costs and employee wages. If the Commencement Date does not occur within 14 days of the Scheduled Delivery Date for any reason, then Landlord shall pay to Tenant, as liquidated damages and not as a penalty, the sum of $_____ per day accruing from the Scheduled Delivery Date to the actual Commencement Date. **[OR Tenant shall be entitled to 2 days of free Minimum Rent for each day of delay accruing from the Scheduled Delivery Date to the actual Commencement Date]**; provided, however, that if such delay is caused by a Force Majeure Event (as defined below), the Scheduled Delivery Date shall be deemed extended by a period during which said Force Majeure Event shall cause such delay, but such deferral of the Scheduled Delivery Date shall in no event be deferred by a Force Majeure Event for more than 45 days. Landlord and Tenant agree that the foregoing sum is their best estimate of the daily damages, including but not limited to lost sales that Tenant will incur as a result of Landlord's failure to deliver the Premises. **[If Landlord fails to pay such liquidated damages by the Rent Commencement Date, Tenant shall be entitled to offset such sums against Minimum Rent and, at its option, Additional Rent until fully recouped.]**[4] If the Commencement Date does not occur within 90 days after the Scheduled Delivery Date for any reason whatsoever, Tenant, at its option, may terminate this Lease upon written notice to Landlord. Such termination date shall not be subject to extensions for any reason whatsoever. If Tenant elects to terminate this Lease, the Lease shall be deemed null and void and of no further force or effect, Landlord shall within 10 business days refund Tenant's Security Deposit (or return and consent to the cancellation of any letter of credit) and any unearned prepaid rent, Landlord shall return to Tenant any guaranty of the Lease or any Lease obligations marked "cancelled" and otherwise confirm the termination of any such guaranty, and neither party shall have any further rights or obligations under the Lease, except those which expressly survive its expiration or termination (all of those events, collectively, a "**Lease Termination**"), and **[in addition to liquidated damages due for the period of delay]**[5], Landlord shall reimburse Tenant for all of Tenant's expenses incurred in connection with this Lease, including, Tenant's leasing costs, Tenant's store development costs incurred in connection with the Premises, attorneys' fees, design fees, consultant fees (whether the foregoing fees are incurred by outside or in-house personnel), permitting fees, site selection costs, and construction costs, plus all other costs and expenses incurred by Tenant in connection with this Lease and the Premises (collectively, the "***Costs***")[6]. Landlord shall also return all monies previously deposited by Tenant upon execution of this Lease, if any.

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4 Delete this sentence if no liquidated damages.

5 Delete bracketed clause if no liquidated damages.

6 Landlord will push back on reimbursing Tenant for its Costs (throughout this Rider) and that's why this provision should be highlighted and outlined in the negotiation of the Letter of Intent ("**LOI**"). Resist capping the Costs- Landlord is making representations that it can deliver

4. **Permitted Use.** The "**Permitted Use**" means use of the Premises for these uses: _____[7]. Tenant may not use the Premises for any other purpose except the Permitted Use.

5. **Exclusivity**. Tenant shall have the exclusive right to operate a _____ in the Project[8] as the Site Plan delineates the Project (the "**Exclusive**"). Landlord shall cause every future lease and every existing lease that is later amended in any way (including pursuant to Landlord's discretionary consent to an assignment or subletting) in the Project to prohibit the tenant under that lease from violating the Exclusive. If any other tenant in the Project violates the Exclusive, then without limiting Tenant's other rights and remedies, so long as that violation continues Tenant shall pay from time to time, in place of Minimum Rent under Landlord's Lease, an amount equal to [50% of Minimum Rent] [Percentage Rent with a breakpoint of $0][9] ("**Substitute Rent**"). Payment of Substitute Rent shall start as of the first date the Exclusive has been violated and shall continue for a period (the "**Substitute Rent Period**") that ends on the earlier of: (a) [24] months after it begins; or (b) the date when the violation of Tenant's Exclusive has been terminated in such a manner that it is not likely to recur (the "**Exclusive Violation Cure Date**"). If the violation continues beyond the Substitute Rent Period, Tenant may terminate the Lease by notice to Landlord (a "**Termination Notice**"). Tenant must give a Termination Notice, if at all, within 90 days after the end of the Substitute Rent Period. If, in that 90-day period, an Exclusive Violation Cure Date occurs, then the Termination Notice shall be ineffective. If Tenant does not elect to terminate the Lease within that 90-day period, then Tenant shall: (a) resume payment of Minimum Rent as Landlord's Lease requires; and (b) be deemed to have waived its right to terminate the Lease based on that violation of its Exclusive. That does not limit Tenant's rights or remedies if a later violation of the Exclusive occurs. If Tenant gives a Termination Notice and no timely Exclusive Violation Cure Date occurs, then: (a) a Lease Termination shall occur; and (b) Landlord shall within 10 business days reimburse Tenant for the unamortized cost of Tenant's Work based on a 20-year straight line amortization schedule (the "**Unamortized Costs**").

6. **Co-Tenancy Provisions**.

A. **Required Co-Tenants**. The "**Required Co-Tenants**" means (excluding Tenant and the Premises): (a) tenants that (would) occupy at least __% of the Project's

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the Premises by a certain date and Tenant is expending huge amounts of money to get the Premises built on time.

[7] Be very clear on Tenant's Permitted Use. Make sure that it is broad enough to cover any future changes in Tenant's industry (such as "any retail use") and include incidental uses, such a storage and general office and administrative purposes. Try to avoid any restrictions or requirements on Tenant's trade name and if there are any requirements, be sure to allow a change in trade name upon assignment or subletting.

[8] Adjust all defined terms in this Rider as appropriate. Make sure Lease defines all defined terms not defined in this Rider. Drill down on the meaning of "Project." Does it include everything we want it to include? If there is a residential portion and office portion of the Project, should the Exclusive apply to those portions of the Project as well?

[9] Definition of Percentage Rent will vary with circumstances and definitions in Landlord's Lease. Adjust as appropriate.

gross leasable area (the **"GLA"**); and (b) [all Anchor Tenants of the Project] [at least 2/3 of Anchor Tenants, rounded up to a whole number][10]. **"Anchor Tenant"** means [_____ and _____, their successors or assigns, or their substantial equivalents reasonably approved by Tenant] [any tenant that occupies or would occupy at least [20,000] square feet of GLA].

B. **Lease-up Contingency**[11].

1) Notwithstanding anything to the contrary in the Lease, if, as of _____[12] (the "**Lease-Up Deadline**"), signed leases do not yet exist between Landlord and the Required Co-Tenants (the "**Lease-Up Contingency**"), then Tenant may terminate the Lease by giving notice (the "**Lease-Up Termination Notice**") to Landlord within 30 days after the Lease-Up Deadline (that 30-day period, the "**Lease-Up Termination Option Period**") (but if Landlord satisfies the Lease-up Contingency in the Lease-Up Termination Option Period, then the Lease-Up Termination Notice shall be null and void and of no further force or effect); or (b) if Landlord's Work has been Substantially Completed and Premises are ready to be delivered to Tenant, reject Landlord's tender of possession of the Premises and delay starting Tenant's Work until Landlord has satisfied the Lease-Up Contingency. If Tenant fails to deliver a Lease-Up Termination Notice in the Lease-Up Termination Option Period, or if Tenant takes possession of the Premises and starts Tenant's Work at the Premises, then Tenant shall be deemed to have waived its right to reject Landlord's tender of possession and/or give a Lease-Up Termination Notice. If Tenant gives a timely Lease-Up Termination Notice, then: (a) a Lease Termination shall occur; and (b) Landlord shall within 10 business days reimburse Tenant for its Costs, as evidenced by paid receipts therefor.

2) If Tenant accepts Landlord's tender of possession of the Premises on or before the Lease-Up Deadline and thereafter promptly starts Tenant's Work at the Premises, then if the Lease-Up Contingency remains unsatisfied as of the Commencement Date, and Tenant is open and operating its business in the Premises for the Permitted Use, then Tenant shall pay Substitute Rent after the Commencement Date until Landlord satisfies the Lease-Up Contingency. Notwithstanding the previous sentence, in no event shall Tenant be required to open the Premises for the conduct of its business until Landlord satisfies the Lease-Up Contingency.

C. **Opening Condition**[13]. Notwithstanding anything in the Lease to the contrary and so long as Tenant has not committed an uncured default beyond notice and grace period, Tenant shall not be required to open for business unless and until the

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[10] If the Project has three or more Anchor Tenants use this test. Landlords may want either (a) or (b) but not both. This will be negotiated during the LOI period.

[11] Lease-up Contingencies typically apply to new developments only.

[12] The Lease-Up Deadline should occur shortly after lease execution so that Tenant doesn't expend too much money on initial development costs.

[13] Some landlords will try to carve out certain reasons for the failure to satisfy the Opening Condition, like force majeure, casualty, condemnation or the making of repairs or restorations following any casualty or condemnation event. These are usually not acceptable, especially for the initial Opening Condition, and Landlord should bear that risk.

Required Co-Tenants are open for business and operating at the Project [,the construction of all Common Areas, including (without limitation) all parking areas are substantially complete, all construction equipment and debris have been removed and Landlord has obtained a Certificate of Occupancy for the entire **[Building/Shopping Center]]**[14] (the "**Opening Condition**"). If Landlord has not satisfied the Opening Condition as of the Commencement Date[15], Tenant may: (a) delay opening until Landlord satisfies the Opening Condition; or (b) open for business at the Premises. If Tenant opens for business before Landlord satisfies the Opening Condition, Tenant shall pay Substitute Rent until Landlord satisfies the Opening Condition. If the Opening Condition is not met within __ months after [the date that would have been the Commencement Date had there been no Opening Condition] (the "**Opening Co-Tenancy Election Date**"), then Tenant shall have the option to either: (x) terminate the Lease by giving Landlord notice (the "**Opening Co-Tenancy Termination Notice**") within 30 days after the Opening Co-Tenancy Election Date (such termination being Tenant's sole remedy)[16]; or (y) if Tenant has not opened for business, Tenant shall immediately open for business. If Tenant elects to give an Opening Co-Tenancy Termination Notice, then: (i) the parties shall have the same rights and obligations as if Tenant had given a valid Lease-Up Termination Notice; and (ii) Landlord shall, without duplication, reimburse Tenant's Unamortized Costs.

D. **Post-Opening Condition**. After the Opening Condition has been satisfied, if at any later time (and only for so long as) the Opening Condition is no longer satisfied, Tenant may: (a) pay Substitute Rent[17]; and (b) notify Landlord that Tenant may terminate the Lease if the Opening Condition remains unsatisfied for one year after Tenant's notice (a "**Termination Warning Notice**"). If Tenant gives a Termination Warning Notice and the Opening Condition is not satisfied within one year thereafter, then Tenant may give a "**Post-Opening Termination Notice**." A Post-Opening Termination Notice shall have the same consequences as an Opening Co-Tenancy Termination Notice. Notwithstanding anything to the contrary in this Section, if after Tenant issues a Termination Warning Notice, Landlord satisfies the Opening Condition within one year, then the Termination Warning Notice shall be null and void and of no further force or effect.

E. **No Other Co-Tenancy Terminations**. If Tenant does not (when entitled to do so) timely give a Lease-Up Termination Notice, an Opening Co-Tenancy Termination Notice, or a Post-Opening Termination Notice, Tenant shall have no other right to terminate the Lease based on absence of any Required Co-Tenants.

7. **Initial Improvements**. Subject to compliance with Laws, Tenant, at Tenant's cost, may install such fixtures and finishes and other initial tenant improvements in the Premises as Tenant deems necessary or desirable for the conduct of Tenant's business in the Premises (the "**Initial Improvements**"). Tenant shall submit the plans and specifications (the "**Plans**") for the

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[14] If this is new construction, Tenant may want to include this bracketed language as well as part of the "Opening Condition."

[15] This defined term will vary depending on the terms of LOI, but the Opening Condition should be tied to the date when Tenant is ready to open for business (and/or start paying rent).

[16] Tenants may sometimes agree to give a one-year termination warning notice, instead of terminating. Landlord would then have one year to satisfy the Opening Condition. In those cases, edit accordingly.

[17] Some landlords may require that tenant show a reduction in sales from the previous year as a result of the Opening Condition no longer being satisfied.

Initial Improvements to Landlord for Landlord's review and approval of the structural elements, such approval not to be unreasonably withheld or delayed. Landlord shall have a period of 14 days (the "**Review Period**") to review the Plans. Landlord shall not unreasonably withhold, condition or delay its approval of the Plans[18]. If Landlord shall not respond to such request for its approval within such 14- day period, then, Landlord shall be deemed to have approved the Plans as presented unless, on or before the last day of the Review Period, Landlord has delivered to Tenant a written description of the specific structural items in the Plans that are not acceptable and a description of the specific changes that must be made to the Plans to secure Landlord's approval. Tenant shall either (a) submit modified plans for approval; or (b) terminate this Lease if Landlord's requested revisions are not acceptable to Tenant in its sole discretion, in which event a Lease Termination shall have occurred and Landlord shall reimburse Tenant for its Costs. The review and approval process described above shall continue until such time as Landlord has approved the Plans in writing or until this Lease is terminated. Notwithstanding any other provision of this lease, in no event shall Tenant be liable for construction or utility charges or other chargebacks, including (without limitation) charges related to review of Tenant's Plans, architectural fees or similar items.

8. **Subsequent Improvements**. After the installation of the Initial Improvements, Tenant may make such interior non-structural alterations, improvements and additions to the Premises including, without limitation, changing color schemes, installing new countertops, flooring, wall-covering and modifying the layout of the tenant fixtures, as Tenant deems necessary or desirable without obtaining Landlord's consent. Notwithstanding the foregoing, Tenant shall not make any alterations, improvements, additions or repairs in, on, or about the Premises which affect the structure or the mechanical systems of the **[Building/Shopping Center**] without Landlord's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed[19]. Landlord shall be deemed to have approved any subsequent improvement proposed by Tenant unless Landlord disapproves of Tenant's proposal in writing within 14 days of receiving Tenant's proposal and request for consent.

9. **Signage**.

A. **Permitted Signage**. Tenant may install Signage in accordance with all Laws on: (a) all exterior walls abutting the Premises; and (b) all Project monument, pylon, or common signs, as indicated on the site plan attached to the Lease as **Exhibit __**. "**Signage**" includes all signs, designs, monuments, logos, banners, projected images, pennants, decals, advertisements, pictures, notices, lettering, numerals, graphics or decoration that Tenant determines to install or display, including Tenant's or its affiliates' standard national or regional signage requirements as in effect from time to time (the "**Signage Program**"). Landlord expressly approves Tenant's Signage shown on **Exhibit __**[20]. Provided that Tenant's Signage Program complies with Law and with Landlord's signage criteria for the Project ("**Signage Criteria**"), notwithstanding anything to the contrary in the Lease, neither (x) Tenant's Signage Program on Tenant's storefront,

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[18] Tenant may also want to add that Landlord's consent is also not required for Tenant's contractors or subcontractors. Confirm whether Tenant is obligated to use union contractors in the Building/Shopping Center- this may substantially increase Tenant's build out costs..

[19] Landlord will want sole consent over structural alterations.

[20] Recommend to Tenant to provide the drawings of its Signage while negotiating the Lease and have them approved prior to Lease execution.

façade and exterior, nor (y) the graphic content, color or graphic design of any signs on Tenant's storefront that show Tenant's trade name or logo, will require Landlord's approval. Landlord shall obtain approval from the [Village of _____] for Tenant's Signage shown on **Exhibit __** and all building elevations within 12 months after the Effective Date. Landlord's failure to do so shall give Tenant the right to terminate this Lease as provided under the Section of this Lease entitled "Permit Contingency". Tenant may from time to time, without Landlord's consent, replace any Signage. Landlord shall not vary or change the location, size or position of Tenant's signage, including but not limited to the position of Tenant's signage on any pylon or monument signs. **[OPTIONAL DEPENDING ON LOI: To the extent Landlord's consent is required, Tenant shall submit plans and specifications for its exterior Signage to Landlord for approval, not to be unreasonably withheld or delayed, prior to submitting the plans and specifications to the local authorities for permitting. Landlord shall be deemed to have consented to such proposed exterior Signage unless Landlord notifies Tenant in writing of its specific objections within 14 days of receiving such proposal.]** Landlord shall not allow any signage other than Tenant's to be erected on the exterior walls of the Premises or on the face of the Project or on the roof above the Premises.

B. **Pylon/Monument Signage**. To the extent that any other tenant installs or has installed any signage on any pylon or monument sign structure, Tenant shall have the right to install equally prominent signage of equal size.

C. **Coming Soon**. At any time after the parties sign the Lease, Tenant may install "Coming Soon" banners and signage in accordance with Law. If they conform to Tenant's Signage Program, then they do not require Landlord's approval.

D. **Directories**. All Project directories and way-finding or directional signage within the Project shall identify Tenant and the Premises at least as prominently as any other tenant.

E. **Interior Signage**. Tenant may, without Landlord's consent, affix window appliqués and signs, interior signs and other interior treatments consistent with Tenant's and its affiliates' other stores, provided they are professionally made[21] and comply with Law. In no event shall any other signage in the Project advertise any _____[22] (other than Tenant's).

F. **OPTIONAL: IF TENANT IS REQUIRED TO COMPLY WITH LANDLORD'S SIGNAGE CRITERIA**: If Landlord changes Landlord's Signage Criteria after Tenant executes this Lease (whether or not the changes are being required by a governing authority), then Landlord shall submit Landlord's new sign criteria ("**New Sign Criteria**") for Tenant's review and approval (in Tenant's sole and absolute discretion). Tenant shall approve or disapprove Landlord's New Sign Criteria or request modifications to Landlord's New Sign Criteria. Landlord shall reimburse Tenant for the actual cost for Tenant to remove the old signage and manufacture and install its new

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21 Some Tenant's may not want to professionally make interior signs unless they are visible from the exterior.

22 Here Tenant's counsel should insert Tenant's specific permitted use. If Tenant operates a movie theater, then no other movie theatre should be advertised in the Project.

signage ("**New Sign Costs**") to correspond with Landlord's New Sign Criteria. If Tenant does not approve Landlord's New Sign Criteria or if Landlord and Tenant fail to agree on acceptable revisions to Landlord's New Sign Criteria, Tenant may terminate this Lease by giving written Notice to Landlord. If Tenant does not terminate the Lease and Landlord has not paid Tenant its New Sign Costs within thirty (30) days after Tenant installs its new signage, then in addition to any other remedies Tenant has, Tenant may offset the unpaid amount against Minimum Rent and all other charges (at Tenant's discretion) until the New Sign Costs are fully offset.

10. Repair and Maintenance. Landlord, at Landlord's sole cost and expense, [with no direct or indirect contribution from Tenant][23], shall maintain, repair and make replacements to all elements of the Building[24] and the Center (including the Common Areas but excluding the Premises), in a clean, safe and first class manner and in compliance with all Laws, including, without limitation, to the structure, roof, roof membrane, foundation, interior and exterior of windows, mullions and electrical, mechanical systems (to points of connection within the Premises), egress stairs, sewer and water mains outside the Premises (to points of connection within the Premises), fire sprinklers, and fire alarm and exterior. Such repairs, replacements and maintenance shall include (without limitation) (a) the upkeep of all structural components of the Premises, the **[Building/Shopping Center]** and the Common Areas; (b) the maintenance and repair of all parking areas, sidewalks, landscaping and drainage systems on the Property and all utility systems (including mechanical, electrical, and HVAC systems) and plumbing systems which serve the **[Building/Shopping Center]** as a whole and not a particular tenant's premises; (c) removing all snow and ice from the Common Areas, including all parking areas, roads and sidewalks, and provide security service to the **[Building/Shopping Center]**; and (d) daily removal of trash and rubbish located in the Common Areas, as wells as washing of containers at intervals to maintain them in a reasonably clean condition.. Landlord may allocate the cost of such maintenance and repairs equitably among all tenants, if and to the extent provided in this Lease. **[Delete previous sentence if premises is in a single tenant building].** Tenant shall have no liability for structural or capital repairs as described above to the Premises or the Building except to the extent caused by Tenant's gross negligence or willful misconduct and not covered by insurance. Landlord shall not be required to maintain the interior surface of exterior walls, windows, doors or plate glass and store fronts within the Premises (except where maintenance of the same is caused by Landlord's negligence or failure to perform its obligations under this Section). Landlord shall make all repairs under this Section promptly after Landlord learns of the need for such repairs but in any event within 30 days after Tenant notifies Landlord of the need for such repairs. If Landlord fails to make such repairs within 30 days after Tenant's written notice to Landlord (except when the repairs require more than 30 days for performance and Landlord commences the repair within 30 days and diligently pursues the repair to completion), Tenant may, at its option, undertake such repairs and deduct the cost thereof from the installments of Minimum Rent next falling due. Notwithstanding the foregoing, in the event of an emergency, Tenant may give Landlord such shorter notice as is practicable under the circumstances, and if Landlord fails to make such repairs immediately after being notified by Tenant, Tenant may immediately undertake such repairs and deduct the cost thereof from the installments of Minimum Rent and all other charges next falling due. Notwithstanding any provision of this Lease to the contrary, any leaks or damage to any water or sanitary drain line located in the plenum of the Premises shall be deemed an emergency which Tenant shall have the right to repair without notifying Landlord, and Tenant shall be reimbursed by Landlord in

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[23] Insert this language if Tenant is not paying any common area maintenance contribution.

[24] Note that if this is ground lease, this would be Tenant's responsibility.

accordance with the provisions of this Section. In addition, Landlord shall be responsible for the following: (i) any repair or improvement to the Premises necessitated by the negligence or willful misconduct of Landlord, its agents, employees or servants or caused by Landlord's failure to perform its obligations hereunder; or (ii) any seismic or structural upgrades, repairs, improvements or alterations to the Premises or the **[Building/Shopping Center]** (collectively, "**Structural Repairs**"); provided that Tenant, at its cost and expense, shall be responsible for the making of Structural Repairs relating to or resulting from alterations on additions made by Tenant.

11. Compliance with Laws.. A. During the Term, except with respect to Landlord's Work, Tenant, at its expense, shall comply promptly with all Laws pertaining to (a) the physical condition of any improvements constructed by Tenant in the Premises; and/or (b) Tenant's specific business operations in the Premises; provided, however, that, Tenant shall not be required to make any Structural Repairs in order to comply with the Laws unless the necessity for the making of such compliance is attributable to (i) the specific manner in which Tenant uses and occupies the Premises[25]; (ii) the negligence or wrongful acts of Tenant, its employees, agents, contractors, customers or other occupants of the Premises, or (iii) if such required Structural Repairs relate to or are attributable to any installations or alterations made by Tenant. Unless same are the responsibility of Tenant pursuant to the preceding sentence, Landlord, at its sole cost and expense, shall comply with all other Laws affecting the Premises, areas adjacent to the Premises, the Common Areas, the **[Building/Shopping Center]** and/or the Property including, without limitation, all ADA requirements. The foregoing or anything else in this Lease to the contrary notwithstanding, Tenant may, at its sole cost and expense, contest the validity or applicability of any present or future Laws. So long as Tenant diligently pursues the contest, compliance with such Laws may be deferred, during the pendency of such contest, provided that (i) Landlord shall not be subject to any criminal proceeding, or any fine, penalty, loss or damage (unless Tenant agrees to indemnify and defend Landlord from and against any such fine, penalty, loss or damage) and (ii) the certificate of occupancy for the **[Building/Shopping Center**] shall not be suspended or threatened to be suspended, by reason of non-compliance or by reason of such contest. Landlord will, at the request of Tenant, cooperate in such contest, provided that Landlord is not required to incur any expense in connection with any such contest.

B. If the existence of any violation of any Legal Requirement affecting the Premises, the Building, or the Property for which Landlord is responsible pursuant to this Lease prevents or delays Tenant in obtaining a building permit or any required certificates, approval or sign-offs from any governmental authorities that are required to be obtained by Tenant pursuant to applicable Laws, in connection with the Initial Improvements and any other alterations, installations or improvements, Tenant shall be entitled to an additional abatement of all Rent on a per diem basis, equal to the number of days of such delay.

12. Minimize Interference. Landlord shall minimize interference with: (i) access to or visibility of the Premises from the Common Areas, (ii) Tenant's conducting of its business in the Premises, and (iii) visibility of Tenant's signage or storefront. If Landlord's activities in the Common Areas interfere with Tenant's business or access to the Premises to the extent Tenant reasonably determines that it cannot feasibly operate its business in the Premises for three

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[25] If the lease is for a stand-alone building, Tenant may be responsible for additional legal compliance and may not make the "use" vs. "manner of use" argument. If that is the case, attempt to limit any repair or replacement costs in the last 2 years of the term to no more than $20,000.

consecutive days[26], then Tenant's sole and exclusive remedy shall be an abatement of all monthly Rent during the period commencing on the expiration of such three day period and ending on the date Tenant reasonably determines it can feasibly resume conducting its business in the Premises. If such interference continues for 3 months, Tenant shall have the right to elect that a Lease Termination has occurred by written notice at any time thereafter and Landlord shall reimburse Tenants for the Unamortized Costs. If Tenant is prevented or materially and adversely restricted from using Common Areas, Tenant shall notify Landlord. Landlord will promptly begin (to the extent reasonably practicable) and diligently continue to endeavor to restore Tenant's ability to use the Common Areas.

13. **Protected Areas**. **Exhibit__** identifies certain "**Protected Areas**" outside the Premises. Any change to or reconfiguration of a Protected Area shall require Tenant's prior written consent, which may be withheld in Tenant's sole[27] discretion. Notwithstanding anything to the contrary in the Lease, at all times in the Term, Landlord shall not cause or permit: (i) any change to any Protected Area that impairs access to or visibility of the Premises or Tenant's Signage, or ability of Tenant's customers to queue or congregate while waiting for film showings; (ii) place anything in any Protected Area that would in any way diminish or interfere with access to the Premises, unless caused by casualty, condemnation or Laws; (iii) construct or place, or allow others to construct or place, any kiosk, pushcart or retail merchandise cart (RMU), planting, seating, sculpture, artwork, easel, directory, escalator or other amenity or object of any kind, whether temporary or permanent, in the Protected Area; (iv) place any signage or advertising in the Protected Area, except Tenant's; or (v) sell or distribute, or permit sale or distribution, of any _____[28] within ___ feet from the main entrance of the Premises. If Landlord violates this paragraph in any manner and does not remedy that violation within three days after notice from Tenant (except that no such notice shall apply if Tenant previously gave such a notice for substantially the same violation in the preceding 90 days), then so long as Landlord has not cured its violation: (a) Tenant shall be entitled to remove any violating items at Landlord's sole cost and expense; or (b) Tenant shall be entitled an abatement of all Rent until the violation is cured.

14. **Operating Hours/Access** Tenant shall have access to the Premises, and related Common Areas, through all retail entrance(s) and the right to operate its business 24 hours a day, seven days a week, at no additional cost, to the extent Law allows. Tenant may operate beyond Project standard hours at no additional cost to Tenant . Landlord shall keep the Common Areas or portions thereof, as reasonably necessary, open, lighted, heated and/or cooled for as long after such standard hours as Tenant requests at no additional cost to Tenant. [[29]:Subject to Permitted

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[26] Most Landlords will require that Tenant actually stop working in the Premises in order to get the rent abatement, but Tenant should push back to get some rent abatement if its signage or visibility is blocked or if 50% of more of the Premises is unusable.

[27] Landlords will want Tenant to be reasonable here. But the whole point of a "Protected Area" is that it is to be protected and not changed, unless a change is required by law.

[28] Tenant will want to prevent the sale of any items that are Tenant's primary business within a certain number of feet from the entrance of the Premises.

[29] Anchor tenants should not be obligated to comply with an operating covenant, or a "required hours of operation" clause or an obligation to continuously operate. In fact, many anchor tenants will agree that it only has to open for one day at the commencement of the lease term. However, if the tenant agrees to an operating covenant, it should be conditioned on 90% of the remaining gross leasable area being open for business and should allow tenant the right to certain permitted closures.

Closures (as hereinafter defined), Tenant shall continuously use, occupy the whole of the Premises for the Permitted Use for a minimum of ___ hours per week in the aggregate; provided that at provided, that at least ninety percent (90%) of the retail tenants in the [**Building/Shopping Center**] are open and operating during Tenant's normal operating hours. For purposes hereof, Tenant shall have the right to close the Premises (each, a "**Permitted Closure**") as follows: (i) for not more than five (5) days on two (2) occasions a year for purposes of taking inventory; (ii) for purposes of performing repairs, cleaning or decorating of the Premises; (iii) for purposes of remodeling or refurbishment, not more frequently than one (1) occasion during any Lease Year, with each closure, not to exceed ninety days and only after not less than ten (10) days' prior written notice to Landlord; (iv) following a casualty which results in damage to or destruction of the Premises; (v) after an event of condemnation; (vi) because of Force Majeure; (vii) as a result of any acts or omissions of Landlord, its employees, agents or contractors; (viii) as a result of any environmental condition, or (ix) any other permitted cessation due to any other express provision of this Lease.[30]]

15. **Parking**: Landlord shall provide, at no additional cost to Tenant,[31] areas as designated on **Exhibit __** ("**Tenant Parking Area**") where Tenant and its concessionaires, officers, employees[32], contractors, agents, customers and invitees may park their vehicles. The Tenant Parking Area shall comply with applicable Law [and Landlord shall apply for and obtain all variances in connection therewith]. Landlord shall not vary or permit to be varied the existing means of ingress and egress to the **[Building/Shopping Center]** and the Property. [Landlord shall not modify, change or move Tenant Parking Area.] [No modifications made to Tenant Parking Area shall reduce the number of parking spaces below the number of parking spaces Law requires or realign the parking spaces in the Tenant Parking Area in a manner that makes them substantially less accessible to the Premises. If Landlord eliminates more than __% of the Tenant Parking Area, Landlord shall add a number of parking spaces equal to the amount of eliminated parking spaces in an area comparable to the Tenant Parking Area to serve as a reasonable replacement.][33]

16. **Roof Equipment and Generator**. Tenant may, at no additional cost to Tenant, plan, design, construct, install, repair, replace, upgrade, supervise and maintain upon the roof and/or exterior of the Building or elsewhere at the Project (and connect to the Premises): (a) any air-conditioning and electrical equipment, alarm bells and equipment, antennas, satellite dishes, other communications devices and similar facilities (including connections, cables, wiring and conduits, "**Tenant's Equipment**"), in areas shown on **Exhibit __**; and (b) Tenant's own dedicated emergency generator ("**Tenant's Generator**") (including so-called "automatic transfer switch (ATS) or multiple ATS's" and all other associated emergency power elements), and fuel tank ("**Tenant's Fuel Tank**") in areas shown on **Exhibit __**. Tenant shall have all necessary keys and access codes so that Tenant may access Tenant's Equipment, Tenant's Generator and Tenant's Fuel Tank (the "**Off-Premises Installations**") at all times without needing to notify,

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30 Note that some Landlords will try to have a separate default and maybe even a penalty for Tenant's failure to continuously operate. The answer is that Landlord has its remedies for a non-monetary default and there does not need to be a separate one inserted here.

31 If a parking fee exists, require Tenant to receive the lowest rate offered to any other tenant's patrons. Define the current fee and try to limit increases.

32 Some leases will provide for off-site parking for tenant employees. This depends on the shopping center.

33 Use if Landlord insists on right to change/eliminate parking spaces.

obtain access through or be accompanied by Landlord or Landlord's agents or employees. Off-Premises Installations shall: (i) comply with applicable Laws; (ii) comply with insurance requirements under the Lease; and (iii) once installed, unless removed by Tenant, be maintained by Tenant at Tenant's cost and expense. If Tenant removes any Off-Premises Installation, then notwithstanding anything to the contrary in the Lease, Tenant shall repair any resulting damage to the Building.

17. **Utilities**. Landlord shall provide, at Landlord's expense, connection points within the Premises to all utilities and separate meters for utilities serving the Premises, if not already installed.[34] Landlord shall pay all utility connection fees (including without limitation all water and sewer connection fees), traffic impact fees and any other extraordinary fees that are associated with the construction of Tenant's Initial Improvements or use of the Premises or Landlord's Work as set forth in Exhibit __. Tenant shall pay for: (a) connection of utilities to connection points provided by Landlord; and (b) Tenant's usage of utilities, directly to each Utility Company[35], with no administrative fee, premium, add-on, meter reading fee, or surcharge of any kind to Landlord. Tenant shall have the right to sufficient utilities and ventilation to support its intended use of the Premises. Without limiting the foregoing, Landlord either (a) represents and warrants that the **[Building/Shopping Center]** has sufficient electrical capacity to allow Tenant to draw ___ amps of service to the Premises without adverse impact on other occupants or the need for an upgrade in utility service; or (b) covenants to upgrade the electrical capacity of the Building prior to the Commencement Date, at Landlord's sole cost and expense, to allow Tenant to draw ___ amps of service to the Premises without adverse impact on other occupants.

18. **Cleaning**. Tenant may, at Tenant's cost, arrange and pay for janitorial service to clean the Premises, using a janitorial service contractor of Tenant's choice.

19. **Trash Removal**. **[IF TENANT IS TO PROVIDE THEIR OWN CONTAINERS, USE THE FOLLOWING:]** Tenant shall arrange for its trash and recycling services and shall pay any costs directly to the company providing such service. Landlord shall provide Tenant with a lawful location on the Property (as shown on **Exhibit __**) to store a trash container and a recycling container adequate for Tenant's needs. Such storage location shall be (a) exclusively for Tenant's use, (b) at least _____ feet long and _____ feet wide, (c) enclosed if required by code or by the terms of Exhibit __[36] and (d) convenient to the Premises.

[IF THE LANDLORD WILL BE PROVIDING CONTAINERS, USE THE FOLLOWING:] Landlord shall arrange with a waste management company to provide adequate trash and recycling services to the tenants of the **[Building/Shopping Center]**. If

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[34] The Lease requirements on Landlord's Work should also address utilities. Their installation should be a condition to occurrence of the Commencement Date.

[35] If utilities are submetered, Tenant may require Landlord to change to direct metering, if possible. If not, any access by Landlord to read the submeter should be subject to the other "Access" provisions in the Rider, and Landlord may not charge Tenant a rate for any utility in excess of the lesser of the rate Landlord pays the supplier of the service or the rate at which Tenant could purchase the services directly through an available supplier, nor may Landlord charge Tenant any administrative fee or charge for reading the meters.

[36] This refers to the Landlords Work exhibit. Tenant may require that Landlord enclose the storage location.

Tenant is required to share trash removal or recycling containers with other tenants, such shared containers shall be adequately sized and serviced to handle Tenant's trash and recycling requirements. Landlord shall pay the costs of such trash removal and recycling services (including usage of such containers) directly to the company providing such service[37].

20. Assignment and Subletting.

A. Assignment and Subletting. Tenant shall not assign this Lease sublet the whole or any portion of the Premises, or permit any third party to use, or occupy any portion thereof without the written consent of Landlord, which consent shall not be unreasonably withheld, conditioned, or delayed. If Landlord's consent is required for an assignment or sublease, then Landlord's consent shall be deemed to have been given unless Landlord notifies Tenant in writing of the reasons for Landlord's disapproval within fourteen (14) days of receipt of the request. For the purpose of this Lease, any sale or transfer of Tenant's capital stock, redemption or issuance of additional stock of any class shall not be deemed an assignment, subletting or any other transfer of this Lease or the Premises[38]. Notwithstanding anything to the contrary contained in the Lease, Landlord shall not have any right to recapture the premises.

B. Permitted Transfers. Tenant may, without Landlord's consent and without sharing profits with Landlord, assign the Lease or sublease all or part of the Premises (a "**Permitted Transfer**") to [**if there is any restriction on tradename elsewhere in this Lease, add here: "without restriction as to tradename"]**: (i) an entity directly or indirectly controlled by or under common control with Tenant (a "**Tenant Affiliate**") (the term "**control**" means (a) ownership of 50% or more of all voting stock of a corporation or 50% or more of all legal and equitable interest in any other business entity; or (b) the ability to direct the major business decisions of such entity without prior approval of Tenant's shareholders, partners or other equity holders); (ii)) a successor entity related to Tenant by merger, consolidation, reorganization or government action; or (iii) a transferee having operating experience and reputation at least similar to Tenant's in _____, [with a net worth equal to or greater than Tenant's at the time of the transfer (an "**Equivalent Operator**"). Transferees under clause (i), (ii) or (iii) are "**Permitted Transferees**." If Tenant assigns the Lease to a Permitted Transferee that, with its guarantor, has a net worth of at least [$10,000,000], Landlord shall release the former Tenant [and Guarantor] from all obligations and liability under the Lease.

C. Assignment or Sublease Profit. [Landlord shall not be entitled to any consideration in connection with any assignment or sublet.[39]] OR [If Tenant assigns, sublets or transfers (a "**Transfer**") the Lease and that Transfer is not a Permitted Transfer, then Tenant shall pay Landlord, as Additional Rent, 50% of any Assignment Profit or Sublease Profit:

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[37] If Tenant is required to pay its pro rata share of trash removal, then it should be at a commercially competitive rate and no administrative charges added on.

[38] In no event should Tenant agree to any increase in rent or security upon transfer.

[39] Most anchor or major tenants will not agree to split profits. In any event, there should be no profit splitting in connection with a Permitted Transfer nor if the lease is a ground lease.

1) Sublease Profit. "**Sublease Profit**" means in any year of the term of the Lease ("**Lease Year**"): (a) any rents, additional charges or other consideration payable under the sublease to Tenant by the subtenant that exceeds all Minimum Rent, Percentage Rent and Additional Rent, accruing in that Lease Year for the subleased space (at the rate per square foot payable by Tenant under the Lease) under the Lease; and (b) all sums paid for the sale or rental of Tenant's fixtures, leasehold improvements, equipment, furniture or other personal property, less, in the case of a sale, the then net unamortized or undepreciated portion (based on Tenant's federal income tax returns[40]) of the amount, if any, by which the original cost thereof exceeded any amounts paid for or contributed by Landlord that the Lease required Tenant to apply against that cost), which net unamortized amount shall be deducted from the sums paid in connection with such sale in equal monthly installments over the balance of the term of the sublease (each such monthly deduction to equal the quotient of the net unamortized amount, divided by the number of months remaining in the term of the Lease); after deducting Tenant's Costs.

2) Assignment Profit. "**Assignment Profit**" means an amount equal to all sums and other consideration paid to Tenant by the assignee for or by reason of the assignment (including sums paid for sale or rental of Tenant's fixtures, leasehold improvements, equipment, furniture, furnishings or other personal property, less, in the case of a sale, the then net unamortized or undepreciated portion (based on Tenant's federal income tax returns) of the amount, if any, by which original cost exceeded any amounts paid for or contributed by Landlord that the Lease required Tenant to apply against that cost), after deducting Tenant's Costs.

3) Tenant's Costs. Tenant's Costs shall be deducted from the first available amounts paid to Landlord under this Section, until fully recovered, before Tenant shall be deemed to have recovered any Assignment Profit or Sublease Profit. '**Tenant's Costs**" means reasonable expenses Tenant actually incurred for the assignment or subletting in question for transfer taxes, brokerage commissions, advertising and marketing expenses, attorneys' fees, any commercially reasonable rent credit or concession or work allowance and any alterations Tenant performs, based on bills, receipts or other evidence of such costs reasonably satisfactory to Landlord.]

D. **Other Transactions**. Notwithstanding anything to the contrary in the Lease, Tenant may, at any time, grant licenses or subleases of departments or concessions for sale of merchandise and services, without Landlord's consent or profit participation.

21. Leasehold Mortgages.

A. Notwithstanding anything in the Lease to the contrary, Tenant may, without Landlord's consent, mortgage Tenant's interest in the Lease, Tenant's interest in the Building and improvements on the Premises, or any part thereof or property therein, and any sublease, under one or more leasehold mortgage(s) and to assign the Lease and any sublease as collateral security for such mortgages, upon the condition that all rights acquired under such mortgages shall be subject to each and all of the covenants,

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40 Consider whether to use some other measure as opposed to Tenant's tax returns. If Tenant uses accelerated depreciation, unamortized cost may be quite low. The same issue arises in Assignment Profit.

conditions and restrictions in the Lease, and to all rights and interests of Landlord, none of which covenants, conditions or restrictions is or shall be waived by Landlord by reason of the right given to so mortgage such interest in the Lease, except as this Rider expressly states.

B. If Tenant mortgages its leasehold, and if the holder(s) of any such mortgage(s) give Landlord a true copy thereof, with written notice specifying the name and address of the mortgagee(s) and (if available at the time) the pertinent recording data for such mortgage(s), Landlord agrees that so long as any such leasehold mortgage(s) shall remain unsatisfied, these provisions shall apply:

1) There shall be no cancellation, surrender or modification of the Lease by joint action of Landlord and Tenant without prior written consent of all leasehold mortgagee(s).

2) Landlord shall, upon serving Tenant with any notice of default, simultaneously serve a copy of that notice upon the leasehold mortgagee(s). The leasehold mortgagee(s) shall thereupon have the same period, after service of such notice upon it, as is allowed to Tenant, plus 30 days (plus such further or additional time as the leasehold mortgagee(s) reasonably require for a nonmonetary default), to remedy or cause to be remedied the defaults complained of, and Landlord shall accept such performance by or at the instigation of the leasehold mortgagee(s) in response to any such notice of default as if the same had been performed by Tenant.

3) Notwithstanding anything in the Lease to the contrary, while such leasehold mortgage(s) remains unsatisfied, or until written notice of satisfaction is given by the holder(s) thereof to Landlord or such leasehold mortgage is terminated of record, if any default shall occur, that, pursuant to any provision of the Lease, entitles Landlord to terminate the Lease, and if before the expiration of 30 days from the date of service of notice of termination upon such leasehold mortgagee(s), such leasehold mortgagee(s) notify Landlord of its desire to nullify such notice and pay Landlord all Rent and other payments herein provided for and then in default, and comply or commence the work of complying with all other requirements of the Lease, if any are then in default, and prosecute the same to completion with reasonable diligence, then in such event Landlord shall not be entitled to terminate the Lease as a result of such default and any notice of termination theretofore given as a result of such default shall be void and of no effect.

4) Landlord agrees that the name of the leasehold mortgagee(s) may be added to the "Loss Payable Endorsement" of any and all insurance policies the Lease requires Tenant to carry, on condition that the insurance proceeds are applied as the Lease specifies, and the leasehold mortgage(s) or collateral documents shall so provide.

5) Landlord agrees that in the event of termination of the Lease by reason of any default by Tenant or any other cause, or if Tenant rejects the Lease in bankruptcy or similar proceedings, Landlord shall enter into a new Lease of the Premises with the leasehold mortgagee(s) or its nominee(s) or assignee(s) for the remainder of the term of the Lease effective as of the date of such termination, at the Rent and upon the same terms, provisions, covenants and agreements as contained in the Lease and subject only to the same conditions of title as the Lease is subject to on the date of its execution and

any exceptions to title created by or at the behest or with the consent of Tenant, and to the rights, if any, of the parties then in possession of any part of the Premises, provided:

a) said leasehold mortgagee(s) or its nominee(s) or assignee(s) makes written request upon Landlord for such new lease within 30 days after the date of such termination and such written request is accompanied by payment to Landlord of all sums due to Landlord under the Lease;

b) said leasehold mortgagee(s) or its nominee(s) or assignee(s) pays to Landlord at the time of the execution and delivery of such new lease, any and all sums that would at the time of the execution and delivery thereof be due pursuant to the Lease but for such termination, and in addition thereto, any expenses, including reasonable attorneys' fees, Landlord incurred by reason of that default;

c) said mortgagee(s) or its nominee(s) or assignee(s) shall perform and observe all covenants herein contained on Tenant's part to be performed and shall further remedy any other condition which Tenant under the terminated Lease was obligated to perform under the terms of the Lease; and upon execution and delivery of such new lease, any subleases which may have theretofore been assigned and transferred by Tenant to Landlord, as security under the Lease, shall thereupon be deemed to be held by Landlord as security for the performance of all of the obligations of the tenant under the new lease;

d) Landlord shall not warrant possession of the Premises to the tenant under the new lease;

e) such new lease shall be expressly made subject to the rights, if any, of Tenant under the terminated lease;

f) the tenant under such new lease shall have the right, title and interest in and to the buildings and improvements on the Premises as Tenant had under the terminated lease; and

g) said leasehold mortgagee(s) or its nominee(s) or assignee(s) shall bear the cost of recording such new lease or short form thereof if it or Landlord desires recordation thereof.

6) Nothing in the Lease requires any leasehold mortgagee(s) or its nominee(s) or assignee(s) to cure any default of Tenant under the Lease unless such leasehold mortgagee chooses to do so under subparagraph (2) above or chooses to nullify any notice of termination from Landlord under subparagraph (3), or if such leasehold mortgagee(s) elects that Landlord enter into a new lease for the Premises under subparagraph (5) above.

7) The proceeds from any insurance policies relating to the Premises or arising from a condemnation of the Premises are to be held by any leasehold mortgagee(s) and distributed in accordance with the Lease.

8) Landlord shall, on request, execute, acknowledge and deliver to each leasehold mortgagee, an agreement prepared at the sole cost and expense of Tenant, in form reasonably satisfactory to such leasehold mortgagee(s) and Landlord, among

Landlord, Tenant and leasehold mortgagee(s), confirming all provisions of the Lease on leasehold mortgagees. The term "mortgage," when used in this Section, includes whatever security instruments are used in the locale of the Premises, such as, without limitation, mortgages, deeds of trust, security deeds and conditional deeds, as well as financing statements, security agreements and other Uniform Commercial Code documents, and also any documents for a sale and leaseback (or an assignment of lease and sublease) transaction.

22. **Subordination and Nondisturbance**. It shall be a condition to subordination of the Lease to any mortgage or lease affecting the **[Building/Shopping Center]** that Landlord obtain on behalf of Tenant (subject to the qualifications in this Section) from any mortgagee or lessor, a subordination, nondisturbance and attornment agreement (an "**SNDA**"); provided that, in the case of any SNDA, it is reasonably acceptable to Tenant and states that Tenant's use or possession of the Premises shall not be disturbed, nor shall its obligations be enlarged or its rights be abridged hereunder by reason of any mortgage or lease affecting the **[Building/Shopping Center**]. Landlord shall pay the fees associated with obtaining an SNDA for Tenant, except that Tenant shall pay to Landlord all reasonable costs of the mortgagee's or lessor's counsel to negotiate the SNDA if Tenant desires changes from such party's standard form. Those fees, to the extent not paid directly by Tenant to the mortgagee or lessor before issuance of the SNDA, shall be paid by Tenant to Landlord, as Additional Rent under the Lease, within 30 days after Tenant's receipt of an invoice therefor, in which case Landlord shall, at its election, either prepay (subject to reimbursement by Tenant if not previously paid to Landlord by Tenant) or forward the amount so paid to the party to whom it is due and owing (with Landlord's contribution thereto, as provided herein if not previously paid by Landlord). The Lease shall be conditioned upon receipt of an SNDA from Landlord's existing mortgagee and ground lessor, if any[41].

23. **FF&E Liens**. If at any time or from time to time Tenant desires to enter into or grant any security interest, financing lease, personal property lien, conditional sales agreement, chattel mortgage, security agreement, title retention arrangement or similar arrangement (including any related financing statement) for Tenant's acquisition or leasing of any FF&E (hereinafter defined) used in the Premises that is leased, purchased under conditional sale or installment sale arrangements, encumbered by a security interest, or used under a license (a "**FF&E Lien**") that otherwise complies with this Lease, then on Tenant's request Landlord shall enter into a Lien Subordination Agreement in a form reasonably acceptable to Landlord and the holder of any FF&E Lien for that FF&E that is subject to an FF&E Lien (such FF&E, "**Financed FF&E**"). If Tenant enters into any FF&E Lien, then Tenant shall: (i) not file (or cause or permit to be filed) that FF&E Lien as a lien against the Premises or any part of the Premises (except the Financed FF&E). "**FF&E**" means all movable furniture, furnishings, equipment, and Tenant's personal property that may be removed without material damage to the Premises and includes items such as factory equipment, furniture, movable equipment, movable telephone and telecommunications equipment, point of sale equipment, televisions, radios, network racks, and computer systems and peripherals.

24. **Environmental Liability**.

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[41] Sometimes Landlords will need a period of time after lease signing to obtain the SNDA, which is acceptable, provided that, Tenant has the right to terminate if the SNDA is not obtained within x days after lease signing and get reimbursed for its Costs.

A. **Environmental Law**. The term "***Environmental Law***" means all present and future federal, state and local laws, statutes, rules, ordinances and regulations relating to pollution or protecting human health or the environment including, without limitation, laws, statues, rules, ordinances and regulations relating to emissions, discharges, releases of hazardous substances, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Hazardous Substances including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq.; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 et seq.; the Toxic Substance Control Act, 15 U.S.C. §§ 2601 et seq.; the Water Pollution Control Act (also known as the Clean Water Act), 33 U.S.C. § 1251 et seq.; the Clean Air Act, 42 U.S.C. § 7401 et seq.; and the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 et seq.; the Safe Drinking Water Act, 21 U.S.C. § 349; 42 U.S.C. § 201 and § 300 et seq.; the National Environmental Policy Act of 1969, 42 U.S.C. § 4321; the Superfund Amendment and Reauthorization Act of 1986, codified in scattered Sections of 10 U.S.C., 29 U.S.C., 33 U.S.C. and 42 U.S.C.; and Title III of the Superfund Amendment and Reauthorization Action, 40 U.S.C. § 1101 et seq., as the same may be hereafter amended or modified.

B. **Hazardous Materials**. The term "***Hazardous Material***" means any substance which is (a) included within the definition of "hazardous substances", "hazardous materials", "toxic substances", or "solid waste" in or pursuant to any Environmental Law or subject to regulation under any Environmental Law; (b) listed in the United States Department of Transportation Optional Hazardous Materials Table, 49 C.F.R. Section 172.101 enacted as of the date hereof or hereafter amended, or the United States Environmental Protection Agency List of Hazardous Substances and Reportable Quantities, 40 C.F.R. Part 301 enacted as of the date hereof or as hereinafter amended; or (c) a flammable substance, explosive, radioactive, asbestos, asbestos-containing material, polychlorinated biphenyl, chemical known to cause cancer or reproductive toxicity, pollutant, contaminant, hazardous waste, medical waste, toxic substance or related material, explosive, oil or petroleum product.

C. **Landlord's Environmental Covenants**. Landlord represents and covenants to Tenant that: (a) the Premises and the **[Building/Shopping Center]** comply with Environmental Law; (b) to Landlord's actual knowledge, the Premises and the Project contain no Hazardous Materials no Hazardous Materials have been released, discharged or disposed of on, under or about the Premises, the **[Building/Shopping Center]** or the Property (or off-site of the Property which might affect the Premises, the **[Building/Shopping Center]** or the Property) by any entity or person, or from any source whatsoever; (c) Landlord's Work: (i) does not and shall not contain Hazardous Materials; and (ii) shall comply with Environmental Law; (d) there are no underground storage tanks on the Premises, the **[Building/Shopping Center]** or the Property; and (e) no underground storage tanks have been removed from the Premises, the **[Building/Shopping Center]** or the Property. Without limiting the foregoing, Landlord represents that the following constitutes all information in Landlord's possession or control concerning any release of Hazardous Substances on, under or about the Premises, the **[Building/Shopping Center]** or the Property (or off-site of the Premises that might affect the Premises, or off-site of the Property that might affect the Premises or the **[Building/Shopping Center]**) including, without limitation, sampling data, environmental studies or reports, environmental site assessments, building surveys, and historical use reviews (collectively, "***Environmental Reports***."), all of which have been provided to Tenant: **[PLEASE PROVIDE ENVIRONMENTAL REPORTS FOR THE PROPERTY AS SOON AS POSSIBLE]**

D. **Removal**. Landlord, at Landlord's sole cost and expense, shall remove, abate, encapsulate or remediate any Hazardous Materials or threatened Release or disposal of a Hazardous Material existing on the Premises or the Project as of the Commencement Date. If any Hazardous Materials are discovered in the Premises during Tenant's inspection of the Premises, construction of its Initial Improvements or any subsequent tenant improvements or at any other time during the Term, then Landlord shall promptly remove or encapsulate the same, at Landlord's sole cost and expense, and if the foregoing delays the construction or installation of Tenant's Initial Improvements then the Rent Commencement Date shall be extended for one (1) day for each day of delay. Landlord indemnifies and saves Tenant harmless from all claims, liens, losses, damages and expenses, including without limitation reasonable attorneys' fees and expenses, arising out of: (x) Landlord's breach of this paragraph; or (y) any Hazardous Materials existing now or discovered later in or on the Premises or the Project, unless Tenant brought them to the Premises or the Project. If it is determined that there are Hazardous Materials on, upon or within the Premises and/or the Project that violate any Environmental Laws or result in action by either local, state or federal environmental agencies, then, Landlord, at Landlord's expense, shall promptly and diligently, to the extent required by any Laws, including (without limitation) any Environmental Laws, and in compliance with such Laws, remove, abate, encapsulate or remediate such Hazardous Materials. Landlord shall use its best efforts to minimize direct and indirect impact on Tenant, including its operations in the Premises and effective use of the Common Areas, if any, during all activities related to remediation. If in Tenant's reasonable opinion such violation and/or action materially impairs Tenant's ability to conduct business upon the Premises and Tenant ceases to operate from the Premises as a direct result, all Rent and charges payable by Tenant under the Lease shall abate during such period as long as Tenant's ability to so operate is materially impaired and Tenant is not so operating. If such condition continues for in excess of 6 months, Tenant shall have the right to elect that a Lease Termination shall occur by notice at any time when that condition continues to materially impair Tenant's ability to conduct business upon the Premises and Tenant in fact ceases operations from the Premises as a direct result.

E. **Tenant's Use Of Any Hazardous Substance**. Notwithstanding the foregoing, Tenant may use cleaning solutions and other substances that are customarily used in Tenant's business. Tenant will manage such use in accordance with the Environmental Laws.

F. **Notices**. Landlord and Tenant shall give prompt written Notice to the other of: (a) any proceeding or inquiry by any governmental authority with respect to the presence of any Hazardous Material on the Premises or the **[Building/Shopping Center]** (or off-site of the Premises that might affect the Premises) or related to any loss or injury that might result from any Hazardous Material; (b) all claims made or threatened by any third party against Landlord or the Premises, the **[Building/Shopping Center]** or the Property relating to any loss or injury resulting from any Hazardous Material; and (c) the discovery of any occurrence or condition on the Premises, the **[Building/Shopping Center]** or the Property (or off-site of the Premises that might affect the Premises) that could cause the Premises or the Common Areas, if any, or any part of either, to be subject to any restriction on occupancy or use of the Premises under any Environmental Law.

G. **Survival**. The provisions under this Section shall survive the expiration or earlier termination of the Lease.

25. **End of Term**. On expiration or earlier termination of the Lease, Tenant shall: (a) have the right, but not the obligation, to remove any of its alterations, improvements, fixtures,

floor coverings, personal property or equipment installed during the term of the Lease; (b) have no obligation to repair any damage caused by that removal; and (c) have no obligation to restore or repair the Premises or the Building in any way.

26. **Holding Over**. This Lease and the tenancy created by this Lease shall expire and terminate at the expiration of the Term, without the necessity of any additional notice from Landlord to Tenant or from Tenant to Landlord. If Tenant remains in possession of the Premises after the expiration of the Term without the written consent of Landlord, the Term will not be extended and Tenant will be occupying the Premises under a tenancy at will, under all the terms, covenants and conditions of this Lease, except that Rent for the holdover period will be calculated on a per diem basis, at a rate equal to (x) for the first two months of holdover, one hundred twenty-five percent (125%[42]), and (y) thereafter, one hundred fifty percent (150%); and (z) thereafter, two hundred percent (200%), of the Minimum Rent due for the last month of the Term, and shall be due and payable to Landlord on the first (1st) of each month, as during the Term. All other charges shall be at the rate payable during the last month of the Term. This holdover arrangement shall continue until such tenancy is terminated by Landlord or Tenant giving the other at least thirty (30) days' prior written notice of its intention to do so. This provision shall not be interpreted to give Tenant any right to continue occupancy following the expiration or earlier termination of this Lease, except with the prior written consent of Landlord.

27. **Permit Contingency**. Tenant's obligations under this Lease are conditioned on Tenant's obtaining[43], within the later of_____ (_____) days of the mutual execution and delivery of this Lease [or one hundred twenty (120) days after the date Landlord delivers to Tenant final plans for the **[Building/Shopping Center]** in an industry standard electronic or digital format that have been approved by all applicable governmental entities][44], any permits and/or licenses (including but not limited to conditional use permits, building permits, variances and other governmental approvals) (collectively, "**Government Approvals**") that are required by applicable laws to enable Tenant legally (a) to construct Tenant's improvements to the Premises in accordance with the Plans; (b) to install Tenant's signage on the Premises; and (c) to conduct its business from the Premises. Each Government Approval shall not be subject to any ban, bar, memorandum or unexpired appeal period. Tenant shall, at Tenant's expense, initiate and diligently pursue each Government Approval. Landlord shall execute any applications and shall provide Tenant with such further assistance and cooperation as Tenant may require in connection with applications for such Government Approvals. If Tenant does not obtain such Government Approvals on terms satisfactory to Tenant within such period or if any Government Approvals are not renewed or are revoked during the Term of this Lease due to Landlord's conduct, Tenant shall have the right to terminate this Lease[45]. If Tenant gives a timely termination Notice, then a Lease Termination shall occur and Landlord shall reimburse Tenant for all its Costs within 30

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[42] Holdover rates should be negotiated down as much as possible. Also try not to agree to indemnify Landlord for any consequential damages for at least the first month of holdover.

[43] The Lease may also be conditioned on Landlord obtaining certain permits to construct the Shopping Center if it is a new development. Landlord should use best efforts to obtain those permits.

[44] Depends on whether Project is a new development or not.

[45] Sometimes, Landlord will want the right to pursue the permits on Tenant's behalf after Tenant has tried and failed. This is acceptable as long as the period of time is limited to no more than 60 days after Tenant's notice of termination. Then, if Landlord cannot obtain the permits within such time, a Lease Termination shall occur.

days thereafter. If the Lease Termination is based on Landlord conduct, Tenant shall be entitled to pursue such other rights and remedies as may be available at law or in equity.

28. **Measurement of Building**[46]. At any time during the first 6 months of the Term, Tenant may engage an independent certified architect or surveyor to measure the GLA of the Premises. If the architect's or surveyor's measurement of the GLA of the Premises is more than the GLA of the Premises set forth in Section __ above, Minimum Rent and Tenant's Proportionate Share (as defined below) shall be proportionally reduced; provided, however, that in no event shall the Minimum Rent and Tenant's Proportionate Share increase by more than three percent. For purposes of this Lease, "***GLA***" means the number of gross square feet of leasable floor area (regardless of whether such area is occupied or enclosed) intended primarily for the exclusive use by an occupant for any length of time, including without limitation garden centers used for the sale and display of merchandise and storage space within or immediately adjacent to an occupant's premises, but excluding any **[Building/Shopping Center]** management office, Common Area maintenance storage areas, and Common Area community room. The GLA of any premises (including the Premises) shall be measured from the exterior face of exterior walls and the exterior face of service corridor walls, the line along the front of the such premises where it abuts the sidewalk or other Common Area (which line is commonly known as the "lease line"), and the center line of any wall that such premises shares with other leasable areas of the **[Building/Shopping Center.]**

29. **Landlord Defaults And Remedies**. The occurrence of any one or more of the following events shall constitute a default and breach of this Lease by Landlord: (a) Landlord's failure to do, observe, keep and perform any of the terms, covenants, conditions, agreements or provisions of this Lease required to be done, observed, kept or performed by Landlord, within 30 days after written notice by Tenant to Landlord of said failure (except when the nature of Landlord's obligation is such that more than 30 days are required for its performance, then Landlord shall not be deemed in default if it commences performance within the 30 day period and thereafter diligently pursues the cure to completion) or with no notice (other than oral) in the event of an emergency; or (b) the failure of any representation or warranty to be true when deemed given hereunder. In the event of a default by Landlord, Tenant, at its option, without further notice or demand, shall have the right to any one or more of the following remedies in addition to all other rights and remedies provided at law or in equity or elsewhere herein: (w) to remedy such default or breach and invoice Landlord the reasonable out-of-pocket costs thereof (including attorneys' fees), including a 5% administrative fee, plus interest thereon at the Default Rate, or deduct such sum from the installments of Rent if not paid within 30 days after sending Landlord an invoice therefor and such failure continues following Landlord's receipt of a second invoice from Tenant for such costs which are not paid within 10 days following Landlord's receipt of the same; (x) to pursue the remedy of specific performance; or (y) to seek money damages for loss arising from Landlord's failure to discharge its obligations under this Lease. Nothing herein contained shall relieve Landlord from its obligations hereunder, nor shall this Section be construed to obligate Tenant to perform Landlord's repair obligations.

30. **Force Majeure**[47]. In the event that either party shall be delayed or hindered in or prevented from the performance of any covenant, agreement, work, service, or other act required

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[46] If Tenant is paying rent on a $/Sq.Ft. basis or its pro rata share of any expenses or taxes, Tenant will want the right to remeasure the Building and confirm the calculations. If so, insert this section.

[47] Force Majeure clauses must be mutual and notice should be required.

under this Lease to be performed by such party (a "**Required Act**"), and such delay or hindrance is due to causes entirely beyond its control such as riots, insurrections, martial law, civil commotion, war, fire, flood, earthquake, or other casualty or acts of God (a "**Force Majeure Event**"), then the performance of such Required Act shall be excused for the period of delay, and the time period for performance of the Required Act shall be extended by the same number of days in the period of delay. For purposes of this Lease, the financial inability of Landlord or Tenant to perform any Required Act, including (without limitation) failure to pay Rent and/or to obtain adequate or other financing, shall not be deemed to constitute a Force Majeure Event. A Force Majeure Event shall not be deemed to commence until the party who asserts some right, defense or remedy arising from or based upon such Force Majeure Event gives written notice thereof to the other party hereto. If abnormal adverse weather conditions are the basis for a claim for an extension of time due to a Force Majeure Event, the written notice shall be accompanied by data substantiating (i) that the weather conditions were abnormal for the time and could not have been reasonably anticipated and (ii) that the weather conditions complained of had a significant adverse effect on the performance of a Required Act. To establish the extent of any delay to the performance of a Required Act due to abnormal adverse weather, a comparison will be made of the weather for the time of performance of the Required Act with the average of the preceding 10 years climatic range based on the National Weather Service statistics for the nearest weather reporting station to the Premises. No extension of time for or excuse for a delay in the performance of a Required Act will be granted for rain, snow, wind, cold temperatures, flood or other natural phenomena of normal intensity for the locality where the Premises are located.

31. **Confidentiality Of Lease**[48]. From and after the date lease negotiations were entered into and throughout the Term of this Lease, the parties shall not disclose any of the terms, covenants, conditions or agreements set forth in the letters of intent or in this Lease or any amendments hereto, nor provide such correspondence, this Lease, any amendments hereto or any copies of the same, nor any other information (oral, written or electronic) which is communicated by or on behalf of Tenant or on behalf of Landlord relating to Tenant's proposed development of the Premises (including, without limitation, architectural plans, specifications, site plans and drawings) or Tenant's business, to any person including, without limitation, any brokers, any other tenants in the **[Building/Shopping Center]** or any affiliates, agents or employees of such tenants or brokers except as set forth herein, without Tenant's written consent or except as ordered by a court with appropriate authority provided Landlord seeks available protective orders. Landlord hereby acknowledges that the disclosure of the foregoing to any third party would cause material damage to Tenant, and Landlord agrees to indemnify, save and hold Tenant harmless from and against any and all damages suffered by Tenant which are attributable to any disclosure by Landlord in violation of the terms of this provision. Notwithstanding the foregoing, Landlord may disclose the terms of this Lease to those of its partners, employees, consultants, attorneys, accountants, current or potential mortgagees, lenders or purchasers of the Property who agree to be bound by the terms of this Section and Tenant may disclose the terms of this Lease to those of its partners, employees, consultants, attorneys, accountants and current or potential lenders, assigns or subtenants who agree to be so bound.

[48] This Section is very important to most anchor or major tenants and is lacking from most leases.

32. Miscellaneous.[49]

(a) If any Superior Mortgagee or Master Landlord shall require any modifications(s) of this Lease, Tenant shall, at Landlord's request, promptly execute and deliver to Landlord such instruments effecting such modification(s) as Landlord shall require, provided that such modification(s) do not, in any respect, adversely affect any of Tenant's rights under this Lease or increase Tenant's obligations.. Landlord shall reimburse Tenant, on demand, for any out-of-pocket costs incurred by Tenant in connection with any such modifications.

(b) Anything in this Lease to the contrary notwithstanding, in no event shall either party have any liability to the other for consequential or punitive damages for breach of any provision of this Lease.

(c) In the event that Landlord or Tenant shall bring an action to recover any sum due hereunder or for any breach hereunder and shall obtain a judgment in its favor, or in the event that Landlord or Tenant retains an attorney for the purpose of collecting any sum due hereunder or construing or enforcing any of the terms or conditions hereof or protecting their interest in any bankruptcy, receivership, or insolvency proceeding or otherwise against the other, the prevailing party shall be entitled to recover all reasonable costs and expenses incurred, including reasonable attorneys' and legal assistants' fees prior to trial, at trial, and on appeal and for post-judgment proceedings. Further, either party shall be entitled to its reasonable attorneys' fees and costs incurred in connection with pursuing and/or collecting any past due sums due from the other party hereunder regardless of whether or not a lawsuit is filed.

(d) Notwithstanding the foregoing, with respect to any remedy exercised by Landlord, Landlord shall have an affirmative obligation to obtain another tenant for the Premises promptly, at a fair market rental, and to otherwise mitigate its damages.[50]

[49] There are many miscellaneous provisions that can be added to this Rider. This Rider just lists a few that would be "non-standard" for a typical lease, but very appropriate for an anchor tenant.

[50] Some Landlords may limit this only if required by applicable laws. Strike that limitation for any anchor tenant- applicable law is subject to change and tenant wants the certainty of an contractual covenant for mitigation. That being said, Landlord should not be required to accept a tenant for the Premises that does fit the "mix" of the Shopping Center. Changing the affirmative obligation to "commercially reasonable efforts" is also acceptable.

BROKERAGE – LATEST TRENDS

by

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BROKER'S COMMISSIONS

In New York State, licensed real estate brokers may earn a commission on transactions they broker, including sales and leases of property. Article 12-A of the Real Property Law governs the licensing of brokers and salespeople, and the payment of commissions (see copy attached).

The relationships among buyers/sellers, landlord/tenants can often be murky and complicated. Parties may not be clear as to when a broker relationship starts and ends, and it may not always be clear whether a broker is representing a landlord or tenant. Not surprisingly, broker arrangements often lead to litigation. These cases are usually highly fact specific and often revolve around the conduct by the parties. Some of the key issues presented with brokers involve (i) can a buyer or tenant be responsible for a commission, absent an agreement, (ii) how does an exclusive broker relationship work, (iii) was the broker the procuring cause of a transaction, and (iv) can a broker file a lien against property for unpaid broker commissions?

THE BROKERAGE AGREEMENT AND EXCLUSIVITY

Siegel Consultants, Ltd. v. Nokia, Inc., 85 A.D. 3d 654 (1st Dep't 2011).
Facts: Tenant claims that it contacted a real estate agent ("Agent") regarding a specific property it was interested in, and the real estate agent in turn contacted consultant broker ("Broker"), who in turn contacted landlord. Broker claims that the Agent contacted him to find a property for tenant, generally. Eventually, a lease was executed. Broker claimed he was entitled to commissions, and cited to language in the lease stating that the landlord was responsible for "any and all commissions due [to Agent and Broker] pursuant to separate agreement or otherwise."

Conclusion: Tenant had no obligation to pay brokerage fee where there was no evidence of a written agreement, retainer, or written employment agreement. Reference to the individual as the broker in the lease agreement was not sufficient to establish broker relationship.

Slattery v. Cothran, 206 N.Y.S. 576 (4th Dep't.1924)
Facts: The parties entered a contract stating that in the event of the sale of the designated property within a specified period, seller would owe broker a fee, and that no offer or sale would be made upon more liberal terms or at a lower cost without providing the broker the opportunity to make an offer and negotiate first. Eventually, the seller found a buyer to purchase the property for more than the asking price, which had previously been lowered due to lack of interest.

Conclusion: The broker was hired as a sole agent, rather than having an exclusive right to sell. Therefore, when the seller found a buyer on its own, on better terms and without use of another agent, the seller did not owe the broker a commission.

See Also:
Barnet v. Cannizzaro, 160 N.Y.S.2d 329 (2nd Dep't. 1957) – Where a broker is granted the "sole and exclusive right" to sell a property, the broker has an exclusive right of sale rather than

exclusive agency. Even if the seller or another agent produces the buyer, the broker is entitled to commission on the sale.

PROVISION OF SERVICES

Berger v. Community Founders, Inc., 83 N.Y.S.2d 791 (1948).
Facts: Broker produced a ready, willing and able buyer for Seller's property. The sale fell through due to an existing contract of sale for a portion of the property clouding title to the property. Seller refused to pay the broker's commission, citing the broker's contract which stated: "[i]t is further understood that should [Seller] be unable to convey title through no fault of [its] own [Seller] shall not be obligated to [Broker] for any commission whatsoever."

Conclusion: Where a broker is employed to find a purchaser for a property, and produces a ready, willing and able buyer, the broker is still entitled to commission where the sale falls through due to a defect in title.

LICENSING

Sutton v. Transcontinental Investing Corp., 222 N.Y.S.2d 778 (1961)
Facts: Plaintiff in a New York licensed real estate broker, making a claim for recovery of brokerage commissions relating to the sale of a property in New Jersey. Plaintiff is not licensed in New Jersey.

Conclusion: A claim for commission for brokerage services provided in New York State requires the plaintiff broker to be licensed in New York State, regardless of the property location.

See Also:
Gartrell v. Jennings, et al., 129 N.Y.2d 583 (2nd Dep't. 1954) - A claim for commission for brokerage services provided in New York requires the plaintiff broker to be licensed in New York State, and such fact must be included in the pleadings.

Manshion Joho Center Co., Ltd. V. Manshion Joho Center, Inc., 206 N.Y.S.2d 480 (1st Dep't. 2005) – Where brokerage services are provided outside of New York State, the plaintiff broker does not need to be licensed in New York despite bringing suit in New York.

LIENS

Talk of the Millenium Realty Inc. v. Sierra, 12 Misc. 3d 1153(A) (2006).
Facts: After Defendant failed to pay a broker commission, the broker filed a Notice of Pendency against Defendant's residential property. Defendant filed a counter-claim to the broker's action for commissions claiming violation f the Federal Debt Collection Practice Act, and improper filing of the Notice of Pendency.

Conclusion: A broker may not file a lien against residential property for unpaid commissions. A lien for commissions may only be filed when the commission is due from negotiating a non-

residential lease for a term greater than three (3) years. Inappropriate filing of such a lien is cause for a tort action against the broker.

McKinney's Real Property Law Ch. 50, Art. 12-A, Refs & Annos
Currentness

McKinney's Real Property Law Ch. 50, Art. 12-A, Refs & Annos, NY REAL PROP Ch. 50, Art. 12-A, Refs & Annos
Current through L.2017, chapters 1 to 23.

End of Document

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 440

§ 440. Definitions

Effective: July 1, 2008
Currentness

1. Whenever used in this article "real estate broker" means any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than a residential mortgage loan, as defined in section five hundred ninety of the banking law, or other incumbrance upon or transfer of real estate, or is engaged in the business of a tenant relocator, or who, notwithstanding any other provision of law, performs any of the above stated functions with respect to the resale of condominium property originally sold pursuant to the provisions of the general business law governing real estate syndication offerings. In the sale of lots pursuant to the provisions of article nine-A of this chapter, the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate. For purposes of this subdivision the term, "interest in real estate" shall include the sale of a business wherein the value of the real estate transferred as part of the business is not merely incidental to the transaction, and shall not include the assignment of a lease, and further, the transaction itself is not otherwise subject to regulation under state or federal laws governing the sale of securities. In connection with the sale of a business the term "real estate broker" shall not include a person, firm or corporation registered pursuant to the provisions of article twenty-three-A of the general business law or federal securities laws.

2. "Associate real estate broker" means a licensed real estate broker who shall by choice elect to work under the name and supervision of another individual broker or another broker who is licensed under a partnership, trade name, limited liability company or corporation. Such individual shall retain his or her license as a real estate broker as provided for in this article; provided, however, that the practice of real estate sales and brokerage by such individual as an associate broker shall be governed exclusively by the provisions of this article as they pertain to real estate salesmen. Nothing contained herein shall preclude an individual who elects to be licensed as an associate broker from also retaining a separate real estate broker's license under an individual, partnership, trade name, limited liability company or corporation.

3. “Real estate salesman” means a person associated with a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate other than a mortgage loan as defined in section five hundred ninety of the banking law, or to lease or rent or offer to lease, rent or place for rent any real estate, or collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker, or who, notwithstanding any other provision of law, performs any of the above stated functions with respect to the resale of a condominium property originally sold pursuant to the provisions of the general business law governing real estate syndication offerings.

4. “Tenant relocator” means any person, firm, corporation, partnership, limited liability company or any legal entity whatsoever, which, for another and for a fee, commission or other valuable consideration, supervises, organizes, arranges, coordinates, handles or is otherwise in charge of or responsible for the relocation of commercial or residential tenants from buildings or structures that are to be demolished, rehabilitated, remodeled or otherwise structurally altered.

5. “Association, associated; or associated with” whenever used in this article shall be deemed to make reference to a salesman's relationship with his or her broker. Nothing in this article shall be deemed or construed to be indicative or determinative of the legal relationship of a salesperson to a broker nor shall any provision of this article be deemed or construed to alter or otherwise affect the legal responsibility of a real estate broker to third parties for the acts of anyone associated with such broker pursuant to this article.

6. “Office manager” means a licensed associate real estate broker who shall by choice elect to work as an office manager under the name and supervision of another individual broker or another broker who is licensed under a partnership, trade name, limited liability company or corporation. Such individual shall retain his or her license as a real estate broker as provided for in this article; provided, however, that the practice of real estate sales and brokerage by such individual as an associate broker shall be governed exclusively by the provisions of this article as they pertain to real estate salesmen. Nothing contained in this subdivision shall preclude an individual who is licensed as an associate broker who elects to work as an office manager from also retaining a separate real estate broker's license under an individual, partnership, trade name, limited liability company or corporation.

Credits

(Added L.1922, c. 672. Amended L.1924, c. 579, § 1; L.1926, c. 831; L.1927, c. 107, § 1; L.1939, c. 360; L.1944, c. 696; L.1974, c. 427, § 2; L.1980, c. 226, § 1; L.1982, c. 45, § 1; L.1986, c. 571, § 17; L.1988, c. 699, § 1; L.1992, c. 590, § 1; L.1998, c. 324, § 21, eff. July 14, 1998; L.2006, c. 183, § 1, eff. July 1, 2008.)

Editors' Notes

PRACTICE COMMENTARIES

by Dan M. Blumenthal

2016

Subd. 1

This section is entitled to strict construction. *See, Reiter v. Greenberg,* 21 N.Y.2d 388, 288 N.Y.S.2d 57 (1968). As such, the claim of the Real Estate Broker in *Commercial Tenant Servs., Inc. v. Northern Leasing Sys., Inc.,* 131 A.D.3d 895, 17 N.Y.S.3d 394 (1st Dept. 2015) for fees associated with an agreement to negotiate lease escalations and overcharge allegations on behalf of a tenant was not an "attempt [ ] to negotiate a [ ] rental of an estate or interest in real estate" governed by this article.

Notes of Decisions (24)

McKinney's Real Property Law § 440, NY REAL PROP § 440
Current through L.2017, chapters 1 to 23.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 440-a

§ 440-a. License required for real estate brokers and salesmen

Effective: June 22, 2010
Currentness

No person, co-partnership, limited liability company or corporation shall engage in or follow the business or occupation of, or hold himself or itself out or act temporarily or otherwise as a real estate broker or real estate salesman in this state without first procuring a license therefor as provided in this article. No person shall be entitled to a license as a real estate broker under this article, either as an individual or as a member of a co-partnership, or as a member or manager of a limited liability company or as an officer of a corporation, unless he or she is twenty years of age or over, a citizen of the United States or an alien lawfully admitted for permanent residence in the United States. No person shall be entitled to a license as a real estate salesman under this article unless he or she is over the age of eighteen years. No person shall be entitled to a license as a real estate broker or real estate salesman under this article who has been convicted in this state or elsewhere of a felony, of a sex offense, as defined in subdivision two of section one hundred sixty-eight-a of the correction law or any offense committed outside of this state which would constitute a sex offense, or a sexually violent offense, as defined in subdivision three of section one hundred sixty-eight-a of the correction law or any offense committed outside this state which would constitute a sexually violent offense, and who has not subsequent to such conviction received executive pardon therefor or a certificate of relief from disabilities or a certificate of good conduct pursuant to article twenty-three of the correction law, to remove the disability under this section because of such conviction. No person shall be entitled to a license as a real estate broker or real estate salesman under this article who does not meet the requirements of section 3-503 of the general obligations law.

Notwithstanding the above, tenant associations, and not-for-profit corporations authorized in writing by the commissioner of the department of the city of New York charged with enforcement of the housing maintenance code of such city to manage residential property owned by such city or appointed by a court of competent jurisdiction to manage residential property owned by such city shall be exempt from the licensing provisions of this section with respect to the properties so managed.

Credits

(Added L.1922, c. 672. Amended L.1923, c. 517; L.1924, c. 579, § 2; L.1925, c. 461; L.1926, c. 831; L.1927, c. 107, § 1; L.1928, c. 658; L.1930, cc. 103, 386; L1931, c. 409; L.1934, c. 159; L.1935, c. 129 § 1; L.1945, c. 268; L.1963, c. 281; L.1969, c. 729, § 1; L.1977, c. 868, § 1; L.1981, c. 971, § 1; L.1982, c. 133, § 32; L.1984, c. 282, § 1. Amended L.1995, c. 81, § 226; L.1998, c. 324, § 22, eff. July 14, 1998; L.2006, c. 183, § 2, eff. July 1, 2008; L.2008, c. 430, § 1; L.2008, c. 430, § 2, eff. July 1, 2008; L.2010, c. 56, pt. LL, § 23, eff. June 22, 2010.)

Editors' Notes

PRACTICE COMMENTARIES

by Dan M. Blumenthal

Article 12-A, simply entitled "Real Estate Brokers and Real Estate Salesmen" (RPL §§ 440-443-a) provides for the licensing of brokers and salespeople and the terms and conditions of such licenses. Generally, except for certain nonprofit or tenant associations appointed to manage New York City owned properties, and parties "acting under the judgment or order of any court; or public officers while performing their official duties, or attorneys at law" (RPL § 442-f), any party seeking a commission for the procuring of a sale or rental of real property or for the collection of real estate rents due a third party is deemed to be a "Real Estate Broker" and must be licensed by the New York Department of State before bringing about a covered transaction. It is the agreement, not any subsequent writing, that is the commissionable event. *Baird v. Hine*, 253 A.D. 65, 300 N.Y.S. 1171 (3d Dept. 1937). The property need not be located in the State of New York. *Sutton v. Transcon. Investing Corp.*, 31 Misc.2d 832, 222 N.Y.S.2d 778 (Sup. Ct. NY Co. 1961) *aff'd*, 17 A.D.2d 807, 232 N.Y.S.2d 1023 (1st Dept. 1962) ("[T]he statutes (§§ 440-a and 442-d of the Real Property Law) cover brokers and services rendered in this State, regardless of the location of the property subject of the claimed brokerage"). Where the brokerage services are incidental to other actions, a license may not be required. *Eaton Assoc. v. Highland Broadcasting Corp.*, 81 A.D.2d 603, 437 N.Y.S.2d 715 (2d Dept. 1981) (A financial consultant held entitled to commissions for procuring mortgages where overall services included financial planning and advice). The Court in *Eaton* noted that § 442-e makes a violation of the license requirement a misdemeanor and, as such, strict construction was mandated "so as not to encompass every situation in which an interest in real estate may be part of the transaction." *Id.* Similarly, in *Herson v. Troon Mgt., Inc.*, 58 A.D.3d 403, 872 N.Y.S.2d 84 (1st Dept. 2009), the First Department held the license requirements of the Act to be "inapplicable where the collection of rent is incidental to responsibilities which fall outside the scope [of] brokerage services." However, proper licensing is required, "when real estate is the dominant feature of the transaction." *Berg v. Wilpon*, 180 Misc.2d 956, 957, 692 N.Y.S.2d 600, 601 (Sup. Ct. Richmond Co. 1999) *aff'd*, 271 A.D.2d 629, 707 N.Y.S.2d 861 (2d Dept. 2000). A determination of "the issue of whether a party's services fall under [RPL] article 12-A is one of fact." *Zedeck v. Derfner Mgmt. Inc.*, 106 A.D.3d 465, 465, 965 N.Y.S.2d 411, 412 (1st Dept. 2013) (Evidence that the unlicensed respondent had negotiated leases and collected rents for plaintiffs for a percentage payment was insufficient to grant summary judgment on the commission issue).

Notes of Decisions (68)

McKinney's Real Property Law § 440-a, NY REAL PROP § 440-a
Current through L.2017, chapters 1 to 23.

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McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 440-b

§ 440-b. Licenses in Putnam county

Currentness

On and after the first day of July, nineteen hundred thirty-four, no person, copartnership or corporation shall engage in or follow the business or occupation of, or hold himself or itself out temporarily or otherwise as a real estate broker or real estate salesman in the county of Putnam, without first procuring a license therefor as provided in this article, except that such license in such county shall be granted and issued, without the written examination provided in this article, to a person, copartnership or corporation who was engaged in business as a real estate broker or real estate salesman in such county prior to the first day of January, nineteen hundred thirty-four.

Credits
(Added L.1934, c. 555, § 1.)

Notes of Decisions (1)

McKinney's Real Property Law § 440-b, NY REAL PROP § 440-b
Current through L.2017, chapters 1 to 23.

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McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 441

§ 441. Application for license

Effective: October 17, 2014
Currentness

1. Form. (a) Any person, copartnership, limited liability company or corporation desiring to act as a real estate broker or any person desiring to act as a real estate salesman on or after the first day of October, nineteen hundred twenty-two, shall file with the department of state at its office in Albany an application for the kind of license desired, in such form and detail as such department shall prescribe and conforming to the requirements of section 3-503 of the general obligations law, setting forth the following, if the application be for a broker's license:

(i) The name and residence address of the applicant, and if an individual the name under which he intends to conduct business.

(ii) If the applicant be a copartnership the name and residence address of each member thereof and the name under which the business is to be conducted; or, if the applicant be a limited liability company, the name of the company, and the name and residence of each of its members; or, if the applicant be a corporation, the name of the corporation and the name and residence address of each of its officers.

(iii) The place or places, including the city, town or village, with the street and number, where the business is to be conducted.

(iv) The business or occupation theretofore engaged in by the applicant, or, if a copartnership, by each member thereof, or, if a limited liability company, by each member thereof, or, if a corporation, by each officer thereof, for a period of two years, immediately preceding the date of such application, setting forth the place or places where such business or occupation was engaged in and the name or names of employers, if any.

(v) The form, information and statement required by section 3-503 of the general obligations law.

(b) Such further information as the department may reasonably require shall be furnished by the applicant including sufficient proof of having taken and passed a written examination and answered such questions as may be prepared by the department to enable it to determine the trustworthiness of the applicant if an individual, or of each member of a co-partnership or each member of a limited liability company or each officer of a corporation for whom a license as a broker is asked, and his or their competency to transact the business of real estate broker in such a manner as to safeguard the interests of the public. In determining

competency, the department shall require proof that the person being tested to qualify to apply for a broker's license has a fair knowledge of the English language, a fair understanding of the general purposes and general legal effect of deeds, mortgages, land contracts of sale, and leases, a general and fair understanding of the obligations between principal and agent, as well as of the provisions of this section. The applicant must also furnish proof that he has attended for at least one hundred twenty hours and has successfully completed a real estate course or courses approved by the secretary of state as to method and content and supervision which approval may be withdrawn if in the opinion of the secretary of state said course or courses are not being conducted properly as to method, content and supervision, and that either the applicant has actively participated in the general real estate brokerage business as a licensed real estate salesman under the supervision of a licensed real estate broker for a period of not less than two years or has had the equivalent experience in general real estate business for a period of at least three years, the nature of which experience shall be established by affidavit duly sworn to under oath and/or other and further proof required by the department of state. Computer-based and distance-learning courses may be approved by the department so long as providers demonstrate the ability to monitor and verify participation by the applicant for the specified time period. Notwithstanding the foregoing authority to approve computer-based and distance-learning courses, the department may prescribe that specified subjects or hours must be presented in a classroom setting.

(c) In the event the applicant shall be a licensed salesman under this article and shall have submitted acceptable proof pursuant to the provisions of either paragraph (d) of subdivision one-A of this section or paragraph (a) of subdivision three of this section of having attended and successfully completed seventy-five hours of an approved real estate course or courses within eight years of the date of the application, the department may accept and credit same against the one hundred twenty hours required hereunder.

1-A. (a) Every application for a real estate salesman's license shall set forth:

(i) The name and residence address of the applicant.

(ii) The name and principal business address of the broker with whom he is to be associated.

(iii) The business or occupation engaged in for the two years immediately preceding the date of the application, setting forth the place or places where such business or occupation was engaged in, and the name or names of employers if any.

(iv) The length of time he has been engaged in the real estate business.

(v) The form, information and statement required by section 3-503 of the general obligations law.

(b) Each applicant for a salesman's license shall provide such further information as the department may reasonably require, appearing at such time and place as may be designated by the department, to take a written examination and answer such questions as may be prepared by the department to enable it to determine the trustworthiness of the applicant and the applicant's competence to transact the business of real estate salesman in such a manner as to safeguard the interests of the public, including the applicant's

working knowledge of the basic concepts of law pertaining to contracts, real property, agency and this article which govern conduct of such business, mastery of basic skills needed to perform the applicant's duties, working knowledge of the ethical obligations of a real estate salesman, and knowledge of the provisions of the general obligations law pertaining to performance of the applicant's duties.

(c) Each application for either a broker's or salesman's license under this article shall be subscribed by the applicant; or if made by a co-partnership it shall be subscribed by a member thereof, or if made by a corporation it shall be subscribed by an officer thereof, and shall conform to the requirements of section 3-503 of the general obligations law. Each application shall contain an affirmation by the person so subscribing that the statements therein are true under the penalties of perjury. An application for a license shall be accompanied by the appropriate license fee, as hereinafter prescribed in this article.

(d) Anything to the contrary herein notwithstanding, on and after the effective date of this paragraph, no salesman's license or conditional license shall be issued by the department unless the application therefor has been accompanied by proof that prior to such application the applicant has attended at least seventy-five hours and successfully completed a real estate course or courses approved by the secretary of state as to method and content and supervision, which approval may be withdrawn if in the opinion of the secretary of state said course or courses are not properly conducted as to method, content and supervision. Computer-based and distance-learning courses may be approved by the department so long as providers demonstrate the ability to monitor and verify participation by the applicant for the specified time period. Notwithstanding the foregoing authority to approve computer-based and distance-learning courses, the department may prescribe that specified subjects or hours must be presented in a classroom setting.

2. Renewals. Any license granted under the provision hereof may be renewed by the department upon application therefor by the holder thereof, in such form as the department may prescribe and conforming to the requirements of section 3-503 of the general obligations law, and payment of the fee for such license. In case of application for renewal of license, the department may dispense with the requirement of such statements as it deems unnecessary in view of those contained in the original application for license but may not dispense with the requirements of section 3-503 of the general obligations law. A renewal period within the meaning of this act is considered as being a period of two years from the date of expiration of a previously issued license. The department shall require any applicant, who does not apply for renewal of license within such period, to qualify by passing the written examination as provided herein, and may require any licensee who has not yet passed the written examination, and who cannot reasonably prove to the satisfaction of the department, that he can meet the competency requirements, to pass the written examination before a renewal of license shall be granted; provided, however, that a person who failed or was unable to renew his license by reason of his induction or enlistment in the armed forces of the United States shall not be required to take or pass such examination.

3. (a) [Eff. until Jan. 1, 2017. See, also, par. (a), below.] No renewal license shall be issued any licensee under this article for any license period commencing November first, nineteen hundred ninety-five unless such licensee shall have within the two year period immediately preceding such renewal attended at least twenty-two and one-half hours which shall include at least three hours of instruction pertaining to fair housing and/or discrimination in the sale or rental of real property or an interest in real property and successfully completed a continuing education real estate course or courses approved by the secretary of state as to method, content and supervision, which approval may be withdrawn if in the opinion of the secretary of state such course or courses are not being conducted properly as to method, content and supervision. For

those individuals licensed pursuant to subdivision six of section four hundred forty-two-g of this article, in the individual's initial license term, at least eleven hours of the required twenty-two and one-half hours of continuing education shall be completed during the first year of the term. Of those eleven hours, three hours shall pertain to applicable New York state statutes and regulations governing the practice of real estate brokers and salespersons. To establish compliance with the continuing education requirements imposed by this section, licensees shall provide an affidavit, in a form acceptable to the department of state, establishing the nature of the continuing education acquired and shall provide such further proof as required by the department of state. The provisions of this paragraph shall not apply to any licensed real estate broker who is engaged full time in the real estate business and who has been licensed under this article prior to July first, two thousand eight for at least fifteen consecutive years immediately preceding such renewal.

3. (a) [Eff. Jan. 1, 2017. See, also, par. (a), above.] No renewal license shall be issued any licensee under this article for any license period commencing November first, nineteen hundred ninety-five unless such licensee shall have within the two year period immediately preceding such renewal attended at least twenty-two and one-half hours which shall include at least three hours of instruction pertaining to fair housing and/or discrimination in the sale or rental of real property or an interest in real property, at least one hour of instruction pertaining to the law of agency except in the case of the initial two-year licensing term for real estate salespersons, two hours of agency related instruction must be completed, and successfully completed a continuing education real estate course or courses approved by the secretary of state as to method, content and supervision, which approval may be withdrawn if in the opinion of the secretary of state such course or courses are not being conducted properly as to method, content and supervision. For those individuals licensed pursuant to subdivision six of section four hundred forty-two-g of this article, in the individual's initial license term, at least eleven hours of the required twenty-two and one-half hours of continuing education shall be completed during the first year of the term. Of those eleven hours, three hours shall pertain to applicable New York state statutes and regulations governing the practice of real estate brokers and salespersons. To establish compliance with the continuing education requirements imposed by this section, licensees shall provide an affidavit, in a form acceptable to the department of state, establishing the nature of the continuing education acquired and shall provide such further proof as required by the department of state. The provisions of this paragraph shall not apply to any licensed real estate broker who is engaged full time in the real estate business and who has been licensed under this article prior to July first, two thousand eight for at least fifteen consecutive years immediately preceding such renewal.

(b) Notwithstanding the provisions of section four hundred one of the state administrative procedure act, except as provided in this paragraph, no license issued under this article shall continue in effect beyond the period for which it is issued if the proof of attendance required hereunder is not submitted and accepted prior to such expiration date. The department in its discretion may however issue a temporary renewal license for such period of time it deems appropriate to permit the submission of the required proof of attendance when the failure to submit such proof is not due to the fault of the licensee.

(c) The secretary of state shall promulgate rules establishing the method, content, setting and supervision requirements of the continuing education real estate course or courses provided for in this section. In establishing the requirements for the continuing education course or courses, the secretary of state shall permit alternatives with respect to content and method of presentation in consideration of the type of brokerage practiced and the availability of the sources of such course or courses in different areas of the state. Each course shall have an established curriculum composed primarily of real estate practice and professional responsibility and ethics and properly prepared written materials of the subject matter which shall be distributed as part of the course. It shall be taught by a qualified faculty with attorneys presenting legal subjects. Credit shall be awarded on the basis of one hour for each sixty minutes of actual attendance

and records shall be maintained of attendance at each session which shall be transmitted to the department at the conclusion of the course. Computer-based and distance learning courses may be approved by the department so long as providers demonstrate the ability to monitor and verify participation by the licensee for the specified time period.

(d) The state real estate board, created pursuant to section four hundred forty-two-i of this article, shall not have the power to promulgate any rule, regulation or guidance requiring continuing education for real estate brokers or salespeople except those requirements set forth in subdivisions two and three of section four hundred forty-two-k of this article.

4. The fees provided for by this section shall not be refundable.

Credits

(Added L.1922, c. 672. Amended L.1924, c. 579, § 3; L.1926, c. 831; L.1927, c. 107, § 1; L.1928, c. 579, § 2; L.1935, c. 160; L.1944, c. 631; L.1946, c. 426; L.1949, c. 288; L.1951, c. 538; L.1952, c. 752; L.1960, c. 706; L.1961, c. 588, § 1; L.1964, c. 645, § 18; L.1969, c. 729, §§ 2, 3; L.1972, c. 919, § 10; L.1977, c. 868, §§ 2 to 5; L.1980, c. 226, § 2; L.1980, c. 375, § 1; L.1985, c. 919, § 1; L.1988, c. 64, §§ 2, 3; L.1988, c. 699, § 2; L.1993, c. 319, § 1; L.1995, c. 81, § 227; L.1995, c. 248, § 1; L.1998, c. 324, § 23, eff. July 14, 1998; L.1998, c. 470, § 1, eff. July 22, 1998; L.2006, c. 183, §§ 3 to 5, eff. July 1, 2008; L.2007, c. 474, § 1, eff. July 1, 2008; L.2014, c. 328, pt. D, § 1, eff. Oct. 17, 2014; L.2016, c. 320, § 1, eff. Jan. 1, 2017.)

Editors' Notes

PRACTICE COMMENTARIES

by Dan M. Blumenthal

This section sets forth the form of application and standards for real estate licensing (both broker and salesperson) in the State. The determination whether to grant or renew a license rests with the New York Department of State which the legislature has vested with "discretion to determine the competency of an applicant to transact the business of a real estate broker in a manner to safeguard the public." *Titus v. Dep't of State*, 200 Misc. 6, 108 N.Y.S.2d 209 (Sup. Ct. Albany Co. 1950).

Notes of Decisions (15)

McKinney's Real Property Law § 441, NY REAL PROP § 441
Current through L.2017, chapters 1 to 23.

End of Document

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 441-a

§ 441-a. License and pocket card

Effective: January 1, 2013
Currentness

1. The department of state, if satisfied of the competency and trustworthiness of the applicant, shall issue and deliver to him a license in such form and manner as the department shall prescribe, but which must set forth the name and principal business address of the licensee, and, in the case of a real estate salesman, the name and business address of the broker with whom the salesman is associated.

2. Terms. A license issued or reissued under the provisions of this article shall entitle the person, co-partnership, limited liability company or corporation to act as a real estate broker, or, if the application is for a real estate salesman's license, to act as a real estate salesman in this state up to and including the date in which the license by its terms expires.

3. Place of business; business sign required. Except as otherwise provided in this article, each licensed real estate broker shall have and maintain a definite place of business within this state, and shall conspicuously post on the outside of the building in which said office is conducted a sign of a sufficient size to be readable from the sidewalk indicating the name and the business of the applicant as a licensed real estate broker, unless said office shall be located in an office, apartment or hotel building, in which event the name and the words “licensed real estate broker” shall be posted in the space provided for posting of names of occupants of the building, other than the mail box. Where the applicant for a real estate broker's license maintains more than one place of business, the broker shall apply for and the department shall issue a supplemental license for each branch office so maintained upon payment to the department of state for each supplemental license so issued the same fee prescribed in this article for a license to act as a real estate broker. Each such branch office shall be under the direct supervision of the broker to whom the license is issued, or a representative broker of a corporation or partnership or manager of a limited liability company holding such license, or a duly appointed office manager. Such fee shall accompany such application and shall be non-refundable. For purposes of this subdivision, the principal residence of a real estate broker or salesman shall not be deemed a place of business solely because such broker or salesman shall have included the residence telephone number in his business cards.

4. Display of license. The license of a real estate broker shall be conspicuously displayed in his principal place of business at all times. Licenses issued for branch offices shall be conspicuously displayed therein. The display of a real estate broker's license, the term whereof has expired, by any person, partnership, limited liability company or corporation not duly licensed as a real estate broker for the current license term is prohibited.

5. Change of address. Notice in writing in the manner and form prescribed by the department shall be given the department at its offices in Albany by a licensed real estate broker on his own behalf and on behalf of each salesman associated with him of any change in his or its principal business address. The filing fee of ten dollars for each licensee named therein shall accompany such notice. Such change by a licensee without such notification shall operate to suspend his license until such suspension shall be vacated by the department.

6. Pocket card. The department shall prepare, issue and deliver, with the assistance of the department of motor vehicles, to each licensee a pocket card in such form and manner as the department shall prescribe, but which shall contain the photo, name and business address of the licensee, and, in the case of a real estate salesman, the name and business address of the broker with whom he or she is associated and shall certify that the person whose name appears thereon is a licensed real estate broker or salesman, as may be. Such cards must be shown on demand. In the case of loss, destruction or damage, the secretary of state may, upon submission of satisfactory proof, issue a duplicate pocket card upon payment of a fee of ten dollars.

7. License term. From and after the date when this subdivision shall take effect, the term for which a license shall be issued or reissued under this article shall be a period of two years.

8. Death of broker. A license issued to a real estate broker who was, at the time of his death, the sole proprietor of a brokerage office may be used after the death of such licensee by his duly appointed administrator or executor in the name of the estate pursuant to authorization granted by the surrogate under the provisions of the surrogate's court procedure act for a period of not more than one hundred twenty days from the date of death of such licensee in order to complete any unfinished realty transactions in the process of negotiation by the broker or his salesmen existing prior to his decease. There shall be endorsed upon the face of the license, after the name of the decedent, the words “deceased”, the date of death and the name of the administrator or executor under whose authority the license is being used. The period of one hundred twenty days may be extended upon application to the secretary of state, for good cause shown, for an additional period not to exceed one hundred twenty days. A license expiring during such period or extension shall be automatically renewed and continued in effect during such period or extension. No fee shall be charged for any such license or renewal thereof.

9. Except for changes made on a renewal application, the fee for changing an address on a license shall be ten dollars.

10. Except for changes made on a renewal application, the fee for changing a name or for changing the status of a real estate broker's license shall be one hundred fifty dollars. The fee for changing a salesperson's name shall be fifty dollars.

11. If a real estate salesperson shall leave the service of a real estate broker, the real estate broker shall file a termination of association notice on such form as secretary may designate. The salesperson's license may be endorsed to a new sponsoring broker upon the establishment of a new record of association filed with the department of state. The fee for filing a record of association shall be twenty dollars.

12. Whenever any person licensed as a real estate broker or real estate salesman is convicted in this state or elsewhere of a felony, of a sex offense, as defined in subdivision two of section one hundred sixty-eight-a of the correction law or any offense committed outside of this state which would constitute a sex offense, or a sexually violent offense, as defined in subdivision three of section one hundred sixty-eight-a of the correction law or any offense committed outside this state which would constitute a sexually violent offense, such real estate broker or real estate salesman shall within five days of the imposition of sentence, transmit a certified copy of the judgment of conviction to the department of state.

Credits

(Added L.1922, c. 672. Amended L.1924, c. 579, § 4; L.1926, c. 831; L.1927, c. 107, § 1; L.1928, c. 579, §§ 3, 4; L.1933, c. 187; L.1935, c. 151; L.1938, c. 429; L.1944, c. 329; §§ 1, 2; L.1949, c. 12; L.1949, c. 368; L.1961, c. 588, §§ 3, 4; L.1963, c. 204, § 72; L.1965, c. 237; L.1971, c. 787, §§ 1, 2; L.1972, c. 919, § 11; L.1980, c. 226, § 3; L.1981, c. 961, § 1; L.1985, c. 497, § 8. Amended L.1989, c. 61, §§ 67, 68; L.1998, c. 324, § 24, eff. July 14, 1998; L.2006, c. 183, § 6, eff. July 1, 2008; L.2008, c. 430, § 3, eff. Aug. 5, 2008; L.2012, c. 345, § 1, eff. Jan. 1, 2013.)

Notes of Decisions (4)

McKinney's Real Property Law § 441-a, NY REAL PROP § 441-a
Current through L.2017, chapters 1 to 23.

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 441-b

§ 441-b. License fees

Effective: April 1, 1999
Currentness

1. The fee for a license issued or reissued under the provisions of this article entitling a person, co-partnership, limited liability company or corporation to act as a real estate broker shall be one hundred fifty dollars. The fee for a license issued or reissued under the provisions of this article entitling a person to act as a real estate salesman shall be fifty dollars. Notwithstanding the provisions of subdivision seven of section four hundred forty-one-a of this article, after January first, nineteen hundred eighty-six, the secretary of state shall assign staggered expiration dates for outstanding licenses that have been previously renewed on October thirty-first of each year from the assigned date unless renewed. If the assigned date results in a term that exceeds twenty-four months, the applicant shall pay an additional prorated adjustment together with the regular renewal fee. The secretary of state shall assign dates to existing licenses in a manner which shall result in a term of not less than two years.

1-A. The fee for a person to take an examination offered by the secretary of state pursuant to this article shall be fifteen dollars. Fees collected by the department of state pursuant to this article shall be deposited to the credit of the business and licensing services account established pursuant to section ninety-seven-y of the state finance law.

2. Corporations and co-partnerships. If the licensee be a corporation, the license issued to it shall entitle the president thereof or such other officer as shall be designated by such corporation, to act as a real estate broker. For each other officer who shall desire to act as a real estate broker in behalf of such corporation an additional license expiring on the same date as the license of the corporation shall be applied for and issued, as hereinbefore provided, the fee for which shall be the same as the fee required by this section for the license to the corporation. No license as a real estate salesman shall be issued to any officer of a corporation nor to any manager or member of a limited liability company nor to a member of a co-partnership licensed as a real estate broker. If the licensee be a co-partnership the license issued to it shall entitle one member thereof to act as a real estate broker, and for each other member of the firm who desires to act as a real estate broker an additional license expiring on the same date as the license of the co-partnership shall be applied for and issued, as hereinbefore provided, the fee for which shall be the same as the fee required by this section for the license to the co-partnership. If the licensee be a limited liability company, the license issued to it shall entitle one member thereof or one manager thereof to act as a real estate broker, and for each other member or manager of the firm who desires to act as a real estate broker an additional license expiring on the same date as the license of the limited liability company shall be applied for and issued, as hereinbefore provided, the fee for which shall be the same as the fee required by this section for the license to the limited liability

company. In case a person licensed individually as a real estate broker thereafter becomes an officer of a corporation or a member or manager of a limited liability company or a member of a co-partnership an application shall be made in behalf of such corporation, limited liability company or co-partnership for a broker's license for him as its representative for the remainder of the then current license term, provided that the license and pocket card previously issued to the licensee in his individual capacity shall have been returned to the department whereupon the department shall cause a properly signed endorsement to be made without charge on the face of such license and pocket card as to such change of license status and return the license and pocket card to the licensee.

3. Disposition of fees. The department of state shall on the first day of each month make a verified return to the department of taxation and finance of all fees received by it under this article during the preceding calendar month, stating from what city or county received and by whom and when paid.

Credits

(Added L.1922, c. 672. Amended L.1926, c. 831; L.1927, c. 107, § 1; L.1935 cc. 150, 498; L.1939, c. 169, § 2; L.1949, c. 11; L.1949, c. 200, §§ 2-4; L.1955, c. 59, § 3; L.1961, c. 588, § 5; L.1965 c. 153, § 10; L.1981, c. 103, § 161; L.1985, c. 497, § 9; L.1988, c. 64, § 4; L.1989, c. 61, § 69; L.1998, c. 324, § 25, eff. July 14, 1998; L.1999, c. 411, pt. B, § 12, eff. Aug. 9, 1999, deemed eff. April 1, 1999.)

Notes of Decisions (8)

McKinney's Real Property Law § 441-b, NY REAL PROP § 441-b
Current through L.2017, chapters 1 to 23.

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McKinney's Real Property Law § 441-c

§ 441-c. Revocation and suspension of licenses

Currentness

1. Powers of department. (a) The department of state may revoke the license of a real estate broker or salesman or suspend the same, for such period as the department may deem proper, or in lieu thereof may impose a fine not exceeding one thousand dollars payable to the department of state, or a reprimand upon conviction of the licensee of a violation of any provision of this article, or for a material misstatement in the application for such license, or if such licensee has been guilty of fraud or fraudulent practices, or for dishonest or misleading advertising, or has demonstrated untrustworthiness or incompetency to act as a real estate broker or salesman, as the case may be. In the case of a real estate broker engaged in the business of a tenant relocator, untrustworthiness or incompetency shall include engaging in any course of conduct including, but not limited to, the interruption or discontinuance of essential building service, that interferes with or disturbs the peace, comfort, repose and quiet enjoyment of a tenant.

(b)(i) The provisions of this paragraph shall apply in all cases of licensed broker or licensed salesman who have failed, after receiving appropriate notice, to comply with a summons, subpoena or warrant relating to a paternity or child support proceeding or is in arrears in payment of child support or combined child and spousal support referred to the department by a court pursuant to the requirements of section two hundred forty-four-c of the domestic relations law or pursuant to section four hundred fifty-eight-b or five hundred forty-eight-b of the family court act.

(ii) Upon receipt of an order from the court pursuant to one of the foregoing provisions of law based on arrears in payment of child support or combined child and spousal support, the department, if it finds such person to be so licensed, shall within thirty days of receipt of such order from the court, provide notice to the licensee of, and initiate, a hearing which shall be held by it at least twenty days and no more than thirty days after the sending of such notice to the licensee. The hearing shall be held solely for the purpose of determining whether there exists as of the date of the hearing proof that full payment of all arrears of support established by the order of the court to be due from the licensee have been paid. Proof of such payment shall be a certified check showing full payment of established arrears or a notice issued by the court, or the support collection unit where the order is payable to the support collection unit designated by the appropriate social services district. Such notice shall state that full payment of all arrears of support established by the order of the court to be due have been paid. The licensee shall be given full opportunity to present such proof of payment from the court or support collection unit at the hearing in person or by counsel. The only issue to be determined by the department as a result of the hearing is whether the arrears have been paid. No evidence with respect to the appropriateness of the court order or ability of the respondent party in arrears to comply with such order shall be received or considered by the department.

(iii) Upon receipt of an order from the court based on failure to comply with a summons, subpoena, or warrant relating to a paternity or child support proceeding, the department, if it finds such person to be so licensed, shall within thirty days of receipt of such order from the court, provide notice to the licensee that his or her license shall be suspended within sixty days unless the conditions in subparagraph (v) of this section are met.

(iv) Notwithstanding any inconsistent provision of this article or of any other provision of law to the contrary, the license of a real estate broker or salesman shall be suspended if at the hearing, provided for by subparagraph two of this paragraph, the license [1] fails to present proof of payment as required by such subdivision. Such suspension shall not be lifted unless the court or the support collection unit, where the court order is payable to the support collection unit designated by the appropriate social services district, issues notice to the department that full payment of all arrears of support established by the order of the court to be due have been paid.

(v) Notwithstanding any inconsistent provision of this article or of any other provision of law to the contrary, the license of a real estate broker or a salesperson shall be suspended in accordance with the provisions of subparagraph (iii) of this paragraph unless the court terminates its order to commence suspension proceedings. Such suspension shall not be lifted unless the court issues an order to the department terminating its order to commence suspension proceedings.

(vi) The department shall inform the court of all actions taken hereunder as required by law.

(vii) This paragraph applies to paternity and child support proceedings commenced under, and support obligations paid pursuant to any order of child support or child and spousal support issued under provisions of section two hundred thirty-six or two hundred forty of the domestic relations law, or article four, five, five-A or five-B of the family court act.

(viii) Notwithstanding any inconsistent provision of this article or of any other provision of law to the contrary, the provisions of this paragraph shall apply to the exclusion of any other requirements of this article and to the exclusion of any other requirement of law to the contrary.

2. Determination of department. In the event that the department shall revoke or suspend any such license, or impose any fine or reprimand on the holder thereof, its determination shall be in writing and officially signed. The original of such determination, when so signed, shall be filed in the office of the department and copies thereof shall be served personally or by registered mail upon the broker or salesman and addressed to the principal place of business of such broker or salesman, and to the complainant. All brokers' and salesmen's licenses and pocket cards shall be returned to the department of state within five days after the receipt of notice of a revocation or suspension, or in lieu thereof, the broker or salesman whose license has been revoked or suspended shall make and file an affidavit in form prescribed by the department of state, showing that the failure to return such license and pocket card is due either to loss or destruction thereof.

3. The display of a real estate broker's license after the revocation or suspension thereof is prohibited.

4. Whenever the license of a real estate broker or real estate salesman is revoked by the department, such real estate broker or real estate salesman shall be ineligible to be relicensed either as a real estate broker or real estate salesman until after the expiration of a period of one year from the date of such revocation.

Credits

(Added L.1922, c. 672. Amended L.1926, c. 831; L.1927, c. 107, § 1; L.1935, cc. 150, 498; L.1939, c. 169; L.1966, c. 347, § 9; L.1974, c. 427, § 3; L.1977, c. 162, § 1; L.1995, c. 81, § 220; L.1997, c. 398, § 128, eff. Jan. 1, 1998.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Dan M. Blumenthal

2016

The revocation of a Broker's license for "demonstrated untrustworthiness and incompetency," was within the discretion of the Administrative Law Judge and "not so disproportionate to the offenses as to shock the judicial conscience." The Appellate Division *in Shane v. New York State Dept. of State Div. of Licensing Services,* 135 A.D.3d 866, 23 N.Y.S.3d 377 (2d Dept. 2016) specifically mentioned prior disciplinary proceedings amongst the factors which are properly considered in fashioning a penalty under this section.

PRACTICE COMMENTARIES

by Dan M. Blumenthal

A Real Estate Broker is responsible for wrongful acts of an associated salesperson which are within the Broker's actual knowledge or where the Broker "retains the benefits of a transaction wrongfully negotiated by such salesperson after notice of the misconduct." *Razik v. New York State Dep't of State Div. of Licensing Servs.*, 60 A.D.3d 769, 875 N.Y.S.2d 184 (2d Dept. 2009), *leave to appeal denied*, 12 N.Y.3d 805, 879 N.Y.S.2d 48 (Mem.) (2009) ("substantial evidence" found in the administrative law record to support finding a failure of the Broker to supervise a salesperson "leading to the improper commencement of an action against a customer"). The statute sets forth the bases for revoking, suspending or levying a fine against a license under the Act. These include conviction of a licensee for a violation of this Act, a "material misstatement" in in the licensee's application, or, "if such licensee has been guilty of fraud or fraudulent practices, or for dishonest or misleading advertising, or has demonstrated untrustworthiness or incompetency." In *Trivelas v. Paterson*, 91 A.D.2d 1000, 457 N.Y.S.2d 864 (2d Dept. 1983), the appellate court reversed a determination of untrustworthiness where the Broker was determined to be negligent for failure to protect his client (by failing to determine in advance that only customary market points would be charged the procured mortgage). The court also found the notice of charges against the Broker to

be deficient, positing that "when proceedings involving a charge of untrustworthiness are brought, the charge should be definite so that the accused might know against what he has to defend." *Id.*

The behavior constituting "untrustworthiness" is not limited to acts or conduct related to the licensee's real estate transactions. *See Fogel v. Dep't of State*, 209 A.D.2d 615, 619 N.Y.S.2d 104 (2d Dept. 1994) ("petitioner's prior criminal conviction for sexual misconduct rendered him, *inter alia*, 'untrustworth[y]' ").

Notes of Decisions (117)

Footnotes

1 So in original ("license" should read "licensee").

McKinney's Real Property Law § 441-c, NY REAL PROP § 441-c
Current through L.2017, chapters 1 to 23.

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Real Property Law (Refs & Annos)
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Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 441-d

§ 441-d. Salesman's license suspended by revocation or suspension of employer's license

Currentness

The revocation or suspension of a broker's license shall operate to suspend the license of each real estate salesman associated with such broker, pending a change of association of the salesman or the expiration of the period of suspension of the broker's license. Such suspension of the salesman's license shall be deemed to be a discontinuance of association with the broker being suspended.

Credits

(Formerly § 441-a, added L.1922, c. 672. Renumbered § 441-d, L.1926, c. 831. Amended L.1927, c. 107, § 1; L.1961, c. 588, § 7; L.1971, c. 787, § 3; L.1980, c. 226, § 4.)

McKinney's Real Property Law § 441-d, NY REAL PROP § 441-d
Current through L.2017, chapters 1 to 23.

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Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 441-e

§ 441-e. Denial of license; complaints; notice of hearing

Effective: May 28, 2001
Currentness

1. Denial of license. The department of state shall, before making a final determination to deny an application for a license, notify the applicant in writing of the reasons for such proposed denial and shall afford the applicant an opportunity to be heard in person or by counsel prior to denial of the application. Such notification shall be served personally or by certified mail or in any manner authorized by the civil practice law and rules. If the applicant is a salesman or has applied to become a salesman, the department shall also notify the broker with whom such salesman is associated, or with whom such salesman or applicant is about to become associated, of such proposed denial. If a hearing is requested, such hearing shall be held at such time and place as the department shall prescribe. If the applicant fails to make a written request for a hearing within thirty days after receipt of such notification, then the notification of denial shall become the final determination of the department. The department, acting by such officer or person in the department as the secretary of state may designate, shall have the power to subpoena and bring before the officer or person so designated any person in this state, and administer an oath to and take testimony of any person or cause his deposition to be taken. A subpoena issued under this section shall be regulated by the civil practice law and rules. If, after such hearing, the application is denied, written notice of such denial shall be served upon the applicant personally or by certified mail or in any manner authorized by the civil practice law and rules, and if the applicant is a salesman, or has applied to become a salesman, the department shall notify the broker with whom such applicant is associated.

2. Revocation, suspension, reprimands, fines. The department of state shall, before revoking or suspending any license or imposing any fine or reprimand on the holder thereof or before imposing any fine upon any person not licensed pursuant to this article who is deemed to be in violation of section four hundred forty-two-h of this article, and at least ten days prior to the date set for the hearing, notify in writing the holder of such license or such unlicensed person of any charges made and shall afford such licensee or unlicensed person an opportunity to be heard in person or by counsel in reference thereto. Such written notice may be served by delivery of same personally to the licensee, or by mailing same by certified mail to the last known business address of such licensee or unlicensed person, or by any method authorized by the civil practice law and rules. If said licensee be a salesman, the department shall also notify the broker with whom he is associated of the charges by mailing notice by certified mail to the broker's last known business address. The hearing on such charges shall be at such time and place as the department shall prescribe.

3. Power to suspend a license. The department, acting by such officer or person in the department as the secretary of state may designate, shall have the power to suspend a license pending a hearing and to subpoena

and bring before the officer or person so designated any person in this state, and administer an oath to and take testimony of any person or cause his deposition to be taken. A subpoena issued under this section shall be regulated by the civil practice law and rules.

Credits

(Formerly § 441-d, added L.1922, c. 672. Renumbered § 441-e, L.1926, c. 831. Amended L.1927, c. 107, § 1; L.1962, c. 312, § 14; L.1966, c. 347, § 10; L.1980, c. 226, § 5; L.1988, c. 699, § 3; L.2001, c. 505, § 3, eff. May 28, 2001.)

Notes of Decisions (14)

McKinney's Real Property Law § 441-e, NY REAL PROP § 441-e
Current through L.2017, chapters 1 to 23.

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McKinney's Real Property Law § 441-f

§ 441-f. Judicial review

Currentness

The action of the department of state in granting or refusing to grant or to renew a license under this article or in revoking or suspending such a license or imposing any fine or reprimand on the holder thereof or refusing to revoke or suspend such a license or impose any fine or reprimand shall be subject to review by a proceeding brought under and pursuant to article seventy-eight of the civil practice law and rules at the instance of the applicant for such license, the holder of a license so revoked, suspended, fined or reprimanded or the person aggrieved.

Credits
(Formerly § 441-e, added L.1922, c. 672. Renumbered § 441-f, L.1926, c. 831. Amended L.1927, c. 107, § 1; L.1929, c. 617, § 1; L.1966, c. 347, § 11.)

Notes of Decisions (11)

McKinney's Real Property Law § 441-f, NY REAL PROP § 441-f
Current through L.2017, chapters 1 to 23.

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McKinney's Real Property Law § 442

§ 442. Splitting commissions

Effective: December 17, 2014
Currentness

1. No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service, help or aid rendered in any place in which this article is applicable, by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate including the resale of a condominium or cooperative apartment unless such a person be a duly licensed real estate salesman regularly associated with such broker or a duly licensed real estate broker or a person regularly engaged in the real estate brokerage business in a state outside of New York; provided, however, that notwithstanding any other provision of this section, it shall be permissible for a real estate broker to pay any part of a fee, commission, or other compensation received to an unlicensed corporation or an unlicensed limited liability company if each of its shareholders or members, respectively, is associated as an individual with the broker as a duly licensed associate broker or salesman.

2. Furthermore, notwithstanding any other provision of law, it shall be permissible for a broker properly registered pursuant to the provisions of article twenty-three-A of the general business law who earns a commission on the original sale of a cooperative or homeowners association interest in real estate, including condominium units to pay any part of a fee, commission or other compensation received for bringing about such sale to a person whose principal business is not the sale or offering of cooperatives or homeowners association interests in real property, including condominium units in this state but who is either: (i) a real estate salesman duly licensed under this article who is regularly associated with such broker; (ii) a broker duly licensed under this article; or a person regularly engaged in the real estate brokerage business in a state outside of New York.

Except when permitted pursuant to the foregoing provisions of this section no real estate broker shall pay or agree to pay any part of a fee, commission, or other compensation received by the broker, or due, or to become due to the broker to any person, firm or corporation who or which is or is to be a party to the transaction in which such fee, commission or other compensation shall be or become due to the broker; provided, however, that nothing in this section shall prohibit a real estate broker from offering any part of a fee, commission, or other compensation received by the broker to the seller, buyer, landlord or tenant who is buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate including the resale of a condominium or cooperative apartment. Such fee, commission, or other compensation must not be made to the seller, buyer, landlord or tenant for performing any activity requiring a license under this article.

Credits

(Added L.1922, c. 672. Amended L.1927, c. 107, § 1; L.1941, c. 719, § 1; L.1980, c. 226, § 6; L.1982, c. 45, § 2; L.1986, c. 734, § 1; L.2004, c. 316, § 1, eff. Aug. 10, 2004; L.2014, c. 514, § 1, eff. Dec. 17, 2014.)

Editors' Notes

PRACTICE COMMENTARIES

by Dan M. Blumenthal

The earliest form of this Section became law in 1922 with the guiding principle that "no one should act as a real estate broker without a license. Unlicensed persons were not to be allowed to shield themselves from its penalties by using the name of a qualified broker and then demanding a part of the commissions earned." *J.L. Holding Co. v. Reis*, 240 N.Y. 424 (1925).

A Broker licensed under this Article may split commissions with a licensed real estate salesperson (provided the salesperson is "regularly associated with such broker"), another licensed Broker, or a "person regularly engaged in the real estate brokerage business in a state outside of New York." Brokers may share commissions with unlicensed corporations or limited liability companies if the individual members/shareholders of the entities are licensed associate brokers or salespeople associated with the Broker but may not recover a commission where the real estate firm's sole contact with the client, although an employee, was unlicensed. *DSA Realty Servs., LLC v. Marcus & Millichap Real Estate Inv. Servs. of New York, Inc.*, 128 A.D.3d 587, 9 N.Y.S.3d 56 (1st Dept. 2015). Where a licensed salesperson representing the co-broker on a commercial land sale directed that a portion of the commissions be directed to unlicensed corporations under his control, his license was revoked as "the benefit which accrued to him is precisely the ill which section 442 was intended to avoid." *Strong v. Cuomo*, 67 A.D.2d 705, 706, 412 N.Y.S.2d 413, 414 (2d Dept. 1979).

Effective December 17, 2014, § 442 of the Act was amended to clarify the section and specifically include cooperative apartments under the fee splitting provisions. The 2014 amendment also permits a real estate broker to offer a portion of the commission to a non-licensed buyer, seller, landlord, tenant or party to a secured loan provided the offer is not compensation for services requiring a license. The stated purpose of the amendment is to resolve any uncertainty about a broker offering incentives to attract new clientele. NY Legis. Memo Ch. 514 (2014).

Notes of Decisions (30)

McKinney's Real Property Law § 442, NY REAL PROP § 442
Current through L.2017, chapters 1 to 23.

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McKinney's Real Property Law § 442-a

§ 442-a. Compensation of salesmen; restrictions

Currentness

No real estate salesman in any place in which this article is applicable shall receive or demand compensation of any kind from any person, other than a duly licensed real estate broker with whom he associated, for any service rendered or work done by such salesman in the appraising, buying, selling, exchanging, leasing, renting or negotiating of a loan upon any real estate.

Credits
(Formerly § 442-b, added L.1922, c. 672. Renumbered § 442-a, L.1926, c. 831. Amended L.1927, c. 107, § 1; L.1980, c. 226, § 7.)

Notes of Decisions (25)

McKinney's Real Property Law § 442-a, NY REAL PROP § 442-a
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McKinney's Real Property Law § 442-b

§ 442-b. Discontinuance or change of salesman's association; report

Currentness

When the association of any real estate salesman shall have been terminated for any reason whatsoever, his broker shall forthwith notify the department of state thereof in such manner as the department shall prescribe. Where change of such salesman's association is the basis for such termination, the salesman's successor broker shall forthwith notify the department of such change in such manner as the department shall prescribe, such notice to be accompanied by a fee of one dollar. No real estate salesman shall perform any act within any of the prohibitions of this article from and after the termination for any cause of his association until he thereafter shall have become associated with a licensed real estate broker.

Credits
(Formerly § 442-c, added L.1922, c. 672. Amended L.1924, c. 579, § 1. Renumbered § 442-b, L.1926, c. 831. Amended L.1927, c. 107, § 1; L.1971, c. 787, § 4; L.1980, c. 226, § 8.)

McKinney's Real Property Law § 442-b, NY REAL PROP § 442-b
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McKinney's Real Property Law § 442-c

§ 442-c. Violations by salesmen; broker's responsibility

Currentness

No violation of a provision of this article by a real estate salesman or employee of a real estate broker shall be deemed to be cause for the revocation or suspension of the license of the broker, unless it shall appear that the broker had actual knowledge of such violation or retains the benefits, profits or proceeds of a transaction wrongfully negotiated by his salesman or employee after notice of the salesman's or employee's misconduct. A broker shall be guilty of a misdemeanor for having any salesman associated with his firm who has not secured the required license authorizing such employment.

Credits

(Formerly § 442-d, added L.1922, c. 672. Renumbered § 442-c and amended L.1926, c. 831; L.1927, c. 107, § 1; L.1933, c. 186, § 1; L.1980, c. 226, § 9; L.1988, c. 699, § 4.)

Notes of Decisions (10)

McKinney's Real Property Law § 442-c, NY REAL PROP § 442-c
Current through L.2017, chapters 1 to 23.

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McKinney's Real Property Law § 442-d

§ 442-d. Actions for commissions; license prerequisite

Currentness

No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

Credits

(Formerly § 442-e, added L.1922, c. 672. Amended L.1924, c. 579, § 8. Renumbered § 442-d, L.1926, c. 831. Amended L.1927, c. 107, § 1; L.1998, c. 324, § 26, eff. July 14, 1998.)

Editors' Notes

PRACTICE COMMENTARIES

by Dan M. Blumenthal

2016

This section makes clear that a party claiming a real estate brokerage commission must be duly licensed at the time of the transaction. In what seems like a mere error in preparing an assignment, the plaintiff in *Burton v. Lucido,* 135 A.D.3d 885, 24 N.Y.S.3d 172 (2d Dept. 2016), took assignment of a claim for brokerage commissions, allegedly earned by a corporate entity. Although the president and sole shareholder in that corporation was duly licensed when the commission was allegedly earned, the corporation was not, nullifying the plaintiff's right to claim a commission herein.

Notes of Decisions (247)

McKinney's Real Property Law § 442-d, NY REAL PROP § 442-d
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McKinney's Real Property Law § 442-e

§ 442-e. Violations

Effective: May 28, 2001
Currentness

1. Misdemeanors; triable in court of special sessions. Any person who violates any provision of this article shall be guilty of a misdemeanor. The commission of a single act prohibited by this article shall constitute a violation hereof. All courts of special sessions, within their respective territorial jurisdictions, are hereby empowered to hear, try and determine such crimes, without indictment, and to impose the punishments prescribed by law therefor.

2. Attorney general to prosecute. Criminal actions for violations of this article shall be prosecuted by the attorney general, or his deputy, in the name of the people of the state, and in any such prosecution the attorney general, or his deputy, shall exercise all the powers and perform all the duties which the district attorney would otherwise be authorized to exercise or to perform therein. The attorney general shall, upon a conviction for a violation of any provision of this article, and within ten days thereafter, make and file with the department of state a detailed report showing the date of such conviction, the name of the person convicted and the exact nature of the charge.

3. Penalty recoverable by person aggrieved. In case the offender shall have received any sum of money as commission, compensation or profit by or in consequence of his violation of any provision of this article, he shall also be liable to a penalty of not less than the amount of the sum of money received by him as such commission, compensation or profit and not more than four times the sum so received by him, as may be determined by the court, which penalty may be sued for and recovered by any person aggrieved and for his use and benefit, in any court of competent jurisdiction.

4. In any prosecution under this article, any person, firm or corporation who, for another, performs or offers to perform or attempts or offers to attempt, the performance of any one of the acts set forth in section four hundred forty of this article, shall be presumed to do so for a fee, commission or other valuable consideration, but such presumption shall not arise out of a single transaction, except upon proof of repeated and successive acts, offers or attempts of a like nature.

5. The secretary of state shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the secretary of state such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the secretary of state, to supply

such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods.

6. For the purpose of enforcing the provisions of this article and in making investigations relating to any violation thereof, and for the purpose of investigating the character, competency and integrity of the applicants or licensees hereunder, and for the purpose of investigating the business, business practices and business methods of any applicant or licensee, or of the officers or agents thereof, the department of state, acting by such officer or person in the department as the secretary of state may designate, shall have the power to subpoena and bring before the officer or person so designated any person in this state and require the production of any books or papers which he deems relevant to the inquiry and administer an oath to and take testimony of any person or cause his deposition to be taken with the same fees and mileage and in the same manner as prescribed by law for civil cases in a court of record, except that any applicant or licensee or officer or agent thereof shall not be entitled to such fees and/or mileage. Any person, duly subpoenaed, who fails to obey such subpoena without reasonable cause or without such cause refuses to be examined or to answer any legal or pertinent question as to the character or qualification of such applicant or licensee or such applicant's or licensee's business, business practices and methods or such violations, shall be guilty of a misdemeanor.

7. In any criminal proceeding before any court or grand jury, or upon any investigation before the department of state for a violation of any of the provisions of this section, the court or grand jury, or the secretary of state, his deputy or other officer conducting the investigation, may confer immunity, in accordance with the provisions of section 50.20 or 190.40 of the criminal procedure law.

8. Notwithstanding any inconsistent provision of law, with respect to violations of section four hundred forty-two-h of this article, the secretary of state is authorized, upon the complaint of any person or on his or her own initiative, to investigate and prosecute violations of the provisions of such section by persons not licensed pursuant to this article and may impose a fine not exceeding one hundred fifty dollars for the first violation, not exceeding five hundred dollars for a second violation, and not exceeding one thousand dollars for a third and each subsequent violation. The attorney general, acting on behalf of the secretary of state, may commence an action or proceeding in a court of competent jurisdiction to obtain a judgment against such unlicensed person in an amount equal to that imposed as a fine.

Credits

(Formerly § 442-f, added L.1922, c. 672. Amended L.1924, c. 579, § 9. Renumbered § 442-e, L.1926, c. 831. Amended L.1927, c. 107, § 1; L.1928, c. 579, § 6; L.1929, c. 617, § 2; L.1935, c. 159; L.1940, c. 468; L.1943, c. 335, § 13; L.1953, c. 891, § 36; L.1967, c. 680, § 121; L.1971, c. 1097, § 93; L.1988, c. 699, § 5; L.2000, c. 607, § 2, eff. May 28, 2001; L.2001, c. 505, § 2, eff. May 28, 2001.)

Notes of Decisions (30)

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McKinney's Real Property Law § 442-f

§ 442-f. Saving clause

Currentness

The provisions of this article shall not apply to receivers, referees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court; or public officers while performing their official duties, or attorneys at law.

Credits
(Formerly § 442-g, added L.1922, c. 672. Renumbered § 442-f, L.1926, c. 831. Amended L.1927, c. 107, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Dan M. Blumenthal

Parties "acting under the judgment or order of any court; or public officers while performing their official duties, or attorneys at law" need not comply with this Article's licensing requirements in order to receive a commission. A party, particularly an attorney, may have reason to obtain a license (i.e. a license would be required to hire real estate salespersons or to advertise brokerage services). Where such a party elects to obtain a real estate broker's license, he or she is subject to regulation by the Secretary of State. *Matter of Cianelli*, 16 A.D.2d 352, 227 N.Y.S.2d 985 (1st Dept. 1962). Subsequent surrender or revocation of the license will not terminate those rights which the party retains as an attorney. *Id.*

Notes of Decisions (13)

McKinney's Real Property Law § 442-f, NY REAL PROP § 442-f
Current through L.2017, chapters 1 to 23.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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McKinney's Real Property Law § 442-g

§ 442-g. Nonresident licensees

Effective: October 17, 2014
Currentness

1. A nonresident of this state may become a real estate broker or a real estate salesman by conforming to all of the provisions of this article, except that a nonresident broker regularly engaged in the real estate business as a vocation who is licensed and maintains a definite place of business in another state, which offers the same privileges to the licensed brokers of this state, shall not be required to maintain a place of business within this state. Anything to the contrary herein notwithstanding, if any state prohibits or restricts the right of a resident of this state to become a licensed nonresident real estate broker or salesman, then the issuance of such a license to an applicant resident in such state shall be similarly restricted. The department of state shall recognize the license issued to a real estate broker or salesman by another state as satisfactorily qualifying him for license as broker or salesman, as the case may be, under this section; provided that the laws of the state of which he is a resident require that applicants for licenses as real estate brokers and salesmen shall establish their competency by written examinations but permit licenses to be issued to residents of the State of New York duly licensed under this article, without examination. If the applicant is a resident of a state which has not such requirement then the applicant must meet the examination requirement as provided herein and the department of state shall issue a license to such nonresident broker or salesman upon payment of the license fee and the filing by the applicant with the department of a certified copy of the applicant's license issued by such other state.

2. Every nonresident applicant shall file with his application or renewal application an irrevocable consent on a form prescribed by the department of state submitting himself to the jurisdiction of the courts of this state and designating the secretary of state of the state of New York as his agent upon whom may be served any summons, subpoena or other process against him in any action or special proceeding. Such process may issue in any court in this state having jurisdiction of the subject matter, and the process shall set forth that the action or special proceeding is within the jurisdiction of the court.

3. Service of such process upon the secretary of state shall be made by personally delivering to and leaving with him or his deputy or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with a fee of five dollars if the action is solely for the recovery of a sum of money not in excess of two hundred dollars and the process is so endorsed, and a fee of ten dollars in any other action or proceeding, which fee shall be a taxable disbursement. If such process is served upon behalf of a county, city, town or village, or other political subdivision of the state, the fee to be paid to the secretary of state shall be five dollars, irrespective of the amount involved or the nature of the action on account of which such service of process is made.

If the cost of registered mail for transmitting a copy of the process shall exceed two dollars, an additional fee equal to such excess shall be paid at the time of the service of such process. Proof of service shall be by affidavit of compliance with this subdivision filed by or on behalf of the plaintiff together with the process, within ten days after such service, with the clerk of the court in which the action or special proceeding is pending. Service made as provided in this section shall be complete ten days after such papers are filed with the clerk of the court and shall have the same force and validity as if served on him personally within the state and within the territorial jurisdiction of the court from which the process issues.

4. The secretary of state shall promptly send one of such copies by registered mail, return receipt requested, to the nonresident broker or nonresident salesman at the post office address of his main office as set forth in the last application filed by him.

5. Nothing in this section shall effect the right to serve process in any other manner permitted by law.

6. Notwithstanding any other provisions of this article, the department of state shall grant a real estate broker or a real estate salesman license to an applicant who is a member of the household of a member of the armed forces of the United States, national guard or reserves and was a member of such household before such member of the armed forces relocated to the state who submits satisfactory evidence of licensure, certification or registration to practice an equivalent occupation issued by a state, territory, protectorate or dependency of the United States, provided that such license, certification or certificate of registration was current and effective within one year of the date of the individual's application for licensure in New York, was granted in compliance with standards that are, in the judgment of the secretary, no less rigorous than those required for licensure in New York. If such standards for licensure, certification or registration are deemed by the secretary to be less rigorous than those required for licensure in New York, the secretary shall permit an applicant to submit evidence in a form acceptable to the department of state to demonstrate the applicant's competency and trustworthiness. If such evidence is sufficient in the judgment of the secretary, the secretary shall grant a real estate broker or real estate salesperson license.

Credits

(Formerly § 442-h, added L.1922, c. 672. Renumbered § 442-g and amended L.1926, c. 831; L.1927, c. 107, § 1; L.1929, c. 617, § 3; L.1963, c. 482; L.1978, c. 744, § 1; L.2014, c. 328, pt. D, § 2, eff. Oct. 17, 2014.)

Editors' Notes

PRACTICE COMMENTARIES

by Dan M. Blumenthal

A non-resident may not sue for a commission in New York unless they held a license prior to the transaction. *Copellman v. Rabinowitz*, 208 Misc. 274, 143 N.Y.S.2d 496 (City Ct. NY Co. 1955). Reciprocity makes obtaining such a license a mere ministerial act in many instances. *See NFS Servs., Inc. v. W. 73rd St. Associates*, 102 A.D.2d 388, 477 N.Y.S.2d 135 (1st Dept. 1984) *aff'd*, 64 N.Y.2d 919, 488 N.Y.S.2d 648 (Mem.) (1985) (citing "the public policy of the state, requiring that the plaintiff plead and prove that a New York license had been issued on the date when the cause of action arose"). In addition to prior reciprocity provisions, effective October 17, 2014

(L.2014, c. 328, pt. D, § 2), this section was amended to add subp. 6, directing issuance of licenses to members of the households of parties in the armed forces of the United States, national guard or reserves provided they were a household member prior to the armed forces member relocating to this state and produce an equivalent license, valid within one year prior and issued by any other U.S. state, territory, protectorate or dependency. If the secretary of state deems the standards for issuance of such a license to be "less rigorous than those required for licensure in New York," the secretary may require submission of evidence demonstrating the applicant's competency and trustworthiness and grant or deny a license based thereon.

Notes of Decisions (3)

McKinney's Real Property Law § 442-g, NY REAL PROP § 442-g
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McKinney's Real Property Law § 442-h

§ 442-h. Rules of the secretary of state

Effective: May 28, 2001
Currentness

1. The secretary of state, and not the state real estate board established under section four hundred forty-two-i of this article, shall adopt such rules and regulations as the secretary of state may determine are necessary for the administration and enforcement of this section.

2. (a) If, after a public hearing and a reasonable investigation, the secretary of state determines that the owners of residential real property within a defined geographic area are subject to intense and repeated solicitations by real estate brokers and salespersons or others to place their property for sale with such real estate brokers or salespersons, or otherwise to sell their property, and that such solicitations have caused owners to reasonably believe that property values may decrease because persons of different race, ethnic, social, or religious backgrounds are moving or are about to move into the neighborhood or geographic area, the secretary of state may adopt a rule, to be known as a nonsolicitation order, directing all real estate brokers, salespersons and other persons regularly engaged in the trade or business of buying and selling real estate to refrain from soliciting residential real estate listings or otherwise soliciting the sale of residential real estate within the subject area. Each area subject to such an order shall be bounded or otherwise specifically defined in the order. The nonsolicitation order shall be subject to such terms and conditions as the secretary of state may determine are, on balance, in the best interest of the public, including but not limited to the affected owners and licensees. A nonsolicitation order may prohibit any or all types of solicitation directed towards particular home-owners, including but not limited to letters, postcards, telephone calls, door-to-door calls, and handbills. Every nonsolicitation order shall contain a provision setting forth the day, month and year that the order shall become effective, as well as the day, month and year that the order shall expire. A nonsolicitation order shall not be effective for more than five years. However, a nonsolicitation order and the boundaries of the area where it applies may be re-adopted or amended from time to time in accordance with the procedures set forth herein.

(b) No real estate broker shall establish a new principal office or branch office within any geographic area which is the subject of a nonsolicitation order without prior approval from the secretary of state. The secretary of state may deny any application for the establishment or relocation of a principal office or branch office if approval of the application would cause the total number of principal and branch offices within the subject area to exceed the total number of principal and branch offices that were licensed within the area on the date the nonsolicitation order became effective.

3. (a) If the secretary of state determines that some owners of residential real property within a defined geographic area are subject to intense and repeated solicitation by real estate brokers and salespersons to place their property for sale with such real estate brokers or salespersons, or are subject to intense and repeated solicitation by other persons regularly engaged in the trade or business of buying and selling real estate to sell their real estate, the secretary of state may adopt a rule establishing a cease and desist zone, which zone shall be bounded or otherwise specifically defined in the rule. After the secretary of state has established a cease and desist zone, the owners of residential real property located within the zone may file an owner's statement with the secretary of state expressing their wish not to be solicited by real estate brokers, salespersons or other persons regularly engaged in the trade or business of buying and selling real estate. The form and content of the statement shall be prescribed by the secretary of state. After a cease and desist zone has been established by the secretary of state, no real estate broker, salesperson or other person regularly engaged in the trade or business of buying and selling real estate shall solicit a listing from any owner who has filed a statement with the secretary of state if such owner's name appears on the current cease and desist list prepared by the secretary of state. The prohibition on solicitation shall apply to direct forms of solicitation such as the use of the telephone, the mail, personal contact and other forms of direct solicitation as may be specified by the secretary of state.

(b) The secretary of state shall compile a cease and desist list for each zone established pursuant to paragraph (a) of this subdivision. In addition to such other information as the secretary of state may deem appropriate, each cease and desist list shall contain the name of each owner who has filed an owner's statement with the secretary, as well as the address of the property within the zone to which the owner's statement applies. The secretary of state shall send to each owner who has filed an owner's statement a written acknowledgement of the secretary of state's receipt thereof and a pamphlet explaining to the owner his or her rights in connection therewith and the procedures and time limits applicable to the filing of complaints for violations. The secretary of state shall allow an owner who files, or on behalf of whom is filed, a complaint or other report of a violation of a cease and desist rule ninety days in which to perfect a complaint by submitting such other or further information or documents as the secretary of state may require. The secretary of state shall print a list for each zone. Each list shall be revised and reprinted at least annually on or before December thirty-first and shall be made available to the public and to real estate brokers at a reasonable price to be set by the secretary of state and approved by the director of the division of the budget. Additions or deletions shall be made to each list only at the time the list is reprinted, and the secretary of state shall not issue amendments or addenda to any printed list.

(c) No rule establishing a cease and desist zone shall be effective for longer than five years. However, the secretary of state may re-adopt the rule to continue the cease and desist zone for additional periods not to exceed five years each. Whenever a rule establishing a cease and desist zone shall have expired or shall have been repealed, all owner's statements filed with the secretary of state pursuant to that rule shall also expire. However, an owner may file a new statement with the secretary of state if a new rule is adopted establishing a cease and desist zone containing the owner's property. Once the boundaries of a cease and desist zone have been established by rule of the secretary of state, the boundaries may not be changed except by repeal of the existing rule and adoption of a new rule establishing the new boundaries.

Credits

(Added L.1989, c. 696, § 2. Amended L.1995, c. 248, § 4; L.2000, c. 607, § 1, eff. May 28, 2001; L.2001, c. 505, § 1, eff. May 28, 2001.)

Notes of Decisions (6)

McKinney's Real Property Law § 442-h, NY REAL PROP § 442-h
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McKinney's Real Property Law § 442-i

§ 442-i. State real estate board

Effective: April 1, 2011
Currentness

1. There is hereby established within the department of state a state real estate board which shall consist of the secretary of state, superintendent of financial services, and thirteen additional members. At least five of these members shall be "real estate brokers", each of whom, at the time of appointment, shall be licensed and qualified as a real estate broker under the laws of New York state and shall have been engaged in the real estate business in this state for a period of not less than ten years prior to appointment. The remaining members shall be "public members" who shall not be real estate licensees.

2. The thirteen members shall be appointed as follows: seven members shall be appointed by the governor, three of whom shall be real estate brokers and four of whom shall be public members; two members shall be appointed by the temporary president of the senate, one of whom shall be a real estate broker and one of whom shall be a public member; two members shall be appointed by the speaker of the assembly, one of whom shall be a real estate broker and one of whom shall be a public member; one member shall be appointed by the minority leader of the senate, who shall be either a real estate broker or a public member; and one member shall be appointed by the minority leader of the assembly, who shall be either a real estate broker or a public member.

3. Each appointed member shall serve for a term of two years; at any point during such term the appointed member may be removed by the person who appointed such member. In the event that any of said members shall die or resign during the term of office, the successor shall be appointed in the same way and with the same qualifications as set forth above. A member may be reappointed for successive terms but no member shall serve more than ten years in his or her lifetime.

4. A majority of members currently serving on the board shall be required in order to pass any resolution or to approve any matter before the board. The secretary of state shall be chairperson of the board. The vice-chairperson and a secretary shall be elected from among the members. A board member who fails to attend three consecutive meetings shall forfeit the seat unless the secretary of state, upon written request from the member, finds that the member should have been excused from a meeting because of illness or death of a family member.

5. Each member of the board shall receive no compensation other than reimbursement for actual and necessary expenses.

6. The board shall meet no fewer than three times per year and at the call of the secretary of state or a majority of the board. In addition to regularly scheduled meetings of the board, there shall be at least one public hearing each year in New York city, one public hearing each year in Buffalo, and one public hearing each year in Albany. At least fifteen days prior to the holding of any of these public hearings pursuant to this subdivision, the board shall give public notice of the hearing in a newspaper of general circulation in each area where the public meeting is to be held. The purpose of these hearings shall be to solicit from members of the public, suggestions, comments, and observations about real estate practice in New York state.

Credits

(Added L.1995, c. 248, § 2. Amended L.2011, c. 62, pt. A, § 29, eff. April 1, 2011.)

McKinney's Real Property Law § 442-i, NY REAL PROP § 442-i
Current through L.2017, chapters 1 to 23.

End of Document

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 442-j

§ 442-j. Effect of invalid provision

Currentness

Should the courts of this state declare any provision of this article unconstitutional, or unauthorized, or in conflict with any other section or provision of this article, then such decision shall affect only the section or provision so declared to be unconstitutional or unauthorized and shall not affect any other section or part of this article.

Credits
(Formerly § 442-l, added L.1922, c. 672. Renumbered § 442-k, L.1926, c. 831. Amended L.1927, c. 107, § 1. Renumbered § 442-j, L.1995, c. 248, § 3.)

McKinney's Real Property Law § 442-j, NY REAL PROP § 442-j
Current through L.2017, chapters 1 to 23.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 442-k

§ 442-k. Powers and duties of the state real estate board

Currentness

1. The state real estate board shall have the power to promulgate rules or regulations affecting brokers and sales persons in order to administer and effectuate the purposes of this article, except that matters pertaining to commingling money of a principal, rendering accounts for a client, managing property for a client, broker's purchase of property listed with him or her, inducing breach of contract of sale or lease, and records of transactions to be maintained are reserved for the exclusive regulatory authority of the secretary of state. The secretary of state, and not the state real estate board, shall promulgate rules and regulations to administer or implement the provisions of sections four hundred forty-one and four hundred forty-two-h of this article. In addition, the secretary of state shall have exclusive regulatory authority to promulgate rules regarding the duties and responsibilities of real estate brokers and salespersons with regard to the handling of clients' funds.

2. Authority to examine applicants. The board is empowered to prescribe the content for the courses of study for the examination and education of persons licensed under this article. The board shall advise the secretary of state on policies governing the administration of the examinations.

3. Approval of schools. The board shall establish the rules and regulations governing the approval by the secretary of state of schools to offer or conduct courses required either for licensure under this article or for the satisfaction of the continuing education requirements contained in paragraph (a) of subdivision three of section four hundred forty-one of this article.

4. Study of laws and regulations. The board shall study the operation of laws and regulations with respect to the rights, responsibilities and liabilities of real estate licensees arising out of the transfer of interests in real property and shall make recommendation on pending or proposed legislation affecting the same, with the exception of legislation affecting section four hundred forty-two-h of this article.

5. Enforcement programs and activities. The board shall advise and assist the secretary of state in carrying out the provisions and purposes of this article and make recommendations concerning the programs and activities of the department in connection with the enforcement of this article.

6. Administration and enforcement. The department of state shall have the power and its duty shall be to administer and enforce the laws and regulations of the state relating to those activities involving real estate

for which licensing is required under this article and to instruct and require its agents to bring prosecutions for unauthorized and unlawful practice.

7. Reports to legislative committees. The board shall submit annually a report to the judiciary committee of the state assembly and the judiciary committee of the state senate, containing a description of the types of complaints received, status of cases, and the length of time from the initial complaint to any final disposition.

Credits
(Added L.1995, c. 248, § 3.)

McKinney's Real Property Law § 442-k, NY REAL PROP § 442-k
Current through L.2017, chapters 1 to 23.

End of Document

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 442-l

§ 442-l. After-the-fact referral fees

Effective: February 16, 2003
Currentness

1. No real estate broker or salesperson, in any place in which this article is applicable, shall demand or receive a referral fee or compensation of any kind for (i) a referral from any person or other entity relative to finding a seller after a bona fide listing agreement has been signed, (ii) a referral from any person or other entity relative to finding a buyer after a bona fide offer to purchase is accepted, or (iii) a referral from any person or other entity relative to finding a property after a bona fide buyer's agency agreement has been signed, unless reasonable cause for payment of such compensation exists.

2. A violation of this section shall be a violation of this article and shall constitute a deceptive act or practice within the meaning of section three hundred forty-nine of the general business law.

Credits
(Added L.2002, c. 482, § 1, eff. Feb. 16, 2003.)

McKinney's Real Property Law § 442-l, NY REAL PROP § 442-l
Current through L.2017, chapters 1 to 23.

End of Document

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 443

§ 443. Disclosure regarding real estate agency relationship; form

Effective: January 1, 2011
Currentness

1. Definitions. As used in this section, the following terms shall have the following meanings:

a. "Agent" means a person who is licensed as a real estate broker, associate real estate broker or real estate salesperson under section four hundred forty-a of this article and is acting in a fiduciary capacity.

b. "Buyer" means a transferee in a residential real property transaction and includes a person who executes an offer to purchase residential real property from a seller through an agent, or who has engaged the services of an agent with the object of entering into a residential real property transaction as a transferee.

c. "Buyer's agent" means an agent who contracts to locate residential real property for a buyer or who finds a buyer for a property and presents an offer to purchase to the seller or seller's agent and negotiates on behalf of the buyer.

d. "Listing agent" means a person who has entered into a listing agreement to act as an agent of the seller or landlord for compensation.

e. "Listing agreement" means a contract between an owner or owners of residential real property and an agent, by which the agent has been authorized to sell or lease the residential real property or to find or obtain a buyer or lessee therefor.

f. "Residential real property" means real property used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons improved by (i) a one-to-four family dwelling or (ii) condominium or cooperative apartments but shall not refer to unimproved real property upon which such dwellings are to be constructed.

g. "Seller" means the transferor in a residential real property transaction, and includes an owner who lists residential real property for sale with an agent, whether or not a transfer results, or who receives an offer to purchase residential real property.

h. “Seller's agent” means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, acts as a seller's subagent or acts as a broker's agent to find or obtain a buyer for residential real property.

i. “Dual agent” means an agent who is acting as a buyer's agent and a seller's agent or a tenant's agent and a landlord's agent in the same transaction.

j. “Designated sales agent” means a licensed real estate salesman or associate broker, working under the supervision of a real estate broker, who has been assigned to represent a client when a different client is also represented by such real estate broker in the same transaction.

k. “Broker's agent” means an agent that cooperates or is engaged by a listing agent, buyer's agent or tenant's agent (but does not work for the same firm as the listing agent, buyer's agent or tenant's agent) to assist the listing agent, buyer's agent or tenant's agent in locating a property to sell, buy or lease respectively, for the listing agent's seller or landlord, the buyer agent's buyer or the tenant's agent tenant. The broker's agent does not have a direct relationship with the seller, buyer, landlord or tenant and the seller, buyer, landlord or tenant can not provide instructions or direction directly to the broker's agent. Therefore, the seller, buyer, landlord or tenant do not have vicarious liability for the acts of the broker's agent. The listing agent, buyer's agent or tenant's agent do provide direction and instruction to the broker's agent and therefore the listing agent, buyer's agent or tenant's agent will have liability for the broker's agent.

l. “Tenant” means a lessee in a residential real property transaction and includes a person who executes an offer to lease residential real property from a landlord through an agent, or who has engaged the services of an agent with the object of entering into a residential real property transaction as a lessee.

m. “Landlord” means the lessor in a residential real property transaction, and includes an owner who lists residential real property for lease with an agent, whether or not a lease results, or who receives an offer to lease residential real property.

n. “Tenant's agent” means an agent who contracts to locate residential real property for a tenant or who finds a tenant for a property and presents an offer to lease to the landlord or landlord's agent and negotiates on behalf of the tenant.

o. “Landlord's agent” means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, acts as a landlord's subagent or acts as a broker's agent to find or obtain a tenant for residential real property.

p. “Advance consent to dual agency” means written informed consent signed by the seller/landlord or buyer/tenant that the listing agent and/or buyer's agent may act as a dual agent for that seller/landlord and a buyer/tenant for residential real property which is the subject of a listing agreement.

q. “Advance consent to dual agency with designated sales agents” means written informed consent signed by the seller/landlord or buyer/tenant that indicates the name of the agent appointed to represent the seller/landlord or buyer/tenant as a designated sales agent for residential real property which is the subject of a listing agreement.

2. This section shall apply only to transactions involving residential real property.

3. a. A listing agent shall provide the disclosure form set forth in subdivision four of this section to a seller or landlord prior to entering into a listing agreement with the seller or landlord and shall obtain a signed acknowledgment from the seller or landlord, except as provided in paragraph e of this subdivision.

b. A seller's agent or landlord's agent shall provide the disclosure form set forth in subdivision four of this section to a buyer , buyer's agent, tenant or tenant's agent at the time of the first substantive contact with the buyer or tenant and shall obtain a signed acknowledgement from the buyer or tenant, except as provided in paragraph e of this subdivision.

c. A buyer's agent or tenant's agent shall provide the disclosure form to the buyer or tenant prior to entering into an agreement to act as the buyer's agent or tenant's agent and shall obtain a signed acknowledgment from the buyer or tenant, except as provided in paragraph e of this subdivision. A buyer's agent or tenant's agent shall provide the form to the seller, seller's agent, landlord or landlord's agent at the time of the first substantive contact with the seller or landlord and shall obtain a signed acknowledgment from the seller, landlord or the listing agent, except as provided in paragraph e of this subdivision.

d. The agent shall provide to the buyer, seller, tenant or landlord a copy of the signed acknowledgment and shall maintain a copy of the signed acknowledgment for not less than three years.

e. If the seller, buyer, landlord or tenant refuses to sign an acknowledgment of receipt pursuant to this subdivision, the agent shall set forth under oath or affirmation a written declaration of the facts of the refusal and shall maintain a copy of the declaration for not less than three years.

f. A seller/landlord or buyer/tenant may provide advance informed consent to dual agency and dual agency with designated sales agents by indicating the same on the form set forth in subdivision four of this section.

4. a. For buyer-seller transactions, the following shall be the disclosure form:

NEW YORK STATE DISCLOSURE FORM

FOR

BUYER AND SELLER

THIS IS NOT A CONTRACT

New York state law requires real estate licensees who are acting as agents of buyers or sellers of property to advise the potential buyers or sellers with whom they work of the nature of their agency relationship and the rights and obligations it creates. This disclosure will help you to make informed choices about your relationship with the real estate broker and its sales agents.

Throughout the transaction you may receive more than one disclosure form. The law may require each agent assisting in the transaction to present you with this disclosure form. A real estate agent is a person qualified to advise about real estate.

If you need legal, tax or other advice, consult with a professional in that field.

DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIPS

SELLER'S AGENT

A seller's agent is an agent who is engaged by a seller to represent the seller's interests. The seller's agent does this by securing a buyer for the seller's home at a price and on terms acceptable to the seller. A seller's agent has, without limitation, the following fiduciary duties to the seller: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account. A seller's agent does not represent the interests of the buyer. The obligations of a seller's agent are also subject to any specific provisions set forth in an agreement between the agent and the seller. In dealings with the buyer, a seller's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the value or desirability of property, except as otherwise provided by law.

BUYER'S AGENT

A buyer's agent is an agent who is engaged by a buyer to represent the buyer's interests. The buyer's agent does this by negotiating the purchase of a home at a price and on terms acceptable to the buyer. A buyer's agent has, without limitation, the following fiduciary duties to the buyer: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account. A buyer's agent does not represent the interests of the seller. The obligations of a buyer's agent are also subject to any specific provisions set forth in an agreement between the agent and the buyer. In dealings with the seller, a buyer's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the buyer's ability and/or willingness to perform a contract to acquire seller's property that are not inconsistent with the agent's fiduciary duties to the buyer.

BROKER'S AGENTS

A broker's agent is an agent that cooperates or is engaged by a listing agent or a buyer's agent (but does not work for the same firm as the listing agent or buyer's agent) to assist the listing agent or buyer's agent in locating a property to sell or buy, respectively, for the listing agent's seller or the buyer agent's buyer. The broker's agent does not have a direct relationship with the buyer or seller and the buyer or seller can not provide instructions or direction directly to the broker's agent. The buyer and the seller therefore do not have vicarious liability for the acts of the broker's agent. The listing agent or buyer's agent do provide direction and instruction to the broker's agent and therefore the listing agent or buyer's agent will have liability for the acts of the broker's agent.

DUAL AGENT

A real estate broker may represent both the buyer and the seller if both the buyer and seller give their informed consent in writing. In such a dual agency situation, the agent will not be able to provide the full range of fiduciary duties to the buyer and seller. The obligations of an agent are also subject to any specific provisions set forth in an agreement between the agent, and the buyer and seller. An agent acting as a dual agent must explain carefully to both the buyer and seller that the agent is acting for the other party as well. The agent should also explain the possible effects of dual representation, including that by consenting to the dual agency relationship the buyer and seller are giving up their right to undivided loyalty. A buyer or seller should carefully consider the possible consequences of a dual agency relationship before agreeing to such representation. A seller or buyer may provide advance informed consent to dual agency by indicating the same on this form.

DUAL AGENT

WITH

DESIGNATED SALES AGENTS

If the buyer and the seller provide their informed consent in writing, the principals and the real estate broker who represents both parties as a dual agent may designate a sales agent to represent the buyer and another sales agent to represent the seller to negotiate the purchase and sale of real estate. A sales agent works under the supervision of the real estate broker. With the informed consent of the buyer and the seller in writing, the designated sales agent for the buyer will function as the buyer's agent representing the interests of and advocating on behalf of the buyer and the designated sales agent for the seller will function as the seller's agent representing the interests of and advocating on behalf of the seller in the negotiations between the buyer and seller. A designated sales agent cannot provide the full range of fiduciary duties to the buyer or seller. The designated sales agent must explain that like the dual agent under whose supervision they function, they cannot provide undivided loyalty. A buyer or seller should carefully consider the possible consequences of a dual agency relationship with designated sales agents before agreeing to such representation. A seller or buyer may provide advance informed consent to dual agency with designated sales agents by indicating the same on this form.

This form was provided to me by ..... (print name of licensee) of ..... (print name of company, firm or brokerage), a licensed real estate broker acting in the interest of the:

( ) Seller as a	( ) Buyer as a
(check relationship below)	(check relationship below)
( ) Seller's agent	( ) Buyer's agent
( ) Broker's agent	( ) Broker's agent
( ) Dual agent	( ) Dual agent with designated sales agents

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:

( ) Advance informed consent dual agency.

( ) Advance informed consent to dual agency with designated sales agents.

If dual agent with designated sales agents is indicated above:

.....is appointed to represent the buyer; and

.....is appointed to represent the seller in this transaction.

(I) (We) acknowledge receipt of a copy of this disclosure form:

Signature of { } Buyer(s) and/or { } Seller(s):

_____ _____

_____ _____

Date:_____ Date:_____

b. For landlord-tenant transactions, the following shall be the disclosure form:

NEW YORK STATE DISCLOSURE FORM

FOR

LANDLORD AND TENANT

THIS IS NOT A CONTRACT

New York state law requires real estate licensees who are acting as agents of landlords and tenants of real property to advise the potential landlords and tenants with whom they work of the nature of their agency relationship and the rights and obligations it creates. This disclosure will help you to make informed choices about your relationship with the real estate broker and its sales agents.

Throughout the transaction you may receive more than one disclosure form. The law may require each agent assisting in the transaction to present you with this disclosure form. A real estate agent is a person qualified to advise about real estate.

If you need legal, tax or other advice, consult with a professional in that field.

DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIPS

LANDLORD'S AGENT

A landlord's agent is an agent who is engaged by a landlord to represent the landlord's interest. The landlord's agent does this by securing a tenant for the landlord's apartment or house at a rent and on terms acceptable to the landlord. A landlord's agent has, without limitation, the following fiduciary duties to the landlord: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account. A landlord's agent does not represent the interests of the tenant. The obligations of a landlord's agent are also subject to any specific provisions set forth in an agreement between the agent and the landlord. In

dealings with the tenant, a landlord's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the value or desirability of property, except as otherwise provided by law.

TENANT'S AGENT

A tenant's agent is an agent who is engaged by a tenant to represent the tenant's interest. The tenant's agent does this by negotiating the rental or lease of an apartment or house at a rent and on terms acceptable to the tenant. A tenant's agent has, without limitation, the following fiduciary duties to the tenant: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account. A tenant's agent does not represent the interest of the landlord. The obligations of a tenant's agent are also subject to any specific provisions set forth in an agreement between the agent and the tenant. In dealings with the landlord, a tenant's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the tenant's ability and/or willingness to perform a contract to rent or lease landlord's property that are not inconsistent with the agent's fiduciary duties to the buyer.

BROKER'S AGENTS

A broker's agent is an agent that cooperates or is engaged by a listing agent or a tenant's agent (but does not work for the same firm as the listing agent or tenant's agent) to assist the listing agent or tenant's agent in locating a property to rent or lease for the listing agent's landlord or the tenant agent's tenant. The broker's agent does not have a direct relationship with the tenant or landlord and the tenant or landlord can not provide instructions or direction directly to the broker's agent. The tenant and the landlord therefore do not have vicarious liability for the acts of the broker's agent. The listing agent or tenant's agent do provide direction and instruction to the broker's agent and therefore the listing agent or tenant's agent will have liability for the acts of the broker's agent.

DUAL AGENT

A real estate broker may represent both the tenant and the landlord if both the tenant and landlord give their informed consent in writing. In such a dual agency situation, the agent will not be able to provide the full range of fiduciary duties to the landlord and the tenant. The obligations of an agent are also subject to any specific provisions set forth in an agreement between the agent, and the tenant and landlord. An agent acting as a dual agent must explain carefully to both the landlord and tenant that the agent is acting for the other party as well. The agent should also explain the possible effects of dual representation, including that by consenting to the dual agency relationship the landlord and tenant are giving up their right to undivided loyalty. A landlord and tenant should carefully consider the possible consequences of a dual agency relationship before agreeing to such representation. A landlord or tenant may provide advance informed consent to dual agency by indicating the same on this form.

DUAL AGENT

WITH

DESIGNATED SALES AGENTS

If the tenant and the landlord provide their informed consent in writing, the principals and the real estate broker who represents both parties as a dual agent may designate a sales agent to represent the tenant and

another sales agent to represent the landlord. A sales agent works under the supervision of the real estate broker. With the informed consent in writing of the tenant and the landlord, the designated sales agent for the tenant will function as the tenant's agent representing the interests of and advocating on behalf of the tenant and the designated sales agent for the landlord will function as the landlord's agent representing the interests of and advocating on behalf of the landlord in the negotiations between the tenant and the landlord. A designated sales agent cannot provide the full range of fiduciary duties to the landlord or tenant. The designated sales agent must explain that like the dual agent under whose supervision they function, they cannot provide undivided loyalty. A landlord or tenant should carefully consider the possible consequences of a dual agency relationship with designated sales agents before agreeing to such representation. A landlord or tenant may provide advance informed consent to dual agency with designated sales agents by indicating the same on this form.

This form was provided to me by ..... (print name of licensee) of ..... (print name of company, firm or brokerage), a licensed real estate broker acting in the interest of the:

( ) Landlord as a	( ) Tenant as a
(check relationship below)	(check relationship below)
( ) Landlord's agent	( ) Tenant's agent
( ) Broker's agent	( ) Broker's agent
( ) Dual agent	( ) Dual agent with designated sales agents

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:

( ) Advance informed consent dual agency.

( ) Advance informed consent to dual agency with designated sales agents.

If dual agent with designated sales agents is indicated above:

.....is appointed to represent the tenant; and

.....is appointed to represent the landlord in this transaction.

(I) (We) ..... acknowledge receipt of a copy of this disclosure form:

Signature of { } Landlord(s) and/or { } Tenant(s):

.....

.....

Date: _____ Date: _____

5. This section shall not apply to a real estate licensee who works with a buyer, seller, tenant or landlord in accordance with terms agreed to by the licensee and buyer, seller, tenant or landlord and in a capacity other than as an agent, as such term is defined in paragraph a of subdivision one of this section.

6. Nothing in this section shall be construed to limit or alter the application of the common law of agency with respect to residential real estate transactions.

Credits

(Added L.1991, c. 726, § 1. Amended L.1993, c. 469, § 1; L.2006, c. 569, §§ 1, 2, eff. Jan. 1, 2007; L.2007, c. 549, § 1, eff. Jan. 1, 2008; L.2010, c. 443, §§ 1 to 3, eff. Jan. 1, 2011.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Dan M. Blumenthal

2016

A Landlord's Agent must "disclose all facts known to the agent materially affecting the value or desirability of property, except as otherwise provided by law." Subp. 4(a). However, in *Ader v. Guzman,* 135 A.D.3d 668, 22 N.Y.S.3d 576 (2d Dept. 2016) the tenant's claim against the Landlord's broker for a lease subsequently found to be illegal and unenforceable due to landlord having failed to procure a rental permit under a town code, was properly granted below where the tenant failed to demonstrate any "active concealment" by the broker.

PRACTICE COMMENTARIES

by Dan M. Blumenthal

In *Rivkin v. Century 21 Teran Realty LLC*, 10 N.Y.3d 344, 858 N.Y.S.2d 55 (2008), the New York Court of Appeals analyzed the legislative history of this Section and determined that the legislative intent in enacting the statute was to clarify who the Real Estate professional represented and prevent "uneven disclosure which too often ... failed to eliminate confusion on the part of buyers or sellers as to the loyalties and duties of agents with whom they [were] dealing" (Assembly Mem. in Support, Bill Jacket, L.1991, ch. 726, at 16). The section applies to transactions involving one-to-four-family residential dwellings (including condominium or cooperative apartments), but does not include unimproved real property upon which condominium or cooperative apartments are to be constructed. *See* § 443(1)(f).

Notes of Decisions (13)

McKinney's Real Property Law § 443, NY REAL PROP § 443

Current through L.2017, chapters 1 to 23.

End of Document

McKinney's Consolidated Laws of New York Annotated
Real Property Law (Refs & Annos)
Chapter 50. Of the Consolidated Laws
Article 12-a. Real Estate Brokers and Real Estate Salesmen (Refs & Annos)

McKinney's Real Property Law § 443-a

§ 443-a. Disclosure obligations

Currentness

1. Notwithstanding any other provision of law, it is not a material defect or fact relating to property offered for sale or lease, including residential property regardless of the number of units contained therein, that:

(a) an owner or occupant of the property is, or was at any time suspected to be, infected with human immunodeficiency virus or diagnosed with acquired immune deficiency syndrome or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through occupancy of a dwelling place; or

(b) the property is, or is suspected to have been, the site of a homicide, suicide or other death by accidental or natural causes, or any crime punishable as a felony.

2. (a) No cause of action shall arise against an owner or occupant of real property, or the agent of such owner or occupant, or the agent of a seller or buyer of real property, for failure to disclose in any real estate transaction a fact or suspicion contained in subdivision one of this section.

(b) Failure to disclose a fact contained in subdivision one of this section to a transferee shall not be grounds for a disciplinary action against a real estate agent or broker licensed pursuant to this article.

(c) As used in this section, the terms “agent”, “buyer” and “seller” shall have the same meanings as such terms are defined in section four hundred forty-three of this article.

3. Notwithstanding the fact that this information is not a material defect or fact, if such information is important to the decision of the buyer to purchase or lease the property, the buyer may, when negotiating or making a bona fide offer, submit a written inquiry for such information. The buyer or the agent of the buyer shall provide the written request to the seller's agent or to the seller if there is no seller's agent. The seller may choose whether or not to respond to the inquiry. The seller's agent, with the consent of the seller and subject to applicable laws regarding privacy, shall report any response and information to the buyer's agent or to the buyer if there is no buyer's agent. If there is no seller's agent, the seller shall inform the buyer's agent, or the buyer if there is no buyer's agent, whether or not the seller chooses to provide a response.

4. This section shall preempt any local law inconsistent with the provisions of this section.

Credits
(Added L.1995, c. 606, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Dan M. Blumenthal

This section addresses certain conditions which may have a psychological impact in a property transaction. The section affirmatively shields sellers and Real Estate agents from any duty of disclosure regarding occupancy by persons with autoimmune diseases such as HIV or AIDS (subp. 1(a)) and the prior occurrence of a felony on the site (subp. 1(b)). While a concerned buyer may ask (in writing) and the agent is obligated to forward the request to the seller, the seller has no obligation to respond (subp. 3).

The section does not address other non-physical conditions which may materially affect the property value. *See Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672 (1st Dept. 1991), wherein a contract vendee sought rescission and damages when he discovered that the home he was about to purchase was reputed to be haunted. Where the seller had publicly reported "supernatural occurrences" at the property, the appellate court determined that the seller owed a duty to disclose the condition or belief and reversed the trial court dismissal of that portion of the complaint seeking rescission of the contract.

Notes of Decisions (1)

McKinney's Real Property Law § 443-a, NY REAL PROP § 443-a
Current through L.2017, chapters 1 to 23.

End of Document

VI. Real Estate Brokerage – Leasing Transaction

by

Robert J. Shansky, Esq.

Scarola, Malone & Zubatov, LLP
New York City

Real Estate Brokerage – Leasing Transaction[1]

Introduction

Although commercial landlords or tenants may engage real estate brokers to find or dispose of space by signing the real estate broker's "standard" agreement, the engagement of real estate brokers has legal consequences and complexities that can be addressed if counsel for the landlord or tenant has an opportunity to review the proposed agreement. The industry standard forms are negotiable.

It is important to remember that payment of a commission to a licensed real estate broker is an exception to the Statute of Frauds,[2] and a landlord or tenant could become liable for payment of a commission in the absence of a written. Depending on the circumstances, a broker may be entitled to a commission based on an oral agreement or an implied contract of employment.

In my view it is best practice to have a clear and complete written agreement in connection with the employment of a real estate broker. In order to address issues commonly occurring in connection with engaging a commercial real estate broker I have chosen an example where a tenant of existing space is engaging a real estate broker to act as its exclusive agent with the exclusive right to represent it in connection with an office relocation. This sample transaction, which is very common, contemplates the disposition of the tenant's existing space and the relocation to new space. In the past I have worked on this type of transaction for my law firm and for clients and it includes many of the issues that can arise in connection with engaging

[1] The views in the outline are of its author, Robert J. Shansky, Esq. and not the views of his law firm. The attachments to this article are attached for illustrative purposes and not intended to be relied on for any particular purpose and the author is not giving legal advice concerning the content or effectiveness of these examples.

[2] New York GOL Section 5-701(10)

real estate brokers in commercial lease transactions, whether by a landlord leasing its space or to a tenant seeking to dispose of space.

The following is an outline of issues to consider and to address (as appropriate) in connection with such proposed lease transactions:

1. Appoint agent to represent tenant in relocating to new Premises – transaction involves disposition of existing space and leasing new space.
2. Interview multiple prospective exclusive agents.
3. Granting exclusive agency, giving the broker sole right to acquire or dispose of space, gives the designated broker the sole right to represent the tenant (all prospects need to be referred to exclusive agent). In certain instances it may be appropriate to carve a specific party out of the agreement.
4. Issues to address in this type of exclusive agency agreement (a form of sample negotiated exclusive agency agreement is attached as Exhibit A).
    (a) Term - the terms will vary depending on the facts of the particular engagement
    (b) Authority of agent – cannot bind principal
        any agreement subject to sole discretion of tenant.
    (c) Identify the key people to work on the project.
        Tenant will want the right to approve any change or replacement of key people.
    (d) State purpose and limit agency to particular transaction and market.
    (e) Describe services to be provided by the broker.
        (i) Work with tenant in identifying tenant requirements and develop strategy;
        (ii) Market research and compare potential locations;

(iii) General overview of physical due diligence and general adequacy of premises for tenant's requirements;

(iv) Financial structuring (may include availability of incentives); and

(v) Assist in management of transactions and negotiations.

(f) Disposition of Existing Space:

(i) Sublease;

(ii) Surrender; or

(iii) Assignment;

(g) Acquiring new space by lease or sublease;

(h) Commission Schedule:

(i) Commission rates;

(ii) Definition of rent for purposes of competing commissions;

(iii) Timing of commission payments (can be negotiated to pay at specific times);

(iv) May address issues of renewal rights or expansion options contained in new lease; and

(v) Special issue if lease contains a tenant termination right.

(i) Marketing and budget with certain tenant approval rights;

(j) Conditions to commission being due, earned and payable:

(i) Transaction documents have been unconditionally executed and delivered by the parties;

(ii) Any advance rent payment or security deposit has been paid;

(iii) All consents or conditions to the effectiveness of the transaction have been obtained; and

(iv) The lease has commenced.

(k) Indemnification – broker will want to limit indemnity to amount of commission received. Should it be limited? There are other covenants that could be breached in the agreement;

(l) Confidentiality and publicity- tenant will commonly want to limit advertising to customary "tombstone" ad identifying the building square feet and the parties involved;

(m) Reduction of commission for tenant's benefit (putting portion of the commission into transaction for tenant's benefit consistent with applicable legal requirements); and

(n) Expiration of exclusive and tail period issues – pending negotiations – not just showing the premises.

5. Exclusive tenant representation versus nation brokerage company

(i) Protection against conflicts;

(ii) Treatment of related brokers as cooperating brokers for purposes of commission payment; and

(iii) Appropriate disclosure of parties.

EXHIBIT A

EXCLUSIVE AGENCY AGREEMENT

This EXCLUSIVE AGENCY AGREEMENT (the "Agreement") dated as of _____, __, 2017, is between [*Tenant*], a _____ ("Client"), and [*national brokerage company*], a [_____] corporation ("Agent").

In consideration of the mutual promises set forth herein, Client and Agent agree as follows:

1. The Services.

1.1 Disposition. Agent represents and warrants that it is a licensed real estate broker in the State of New York. Client employs Agent during the Term (as defined below) as its exclusive Agent, and with the exclusive right to: (a) sublease Client's leased premises located in the building at _____, _____, NY (the "Premises"), (b) arrange for an assignment of all or a portion of Client's obligations under its lease for the Premises (the "Lease"), or (c) arrange for an agreement between landlord and Client whereby Client is relieved of all or a portion of its obligations under the Lease (collectively, the "Disposition Services").

1.2 Acquisition. Client employs Agent during the Term as its exclusive Agent, and with the exclusive right to, locate and assist in negotiating lease(s) for new office space, or assist in negotiating a renewal, expansion and/or an extension of existing lease(s), on behalf of Client in the New York metropolitan area (the "Acquisition Services", and together with the Disposition Services, the "Services"). Acquisition Services will also include the consulting services listed in Exhibit A for no additional compensation. Agent will acquire the details on all contemplated or presently available locations and present to Client Agent's recommendations on the locations that would be most suitable to meet Client's requirements. If and when Client decides on a location, the Project Team will negotiate on Client's behalf subject to the terms of this Agreement.

1.3 General. (a) Agent shall perform the Services in accordance with applicable[3] professional standards. During the Term Client shall refer all inquiries to Agent and to conduct all negotiations through Agent (under the supervision, direction and control of Client); but Agent has no authority to obligate Client. _____ and _____ of Agent (the "Project Team") will perform the Services under this Agreement. No changes will be made in the Project Team during the Term without the prior consent of Client. If Agent deems it necessary, Agent will solicit the cooperation of other licensed real estate brokers. All final business decisions shall be made solely by Client and Agent does not have authority to bind Client. Agent will keep Client advised of its progress with respect with respect to the Disposition Services and Acquisition Services.

(b) The Project Team may solicit offers for leases, sublease or other transactions from clients of [*national brokerage company*] or its affiliates. Client agrees that representatives of [*national brokerage company*] or its affiliates other than the Project Team may represent one or more other prospective parties to such lease, sublease or transaction, and in such case, the representative of Agent other than the Project Team that representing such other party shall be considered a Cooperating Broker for purposes of this Agreement.

[3] Tenant could specify a higher standard, such as best efforts or highest professional standard.

(c) In cases where clients of Agent or its affiliates other than the Project Team may represent one or more prospective parties to such lease, sublease or transaction, we will disclose our dual role in the potential transaction to both Client and the other prospective party and will implement our usual internal safeguards to assure confidentiality to Client and the prospective party in Client's and their respective dealings with us. Client agrees that such occasional dual representation may occur, subject to appropriate disclosure and consents to the payment of our commissions as provided in this Agreement.

(d) Client may withdraw from negotiations of a transaction and refuse to continue therewith at any time, for any reason whatsoever without notice to Agent and without any responsibility to Agent of any kind for any compensation, commissions or damages and Agent further agrees that it shall make no claims for any compensation, commissions or damages against Client even though the proposed transaction fails to be consummated solely and only because of Client's refusal of continue the negotiations and to execute or deliver the sublease or other transaction document.

2. Commission.

2.1 Disposition Commissions. In the event and each time, whether or not through the efforts of Agent during the Term: (a) Client and a subtenant execute a sublease for some or all of the Premises satisfactory to client in its sole discretion, (b) an assignee assumes all or part of Client's obligations under the Lease, or (c) Client and its landlord enter into an agreement whereby Client is relieved of all or a portion of its remaining obligation under the Lease, subject to the terms of this Agreement, Client agrees to pay Agent a commission (the "Disposition Commission") in accordance with the Disposition Commission Schedule attached hereto as EXHIBIT B and subject to the terms and provisions of this Agreement. In addition, if a subtenant or assignee for all or a portion of the Premises is represented by any broker other than the Project Team ("Cooperating Broker"), Client shall be responsible for any commissions or other fees payable to that Cooperating Broker in accordance with the Disposition Commission Schedule subject to the terms of this Agreement. Agent shall prepare for Client's approval, in its sole discretion, a marketing budget. Client shall pay to Agent within thirty (30) days of presentation of Agent's invoice, all marketing expenses incurred by Agent in accordance with the marketing budget approved by Client.

2.2 Acquisition Commissions. (a) If Client executes and delivers a lease for office space during the Term, satisfactory to Client in its sole discretion, including a renewal or extension of Client's existing lease, whether or not through the efforts of Agent, Agent will be entitled to receive from the lessor or sublessor or its Agent (collectively the "landlord") a commission (an "Acquisition Commission", and together with the Disposition Commissions, the "Commissions") based on the standard market commission rate and terms in the New York City Metropolitan area. Agent agrees to look solely to the landlord for payment of any Acquisition Commission.

(b) Client shall be entitled to receive a benefit equal to [_____] percent (__%) of any Acquisition Commission paid to Agent for Acquisition Services hereunder for such lease with a term (the "Benefit"), same to be structured in a manner consistent with applicable law. The Benefit shall, at the discretion of Client but in compliance with applicable law, be credited to the benefit of Client in whatever form Client desires (e.g., placed back into the transaction economics in the form of additional transaction concessions, or paid to third parties in respect of fees and expenses incurred by Client). Client acknowledges and agrees that the Benefit is not offered, given or paid to Client as compensation for any service, help or aid that Client may or may not have rendered to Agent in connection with the

Services but rather is compensation and an inducement for Client to hire Agent as its exclusive broker and enter into this Agreement.

3. Indemnities. Agent will defend (with counsel reasonably acceptable to Client), indemnify and hold harmless Client and its affiliates, and each and all of their officers, directors, employees, partners and agents from and against all third party claims, losses, liabilities and expenses, including reasonable attorneys' fees, expert witness fees and court costs ("Loss") to the extent arising out of (a) Agent's default, [gross] negligence or intentional misconduct in connection with this Agreement, and (b) any claims by brokers claiming a commission, fee or other compensation as a result of dealing with Agent, provided Agent's liability for claims by brokers claiming a commission, fee or other compensation as a result of dealing with Agent shall be limited to the amount of commissions paid to Agent with respect to the particular transaction under this Agreement. [4]

4. Term. (a) Subject to the next succeeding sentence, this Agreement shall commence upon the date set forth above and shall remain in effect for [365] days (the "Term"). After 30 days from the commencement of this Agreement, either party may terminate this Agreement by providing 30 days' written notice to the other party.

(b) Within ten (10) days following expiration or earlier termination of this Agreement, Agent shall deliver to Client a list of parties with who Agent is engaged in active negotiations[5] during the Term (identifying such prospective subtenant or assignee, or landlord (or any of their respective agents)), regarding the possibility of a sublease, Lease assignment or termination, new lease or other space acquisition agreement (the "Pending Negotiation List"). Agent shall be entitled to a Commission as provided above in accordance with the terms hereof with respect to any sublease, Lease assignment or termination, or any space acquisition or other transaction arising from the Services identified on the Pending Transaction List, that is executed and delivered within six (6) months immediately following the expiration or termination of this Agreement.

[(c) Tenant may terminate this Agreement by written notice go Agent at any time if any of the following occur:

(i) any one or both of _____ and _____ is no longer a partner, employee or independent contractor with agent;

(ii) Tenant determines in good faith, that Agent has a conflict that materially adversely affects Agent's ability to represent tenant in an unbiased manner; or

(iii) Agent is no longer licensed as a real estate broker in the State of New York.][6]

5. Physical Condition. While Agent may be doing a survey of building systems for tenant comfort purposes at any property Client intends to lease or acquire, Client acknowledges that Agent is not an expert in, and will not be responsible for providing any advice with respect to, environmental hazards, engineering matters (structural or otherwise) or legal, regulatory or other technical issues. Client shall hire such experts as it deems necessary to investigate any environmental matters,

[4] In this form only the indemnity as to commissions is limited.
[5] Tenant wants to be sure merely showing space does not constitute a pending negotiation.
[6] The Agreement may include a default provision.

engineering matters, legal or regulatory matters or other technical matters at any property it intends to lease, purchase or occupy.

6. Confidentiality; Publicity. Agent shall keep confidential all non-public information obtained from Client relating to the Services, except as reasonably required in order to perform Services hereunder. There are to be no public statements and/or advertisements or other publicity by Agent with respect to its engagement or any Lease negotiated with Agent's assistance, or with respect to any unsuccessful negotiations, without Tenant's written approval. In addition, any and all work product, materials, data and studies created in connection with the Services (excluding proprietary items) shall belong to Client. Client agrees that after conclusion of a transaction Agent may publicize its role in any transaction Client enters into, provided Agent does not disclose any financial information regarding such transaction.

7. Notices. Any and all notices required or permitted to be delivered pursuant to the terms of this Agreement shall be in writing and may be delivered by (x) hand, (y) nationally recognized overnight mail or courier service, or (z) certified or registered mail (postage prepaid and return receipt requested). Notices shall be addressed to the parties at the following addresses:

(a) If intended for Tenant to:

_____
_____
New York, New York _____
Attention: _____

(b) If intended for Agent to:

_____
_____
_____
Attention:_____

Notice shall be deemed to be received upon actual receipt.

8. Limited Liability. Neither party shall be liable to the other for, and each party hereby waives any and all rights to claim against the other, any special, indirect, incidental, consequential, punitive or exemplary damages in connection with this Agreement.

9. Miscellaneous. (a) This Agreement represents the complete and final understanding between Agent and Client with respect to the Services and may not be waived, amended, or modified by either party, unless such waiver, amendment or modification is in writing and signed by both parties.

(b) This Agreement shall be governed by the laws of the state of New York. This Agreement is binding upon the parties hereto and their respective successors and assigns; provided, however, this Agreement may not be assigned by either party.

(c) If either party shall institute any action or proceeding against the other relating to the provisions of this Agreement, the unsuccessful party in the action or proceeding shall reimburse the prevailing party for all reasonable expenses and attorneys' fees and disbursements.

(d) The parties waive trial by jury in any action brought in connection with this Agreement. Delinquent payments hereunder shall earn interest at the rate of _____ percent (___%) per month from the date due until paid.

(e) The parties further agree that signatures may be exchanged by hand, by mail, by fax, by e-mail or other electronic means, by photocopy, or in counterparts -- any such method being binding on both sides when completed and exchanged. The invalidity or unenforceability of any particular provision of this agreement shall not affect the validity or enforceability of the other provisions hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

[*national brokerage company*]

By: _____

Name:_____

Title:_____

[*Tenant*]

By:_____

Name:_____

Title:_____

EXHIBIT A
ACQUISITION SERVICES

(*Just sample*)

Evaluation of Tenant requirements and real estate strategy

Analysis of competing locations

Limited physical due diligence

Market research

Financial structuring and analysis, including availability of incentives

Transaction management including assistance in lease negotiation

EXHIBIT B: DISPOSITION COMMISSION SCHEDULE

Disposition Commissions

The following compensation schedule shall apply to subleases, leases assignments or lease terminations:

Transaction Without a Cooperating Broker – One full commission, calculated in accordance with the Standard Market Leasing Commission Rates, below, shall be paid by Client to Agent.

Transaction With a Cooperating Broker – Override equal to [__%][7] of one full commission, calculated in accordance with the Standard Market Leasing Commission Rates, below, shall be paid by Client to Agent, in addition to one full commission paid by Client to the Cooperating Broker.

Time of Payment

All Transactions – 100% of the commission due Agent shall be due, earned and payable within thirty (30) days of (i) full execution and delivery of the sublease, assignment or termination agreement, (ii) the receipt of any security deposit due upon document execution, and (iii) receipt of all consents necessary for the effectiveness of such agreement.[8]

Standard Market Leasing Commission Rates

5.0% of the Fixed Rent:	1st year of the term or any fraction thereof.
4.0% of the Fixed Rent:	2nd year of the term or any fraction thereof.
3.5% of the Fixed Rent:	3rd year up to and including the 5th year of the term.
2.5% of the Fixed Rent:	6th year up to and including the 10th year of the term.
2.0% of the Fixed Rent:	11th year up to and including the 20th year of the term.

For purposes of this Agreement "Fixed Rent" for a sublease or assignment shall mean the Fixed Rent payable by a subtenant (for purposes if this Exhibit, "sublease" shall include any Lease assignment, and "subtenant" shall include any assignee. The following shall be excluded from Fixed Rent:

a) Any free rent or other abatement of rent allowed by Client (however, for purposes of calculating the commission payable to Agent such free rent or abatement shall be amortized over the initial term of the sublease and deducted in equal annual installments from the Fixed Rent otherwise due and payable during such initial term);

[7] This can be negotiated; it could be 25% to 50%.

[8] The timing of payments and possible payment in installments is negotiable.

b) Amounts payable, by reason of rent inclusion or otherwise, for electricity, or after hours utilities, utility services, heat and/or air-conditioning or other services;

c) Payments by subtenant of any additional rent escalation charges, for operating expenses (including management recovery cost) of the Property; real estate taxes; wage or labor rate escalation payments, cost of living increases or any other similar payments; or any lease cancellation payments; and

d) Any moving costs of subtenant paid by Client or credited to subtenant.

LATEST TRENDS IN COMMERCIAL LEASING

A Case Study

by

Sujata Yalamanchili, Esq.

Hodgson Russ, LLP
Buffalo

LATEST TRENDS IN COMMERCIAL LEASING

A Case Study

Facts: *The following facts are fictional, but are based on some real life, recently developed projects.*

A developer ("Developer") wants to construct a medical office building (an "MOB") on land currently owned by a local hospital operator (the "Operator"), adjacent to a hospital building (the "Hospital").

Issues:

a. The property has some historic environmental contamination

b. The Operator wants an internal connector between the MOB and the Hospital

c. The Hospital wants to lease space in the MOB

d. The Operator want to retain some control over other occupants and users of the MOB

e. Developer wants to finance the construction and development of the MOB

Structure – the parties entered into a long term ground lease of the land. Developer then leased back space in the MOB to Operator. Developer entered the land into NYS's Brownfield tax credit program, which was expected to yield tax credits to Developer.

Analysis:

a. **Petroleum Contamination** – after conducting extensive testing and due diligence, the developer determined that the property had at least $5,000,000 of petroleum contamination. The developer decided to enter the property in the New York State Brownfield Tax Credit Program.

See **Exhibit A** attached hereto.

b. **Internal Connector**

a. the Operator granted easement rights to Hospital
b. leveling the MOB to match the appropriate floors of the Hospital
c. shared design and architectural review of plans and specifications

c. **Lease Of Space to Operator** – the Operator leased space in the MOB. The lease included many provisions typical in MOB leases, such as landlord build out with an allowance, use of common areas, landlord provision for common area maintenance, renewal options.

The lease also included unique provisions, such as allowing the Operator to use underground parking at the MOB, the exclusive right to use a set of elevators with separate access to the connector, and payment of operating expenses associated with those exclusive areas. The Developer, as landlord, also agreed to provide back-up generator power to support the Operator at the MOB, and to provide removal of regulated medical waste from the building.

d. **Use and Control**- the Operator, as ground lessor under the ground lease, wanted to retain control over other operators and users of the MOB. So, the ground lease included strict restrictions on the uses allowed at the MOB. It was also important to file a memorandum of ground lease which memorialized those restrictions

e. **Financing** - The Ground Lease also had to be "financeable" meaning a commercial lender had to be willing to lend money to Developer in exchange for a leasehold mortgage on the ground lease as its sole collateral.

EXHIBIT A

NYS BROWNFIELD CLEANUP PROGRAM – TAX CREDIT CRIB SHEET

Here is an overview of the primary tax benefits available under the NYS Brownfield Cleanup Program ("BCP").

The calculation is simple. Participants get a percentage of the cost they incur for remediating and developing a contaminated Brownfield site.

Applicable Costs X Applicable Percentage = Tax Credits

The tax credit is broken into two components that follow this equation. The first component is for work done remediating the site. The second component is for work done developing (i.e., building on) the site.

Component 1: the Remediation Component (Credit = 22% to 50% of your remediation costs)

50% for sites that are approved for unrestricted use;
40% for sites that are approved for residential use (except those remediated to Track 4);
28% for sites that are approved for residential use and remediated to Track 4;
33% for sites that are approved for commercial use (except those remediated to Track 4);
25% for sites that are approved for commercial use and remediated to Track 4;
27% for sites that are approved for industrial use (except those remediated to Track 4); and
22% for sites that are approved for industrial use and remediated to Track 4.

There is no cap on this component of the credit!!

PLUS

Component 2: the Development Component (Credit = 10 to 24% of your development costs)

The base portion of the applicable percentage is either 10%

Certain projects can increase their applicable percentage by the following amounts:

+5% for BOA sites

+5% for affordable housing

+5% for manufacturing sites

+5% for sites within an En-Zone

+5% for sites remediated to Track 1

But Be Careful! This component is subject to a CAP!

The tax credits resulting from this component are subject to a cap. The credits cannot exceed the lesser of thirty-five million dollars or three times the sum of the costs included in the calculation of the remediation component. However, if the site is used for "manufacturing activities," the cap is increased to the lesser of forty-five million dollars or six times the sum of the costs included in the calculation of the remediation component.

Here are two examples of the program's calculations:

Example 1

$5 million dollar remediation by a corporation that resulted in a remediated site approved for commercial use and remediated to Track 4. Following remediation, a $40 million building is constructed on the site. The site is not located in an environmental area or part of a Brownfield Opportunity Area.

Remediation Component: $5 million X 25% = $1.25 million in tax credits

Development Component: $40 million X 10% = $4.0 million in tax credits

Cap: the lesser of $35 million or $15 million ($5 million X 3) – does not apply here.

Total costs involved in the program $45 million. Total Tax Credits: $5.25 million.

Example 2

$3 million dollar remediation by a corporation that resulted in a remediated site approved for residential use (non-Track 4 status). Following remediation, a $80 million building is constructed on the site. The site is located in an environmental area but is not part of a Brownfield Opportunity Area.

Remediation Component: $3 million X 40% = $1.2 million in tax credits

Development Component: $80 million X 15% = $12 million in tax credits – but CAPPED OUT at $9 million!

Cap: the lesser of $35 million or $9 million ($3 million X 3)

Total costs involved in the program $83 million. Total Tax Credits: $10.2 million.

SPEAKER BIOGRAPHIES

Deborah Goldman

Deborah Goldman brings to her legal practice the benefit of an MBA in Real Estate Finance from Columbia Business School and the practical non-legal experience of having worked in the development department of Starwood Hotels and Resorts after completing business school. She graduated *cum laude* from New York University Law School in 1992 and immediately began practicing commercial real estate law with the now-defunct Shea & Gould. Later, she worked in the real estate department at a number of large law firms, including Proskauer Rose, Kramer Levin and Latham and Watkins. As Counsel at Joshua Stein PLLC since November 2010, she emphasizes commercial leasing work, also handling hotel matters and all types of commercial real estate transactions with an emphasis on acquisitions, dispositions, hotel management agreements and financings. She is currently the co-chair of the Commercial Leasing Committee of the New York State Bar Association.

Sujata Yalamanchili, Esq.
Hodgson Russ LLP, Buffalo

Sujata is the leader of Hodgson Russ's Real Estate, Finance & Bankruptcy Practice Area. She draws upon her extensive experience in business and commercial real estate development, commercial leasing, and real estate investment and financing to provide business-focused legal advice to help her clients reach their goals. Her experience includes structuring acquisition and development projects for office, distribution, and manufacturing facilities of numerous companies in a variety of industries; advising retail sector developers and operators in development, acquisition, leasing, financing, and 1031 exchange matters; and handling real estate financing matters, including nontraditional sale leaseback and ground-lease matters.

Highlights of Sujata's work include:

- Acting as lead real estate counsel to a publicly traded financial institution, a nonprofit health care organization, and a UK-based retailer with more than 200 retail locations throughout North America
- Advising companies entering into contracts with airport authorities, including structuring joint venture arrangements to qualify for minority- and women-owned business status
- Assisting in the development of hospitality projects, including management contracts, leases, franchise agreements, and joint venture agreements

Before attending law school, Sujata worked as a financial analyst for a Fortune 50 company, where her responsibilities included cost accounting, project analysis, budgeting, and forecasting.

At Hodgson Russ, Sujata previously served as a member of the firm's board of directors and is a former chair of its Committee for Attorney Recruitment, Development, and Diversity.

Honors

- Listed, *Best Lawyers in America* (Real Estate Law)
- Listed, *Upstate New York Super Lawyers*, 2013 - 2016
- Wall of Fame, Williamsville Central School District
- University at Buffalo School of Management Alumni Achievement Award for Service to the School, 2010
- *Buffalo Business First*'s 40 Under Forty Award, 2005
- *Who's Who in American Colleges and Universities,* 1988
- University at Buffalo Outstanding Undergraduate Award

ROBERT J. SHANSKY, Esq.

Scarola, Malone & Zubatov, LLP, New York City

Robert J. Shansky is an experienced and widely respected transactional real estate lawyer. He graduated from the University of Wisconsin (B.A., Phi Beta Kappa, 1968), and the Harvard Law School (J.D., 1971). He was elected a Fellow of the American College of Real Estate Lawyers, the premier organization of United States real estate lawyers, he was included in the 22nd Edition of the Best Lawyers in America (c) in Real Estate Law, and has been repeatedly selected for inclusion in New York Super Lawyers (2006-16). Mr. Shansky is an active member of many professional organizations including the American Bar Association (Section on Real Property, Probate and Trust Law, participating in the Leasing Group Committee on Emerging Issues and Specialized Leases, Retail and Industrial Leasing Committees, Chair of the Retail Leasing Group 2015-16) and the New York State Bar Association (Environmental Law Committee and Real Property Section, Member of the Executive Committee, Committee on Commercial Leasing (currently Co-Chair of this Committee)). He has spoken frequently on real estate issues at ABA, ACREL, New York State Bar and PLI programs and was a contributing editor to the treatise Commercial Leasing (Second Edition), published by The New York State Bar Association in 2010. Mr. Shansky's practice includes transactions in a wide array of complex real estate and corporate matters, including acquisitions, dispositions, leasing, financing and development of commercial, industrial, warehouse and residential projects. He represents financial institutions, corporations, hedge funds, private equity funds and retail companies, as well as individuals. His experience includes representing a major financial institution in connection with leasing over 2.5 million square feet of midtown office space and the sale and partial leaseback of its office buildings. He has been responsible for the real estate aspects of major corporate and private equity transactions, including a number of acquisitions and financings for companies in many different businesses and industries. Before joining the Firm, Mr. Shansky practiced for 27 years with the New York office of Jones Day, where he was a partner.

BUFFALO

Timothy Moriarty, Esq.
McGuire Development, Buffalo

As a real estate development associate, Tim works with McGuire Development's leadership on real estate consulting, new business development, real estate services and market research through the company's management development program. Tim's passion for real estate and development increased exponentially as a student at the University at Buffalo as he watched Buffalo's development renaissance begin and he is eager to bring his unique perspective to the company and its projects.

Tim's past experience includes internships with the Erie County Industrial Development Agency (ECIDA), the Department of Homeland Security and the New York State Attorney General's Office. Tim also volunteered as a student defender at the University at Buffalo to advise students that were subject to University disciplinary action.

Tim is a native of the Buffalo / Niagara region and is a passionate advocate of Buffalo's continued growth and rebirth. He is a member of Buffalo Niagara 360, an associate member of the Urban Land Institute and a Ride for Roswell participant since 2010.

Tim graduated with his Juris Doctorate from the SUNY Buffalo Law School. He also has a Masters in Business Administration and a Bachelor of Science in Business Administration from the University at Buffalo School of Management. Tim is licensed to practice law in the State of New York.

Blaine S. Schwartz is a partner in the Real Estate practice group at Lippes Mathias Wexler Friedman LLP in Buffalo.

Blaine brings a wealth of experience to the law firm's commercial real estate clients. He joined the law firm after 14 years as Senior Counsel for the largest privately owned commercial real estate developer in the United States.

Blaine is known for his wide ranging experience with commercial real estate. He regularly negotiates complex real estate agreements and sophisticated loan documents along with structuring IRS Section 1031 tax deferred exchanges. He has also drafted and reviewed construction, architect and engineering contracts for projects ranging in size from $1 million to more than $100 million.

Blaine has extensive experience in efficiently and creatively structuring, negotiating and documenting all types of commercial real estate transactions. He has represented buyers and sellers in complex financings along with the acquisition, sale, development, planning, construction and leasing of vacant land, retail shopping centers, student housing projects, religious buildings, shopping malls, office buildings, warehouses, industrial complexes, hotels, lifestyle communities, housing developments and apartments throughout the United States. Blaine also helped to structure, negotiate, close and finance a number of complex, multi-property transactions – one of which included the sale of 110 properties in a single transaction, for $2.25 billion.

Prior to joining Lippes Mathias Wexler Friedman, Blaine worked as the news director for WCMF Radio in Rochester, New York; and as a news anchor for WMMS-FM in Cleveland, Ohio. He was also a Midwest stringer reporter for NBC radio news and National Public Radio.

Education

Cleveland State University, J.D.
State University of New York at Brockport

Admitted to Practice

New York
Ohio

Honors & Awards

Upstate New York Super Lawyers®, (2013, 2016)
The Best Lawyers in America© (2014, 2015, 2016, 2017)

Professional Associations

Bar Association of Erie County

Kathleen Sellers, JD, CLU

Kate Sellers is the Vice President of Charles J. Sellers & Co., Inc., a family owned and operated insurance agency founded in 1920. Kate is a graduate of Canisius College and Duke Law School and previously worked as a litigation attorney with Hodgson Russ LLP and as a confidential law clerk to the Hon. Richard J. Arcara. She is licensed for all lines of insurance and holds the designations of Chartered Life Underwriter (CLU) and Registered Health Underwriter (RHU).

Danielle Shainbrown, Esq.
McGuire Development, Buffalo

Danielle Shainbrown specializes in working with clients to understand and achieve their unique real property goals and objectives. Through her past experience, coupled with her formal education, Danielle has developed a vast knowledge of real estate markets, property management, legal processes, and business efficiencies. Her expertise spans all aspects of the real estate development industry from client consulting to project visioning to negotiating agreements and securing project financing.

Danielle's comprehensive background allows her to anticipate trends and client needs before they emerge. As a lifelong resident of Western New York, her thorough understanding of the real estate climate in this community places her on the cutting edge of real estate development and revitalization.

Danielle guides her clients through each step of McGuire Development Company's process with a vast knowledge of market statistics, economic projections, industry trends, and development legalities. This level of service and commitment to client satisfaction has enabled her to establish loyal relationships with her clients, providing a strong network of leads and referral sources.

As Vice President and Chief Legal Officer of McGuire Development Company, Danielle's intimate knowledge of our suite of services allows her to efficiently and effectively assist clients in creating and realizing a project vision. She is adept at negotiating business deals and contracts from initial contact to project completion. She is responsible for leading negotiations on behalf of our clients, developing and implementing project management plans, investigating real estate opportunities, facilitating a team approach to real estate development, and ensuring a transparent process for each and every one of our clients.

Danielle lends her expertise and passion to our community as a board member for several organizations. She is the secretary of the board of directors for Heritage Centers and active on the board of directors for the National Federation of Just Communities of Western New York, where she was the past committee chair for the 2013 and 2014 Community Leaders Award Luncheon as well as the 2015 Citation Banquet, as well as a past board member of the Kaleida Health Foundation. Danielle was a member of the Construction Committee for the Buffalo Club 2013 Expansion Project. She is also a member of the Leadership Buffalo Class of 2011, a recipient of the Buffalo Business First "40 Under 40" Award (2012), and a member of the Bar Association of Erie County.

STEVEN W. WELLS

Senior Associate

swells@hodgsonruss.com 716.848.1233

Steven focuses his practice in bankruptcy, creditors' rights, and commercial litigation. The bulk of his practice involves representing banks and other types of lenders in commercial loan workouts. He has experience in all aspects of loan workouts, including negotiating forbearance agreements, conducting Article 9 sales, replevin of collateral, lawsuits on debts instruments, foreclosures and representing creditors through their borrowers' bankruptcy proceedings. He also represents financially troubled companies, both inside and outside of bankruptcy.

Steven has represented a wide range of clients, including private financial organizations, hard-money lenders, financial institutions, banks, lessors and lessees of equipment and real estate, health care facilities, agricultural lenders and bankruptcy trustees. He has also handled various commercial litigation matters relating to breach of contract, business torts, and construction/building.

Honors

- Former publications editor, *Buffalo Law Review*
- Medal of Excellence, American Bankruptcy Institute
- Jessup International Moot Court Competition Team

Publications

A Close Look at Creditor Roadblocks in Bankruptcy
Law360, May 14, 2014

Understanding The Various Laws Governing Foreclosure
Law360, May 7, 2014

A Primer on UCC Article 9 Sales
Law360, April 30, 2014

The Guaranty Building
140 Pearl Street
Suite 100
Buffalo, NY 14202

Areas of Practice

Bankruptcy, Restructuring & Commercial Litigation

Admissions

New York

U.S. District Court for the Western District of New York

U.S. Bankruptcy Court for the Western District of New York

Education

B.A., Ithaca College

J.D., cum laude, SUNY Buffalo Law School

New York Institutes New Filing Requirement to Certify Accuracy of Residential Foreclosure Documents
November 16, 2010

Financial Restructuring & Bankruptcy – State Law Lender Remedies
Lexis Practice Advisor

Professional Affiliations

- American Bankruptcy Institute
- New York State Bar Association
- Bar Association of Erie County

Community & Pro Bono

- Salvation Army of Buffalo Advisory Board

Sujata Yalamanchili, Esq.
Hodgson Russ LLP, Buffalo

Sujata is the leader of Hodgson Russ's Real Estate, Finance & Bankruptcy Practice Area. She draws upon her extensive experience in business and commercial real estate development, commercial leasing, and real estate investment and financing to provide business-focused legal advice to help her clients reach their goals. Her experience includes structuring acquisition and development projects for office, distribution, and manufacturing facilities of numerous companies in a variety of industries; advising retail sector developers and operators in development, acquisition, leasing, financing, and 1031 exchange matters; and handling real estate financing matters, including nontraditional sale leaseback and ground-lease matters.

Highlights of Sujata's work include:

- Acting as lead real estate counsel to a publicly traded financial institution, a nonprofit health care organization, and a UK-based retailer with more than 200 retail locations throughout North America
- Advising companies entering into contracts with airport authorities, including structuring joint venture arrangements to qualify for minority- and women-owned business status
- Assisting in the development of hospitality projects, including management contracts, leases, franchise agreements, and joint venture agreements

Before attending law school, Sujata worked as a financial analyst for a Fortune 50 company, where her responsibilities included cost accounting, project analysis, budgeting, and forecasting.

At Hodgson Russ, Sujata previously served as a member of the firm's board of directors and is a former chair of its Committee for Attorney Recruitment, Development, and Diversity.

Honors

- Listed, *Best Lawyers in America* (Real Estate Law)
- Listed, *Upstate New York Super Lawyers*, 2013 - 2016
- Wall of Fame, Williamsville Central School District
- University at Buffalo School of Management Alumni Achievement Award for Service to the School, 2010
- *Buffalo Business First*'s 40 Under Forty Award, 2005
- *Who's Who in American Colleges and Universities,* 1988
- University at Buffalo Outstanding Undergraduate Award

NEW YORK CITY

ADAM LEITMAN BAILEY, P.C.

NEW YORK REAL ESTATE ATTORNEYS

Practice Areas

Real Estate Litigation; Landlord and Tenant Law; Residential Real Estate; Real Estate Transactions; Commercial Real Estate; Business Law; Business Litigation; Real Property; Condominium Law; Cooperative Housing Law; Real Estate Closings; Purchase and Sale of Real Estate; Insurance Defense Litigation; Commercial Leasing; Foreclosures; Complex Litigation; SRO Law and Litigation; Corporate Law; Property Law; Rent Control; Commercial Litigation; Commercial Landlord and Tenant Law; Mortgage Finance Practice; Representation of Lending Institutions; Title Litigation; Insurance Defense; Appellate Litigation

ADAM LEITMAN BAILEY / PARTNER

Biography

Actively at the helm of the law firm he built from scratch, Adam Leitman Bailey, Esq. practices residential and commercial real estate law. Among New York's most successful and prominent real estate attorneys, Mr. Bailey is one of two attorneys in New York that has been named a Super Lawyer (receiving its prestigious Top 100 Attorney award out of all New York Attorneys), ranked in *Chambers & Partners*, honored with a Martindale-Hubbell "AV" Preeminent rating and as a Best Lawyer ranking for himself and his law firm.

The internationally esteemed Chambers & Partners has repeatedly selected Mr. Bailey as one of New York's Leading Real Estate lawyers and, being one of only three New York attorneys from firms with fewer than 30 attorneys to receive the honor. Chambers & Partners hailed Mr. Bailey as a "tenacious and confident litigator who is quick-witted in court and respected by the judges," noting that Bailey is "an extraordinary practitioner who gets great results" and quoting a client on Mr. Bailey's "ability to anticipate things before they happen." "Clients praise his 'judgment and knowledge of the field,' adding: 'Adam is the person for any sticky situation because he has seen and done everything. He is strategic about litigation.'" "He has been hired to litigate extremely high-profile cases…sources are highly impressed by his courtroom presence." "You feel like you have a zealous advocate out there working for you, and you never worry about things when they are in his hands."

A New York State Judge wrote that Mr. Bailey *"was the best trial lawyer I saw in my nine years as a Judge in New York City." The Commercial Observer* named him as one of New York's Most Powerful Real Estate Attorneys. *Real Estate Weekly* recognized him as, "one of the most respected commercial real estate attorneys in not only New York City, but arguably the country."

The *New York Times* referred to his legal strategy and legislation proposed in one case as "novel," in addition to remarking on another case in which "Adam Leitman Bailey fought on…grinding through excruciating detail and obscure Perry Mason moments." After Mr. Bailey's firm used a forgotten statute to prevail in a landmark case, the *Wall Street Journal* quoted a prominent New York developer's attorney who called the holding a "game changer" affecting real estate nationwide. In another case hailed as "the city's largest condo refund ever" (*Curbed NY*) involving "a settlement likely to send shivers through the ranks of the city's condo developers" (the *New York Post*), the settlement he received was the largest condominium settlement in history for one building, and in another transaction, he obtained the largest government grant ($21 million) for a cooperative in New York history. *The Commercial Observer* ranked another victory among their "15 Most Fascinating New York Real Estate Cases of the 21st Century." Most recently, Mr. Bailey secured the largest settlement in New York City history for a property casualty law suit.

Dateline NBC referred to Mr. Bailey as "aggressive, tenacious and smart" in asking him to share his negotiating secrets on its nationally syndicated television program.

Mr. Bailey's advocacy has prevailed in numerous important trials and cases before various courts and trial venues, including Housing, Civil, and New York State Supreme and Federal Courts, as well as various New York Appellate tribunals.

Notable wins have included:

- **Lorne v. 50 Madison Avenue LLC,** an Appellate Division decision that finds responsibility for repairs of newly con structed buildings remains with Sponsor instead of Condo Board;
- **Hartman v. Goldman,** an adverse possession case of first impression before New York's Appellate Division;
- **542 East 14th Street v. Lee,** a case of first impression before New York's Appellate Division defining expansion of rent regulation law for non-primary residence cases;
- **Interstate Land Sales Full Disclosure Act Cases,** turning to a forgotten federal statute called the Interstate Land Sales Full Disclosure Act, he creatively discovered a way to void the contracts of sales for buildings over 100 units resulting in hundreds of settlement and court victories.
- **Rivas v. McDonnell,** a noteworthy Appellate Division decision involving an interpretation of the recording statute;
- **Sky View Parc Purchasers Association, et al. v. FTC Residential Company II, L.P.,** the largest condominium settlement in New York history;
- **Trump SoHo,** where Adam Leitman Bailey prevailed in a settlement providing millions of dollars to clients

Mr. Bailey has successfully defended a number of leading title companies and lenders in the nation and prevailed in numerous trials and settlements involving commercial and residential building owners, tenants, real estate developers, real estate brokerages, insurance companies and cooperative and condominium boards. In addition, Mr. Bailey has favorably represented a number of tenant and homeowner associations as well as commercial and residential tenants, garnering millions of dollars in compensation and rent abatements for these associations and individuals. For clients facing landlords who leave buildings in disrepair, Mr. Bailey has an unusually successful track record of getting those residential towers, apartments, and stores repaired and all services restored.

Mr. Bailey has also applied his expertise in closing various real estate deals and commercial leases. He has been named to the Board of Editors for *Commercial Leasing Law & Strategy* and has a regular real estate column in the *New York Law Journal*. Bailey's lease-drafting skills received national attention when BlumbergExcelsior, the nation's leading form distributor, responsible for over 70 percent of the residential leases signed in the United States, tapped Bailey to draft a new set of residential and office leases for purchase nationwide. BlumbergExcelsior's principal remarked that Bailey's lease drafting skills were "remarkable." While almost all New York property owners utilize his leases for residential purposes, his commercial leasing ideas and strategies are commonly part of the entire national commercial-leasing scene and have been included in "The Insider's Best Commercial Lease Clauses," published by the Vendome Group.

His success as cooperative and condominium general counsel earned Mr. Bailey recognition in "Who's Who in Real Estate" by *Habitat Magazine*. As an assistant adjunct professor at New York University, Mr. Bailey teaches commercial and residential landlord-tenant law. In 2011, Mr. Bailey took on the role of author to guide first-time home buyers through the purchasing process. John Wiley and Sons published his first book, *Finding the Uncommon Deal: A Top New York Lawyer Explains How to Buy a Home for the Lowest Possible Price* which became a No. 1 *New York Times* bestseller and is available for purchase worldwide. Mr. Bailey has also been elected a Fellow of the American College of Real Estate Lawyers (ACREL), where he serves on the Insurance and Title Insurance committees, and the American College of Mortgage Attorneys (ACMA).

ADAM LEITMAN BAILEY, P.C.

NEW YORK REAL ESTATE ATTORNEYS

Awards

- **Chambers & Partners,** "Chambers USA: America's Leading Lawyers for Business"
- **Bar Register of Preeminent Lawyers,** Named to the prestigious Bar Register of Preeminent Lawyers
- **Avvo,** Receives Highest Rating From Avvo
- **Martindale Hubbell ,** Adam Leitman Bailey Receives Highest Rating From Martindale Hubbell
- **Super Lawyers,** Named Super Lawyer, Corporate Counsel Edition, Law Politics
- **The American College of Real Estate Lawyers,** Selected to the American College of Real Estate Lawyers (ACREL)
- **American College of Mortgage Attorneys,** Selected to the American College of Mortgage Attorneys (ACMA)
- **Best Lawyers "Best Law Firm," U.S. News and World Report,** Adam Leitman Bailey, P.C. is Only One of Five New York Real Estate Law Firms with Under 30 Attorneys to be Selected as a "Best Law Firm"

Deborah Goldman

Deborah Goldman brings to her legal practice the benefit of an MBA in Real Estate Finance from Columbia Business School and the practical non-legal experience of having worked in the development department of Starwood Hotels and Resorts after completing business school. She graduated *cum laude* from New York University Law School in 1992 and immediately began practicing commercial real estate law with the now-defunct Shea & Gould. Later, she worked in the real estate department at a number of large law firms, including Proskauer Rose, Kramer Levin and Latham and Watkins. As Counsel at Joshua Stein PLLC since November 2010, she emphasizes commercial leasing work, also handling hotel matters and all types of commercial real estate transactions with an emphasis on acquisitions, dispositions, hotel management agreements and financings. She is currently the co-chair of the Commercial Leasing Committee of the New York State Bar Association.

Ronald D. Sernau, Esq.
Proskauer Rose LLC, New York City

Ronald D. Sernau, co-chair of the Real Estate Department and co-chair of the Private Equity Real Estate practice, has more than 25 years of experience in real estate law, representing sophisticated parties in particularly visible transactions involving trophy properties. The community has consistently recognized Ron as a member of the inner circle in New York's real estate industry.

Ron offers clients the insight he has gained by representing opposing interests in similar transactions. He has represented landlords and tenants, lenders and borrowers, purchasers and sellers, equity investors and developers, managers and owners, and brokers and principals. He draws on his experience to address legitimate interests that the opposing party must protect, and to minimize the negotiation of issues that the opposing party can compromise. Ron's clients, some of which have relied on his advice for decades, routinely involve Ron in their strategic decision making.

Ron's clients include a variety of enterprises that are involved with real estate. He represents some of the most prominent real estate developers in New York City in their investments in, and their development of, premier properties. Various businesses, from large publicly traded companies to boutique investment firms, engage Ron to address their real estate concerns. He also has substantial experience in providing general legal advice for luxury retailers, with a particular focus on real estate issues.

Ron created the Proskauer Commercial Leasing System, which automates the commercial leasing process, reducing the processing time for a commercial lease from several weeks to several days. Realcomm, a real estate technology trade organization, awarded Ron with its prize for the best use of technology in real estate law in 2004.

An avid speaker on real estate topics, Ron has appeared before groups sponsored by the Association of the Bar of The City of New York, the New York Hospitality Council, Inc., the New York State Bar Association, the Georgetown Commercial Leasing Institute, CB Richard Ellis, Inc., the Association of Attorneys and Executives in Corporate Real Estate, Practising Law Institute, The Real Estate Board of New York, Inc and the American College of Real Estate Lawyers. He lectures at New York University and his articles have appeared in The New York Law Journal and The National Law Journal.

ROBERT J. SHANSKY, Esq.

Scarola, Malone & Zubatov, LLP, New York City

Robert J. Shansky is an experienced and widely respected transactional real estate lawyer. He graduated from the University of Wisconsin (B.A., Phi Beta Kappa, 1968), and the Harvard Law School (J.D., 1971). He was elected a Fellow of the American College of Real Estate Lawyers, the premier organization of United States real estate lawyers, he was included in the 22nd Edition of the Best Lawyers in America (c) in Real Estate Law, and has been repeatedly selected for inclusion in New York Super Lawyers (2006-16). Mr. Shansky is an active member of many professional organizations including the American Bar Association (Section on Real Property, Probate and Trust Law, participating in the Leasing Group Committee on Emerging Issues and Specialized Leases, Retail and Industrial Leasing Committees, Chair of the Retail Leasing Group 2015-16) and the New York State Bar Association (Environmental Law Committee and Real Property Section, Member of the Executive Committee, Committee on Commercial Leasing (currently Co-Chair of this Committee)). He has spoken frequently on real estate issues at ABA, ACREL, New York State Bar and PLI programs and was a contributing editor to the treatise Commercial Leasing (Second Edition), published by The New York State Bar Association in 2010. Mr. Shansky's practice includes transactions in a wide array of complex real estate and corporate matters, including acquisitions, dispositions, leasing, financing and development of commercial, industrial, warehouse and residential projects. He represents financial institutions, corporations, hedge funds, private equity funds and retail companies, as well as individuals. His experience includes representing a major financial institution in connection with leasing over 2.5 million square feet of midtown office space and the sale and partial leaseback of its office buildings. He has been responsible for the real estate aspects of major corporate and private equity transactions, including a number of acquisitions and financings for companies in many different businesses and industries. Before joining the Firm, Mr. Shansky practiced for 27 years with the New York office of Jones Day, where he was a partner.

Albert Sica

The ALS Group founder Albert Sica leads the firm's advisory practice providing unbiased third-party expertise on risk-management and insurance issues. Al brings more than 25 years of experience to his role, combining the strategic vision of Enterprise Risk Management (ERM) with decades of hands-on experience implementing strategies at the tactical level, working with executive leaders and front-line operational managers alike, bringing needed change management to risk-exposed organizations trapped in old-game paradigms.

Al's professional experience spans numerous verticals and geographies across the globe, including real estate, construction, retail, manufacturing, distribution, private equity/venture capital, M&A due diligence, and Public/Private Partnerships (P3). He routinely supports clients with risk and coverage analysis, including OCIP vs. CCIP evaluations, broker RFPs, and enterprise-wide risk assessments.

Joshua Stein, Esq.
Joshua Stein, PLLC, New York City

Joshua Stein PLLC handles commercial real estate financing, leases (ground and space), development, hotel transactions, and acquisitions. Our clients range from global banks to major developers to individuals acquiring LLC interests in small buildings or signing a lease for their first retail space.

In 2016, Joshua Stein, the firm's principal, was recognized by *Who's Who Legal* as one of the ten "most highly regarded" commercial real estate attorneys in the United States—and the only one of the group not in a large firm. *Super Lawyers* recognizes him as one of the top 100 (and sometimes top 10) attorneys in NYC, across all practice areas. *Chambers USA* has repeatedly identified him as a leading NYC real estate attorney—again the only one not part of a large practice. He is one of the most prolific writers on commercial real estate law and transactions in the United States (see "Publications").

For more information, click on the "About Us" tab from any page of this website.

Click here to join the Joshua Stein PLLC email list to receive updates such as copies of articles, upcoming events, and other news on commercial real estate law and deals.

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