

TOP FIVE MOST MISUNDERSTOOD LEASE PROVISIONS

1. SUBORDINATION

What Does It Mean? This provision addresses the relative priority of the interests of a tenant under a lease and the interests of Landlord's lender in the Shopping Center.

Why Do We Care? Our lender will always require that it have the first priority position, ahead of all tenant interests.

We want this to be taken care of in the leases rather than be required to obtain separate subordination agreements from tenants. Tenants want to be certain that their leases cannot be extinguished if the lender forecloses on the Landlord's interest in the Shopping Center and then decides to put the Shopping Center to a different use or seek higher rents.

What Should Our Position Be? Always try to leave the form lease language in place, making the lease automatically subordinate to the lien of our lender. Fallback position is to agree to use commercially reasonable efforts to obtain a reasonable SNDA from the lender (i.e., the lender's form of SNDA). Never condition the subordination of the lease on the ability to obtain an SNDA acceptable to the tenant (i.e., the tenant's form of SNDA).

2. Eminent Domain

What Does It Mean? The power of a governmental entity to

take private property for public use.

Why Do We Care? Governmental entities cannot take private property without compensating the owner and we want to make sure Landlord retains all of the compensation paid for a taking under power of eminent domain. Tenants often want to share in the proceeds of a taking (especially if they have expended large amounts for build-out) or require Landlord to restore the Shopping Center or Premises after a taking by acquiring additional land, constructing new entrances, etc.

What Should Our Position Be? We need to make sure Landlord always retains the entire award paid for a taking. Tenants can make an application for a separate award from the condemning authority for moving costs, business interruption, etc., as long as it does not reduce the Landlord's award. We also need to maintain the right to terminate the lease if there is a partial taking of Landlord's property (a taking of the entire property terminates the lease as a matter of law). Try to avoid obligations of the Landlord to restore the Shopping Center or Premises following a taking or limit the amount we are required to spend to the amount of the award received from the condemning authority.

3. Subrogation

What Does It Mean? For an insurance company to be able to step into the shoes of its insured and sue the party that caused the insurance claim to be paid.

Why Do We Care? To the extent any possible damage to a tenant's property is covered by insurance, we want them to look to their insurance and not risk being sued by their insurance company, so we require a waiver of the insurance company's right of

subrogation. Tenants may not want to agree to this as any claims on their insurance may increase their premiums.

***What Should Our Position Be?* Never delete the waiver of subrogation. The form lease already contemplates a mutual waiver. Never agree to a carve-out from the absolute waiver.**

4. Landlord Lien Rights

***What Does It Mean?* In most states (including Georgia), landlords are granted statutory rights to lien a tenant personal property if a tenant fails to pay rent.**

***Why Do We Care?* This can be a valuable tool in getting tenants to pay rent. In some circumstances, Landlord could seize and sell a tenant's property to recover unpaid rent. This right can prevent a tenant from obtaining certain financing or leasing of equipment or inventory and, as such, tenants often want Landlord to expressly waive these rights**

***What should our position be?* We should always try to maintain any rights we have as Landlord. As a fallback position, we should agree to enter into a subordination agreement with Tenant's lender or equipment lessor agreeing to take a subordinate interest in the tenant's property. Worst case, we could agree to a waiver of Landlord's lien rights; however, this should be done in the form of a written agreement with the tenant's lender or equipment lessor which clearly addresses the rights of the lender or equipment lessor to enter the Premises and remove the property of the tenant, including the obligation to pay rent during the period of occupancy and to repair any damage caused by the removal of the property.**

5. Idemnification

What Does It Mean? An agreement to make another party whole or pay up front any costs incurred by that party as a result of an anticipated loss.

Why Do We Care? If the Landlord incurs a loss or becomes involved in litigation as a result of the acts of a tenant or a breach of the lease by a tenant, we want the tenant to pay all costs up front, rather than having to sue the tenant after the fact to recover Landlord's losses. Tenants often seek the same from Landlord.

What Should Our Position Be? We should always require the tenant to indemnify Landlord as set forth in the form lease. Landlord faces a much greater risk if it indemnifies every tenant, insurance costs go up and the tenants have control over the leased spaces in the Shopping Center, so we should not agree to a mutual indemnity except for anchor tenants. There are also levels of Landlord indemnities to be considered.

© 2001 Robert E. Stanley. All rights reserved.

NOTE: This site includes a summary of certain legal issues facing landlords today. This site does not, and is not intended to, give legal advice. Reference should be made to full text of the statutes, regulations and legal documents for complete analysis. Consultation with competent counsel is strongly recommended.