

**REAL ESTATE
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Navigating Lease Disputes: Lessons from the Pandemic

By ANN S. LEE

As a real estate lawyer, I regularly advise clients about lease disputes. Some of the most difficult disputes are those no one anticipated or were not addressed in the lease. Considering risks at the outset and addressing them in your lease is the best way to protect your business. Key lease provisions to consider are:

FORCE MAJEURE CLAUSE

This clause excuses a party from performing its obligation when made impossible by war, natural disaster, labor strike or other circumstance beyond their control. Typical force majeure clauses do not allow the tenant to stop paying rent nor did they typically anticipate a global pandemic. Some tenants relied on this clause to stop paying rent during the COVID-19 pandemic, arguing government shutdown orders rendered it impossible or impractical to use the premises and/or frustrated the purpose of the lease agreement. In California, courts uniformly held the pandemic did not render it impossible for tenants to pay rent and thus did not excuse them from doing so. Given the potential impact of a force majeure event on your business, property, loan covenants, co-tenancy clauses and other aspects of tenancy, it has become increasingly important for commercial landlords and tenants to discuss and negotiate this term accordingly.

OPTIONS

Options are valuable rights that allow tenants who wish to stay at the premises to extend the lease, usually at an agreed-upon rent. It is important for tenants to understand that options are strictly enforced. If a commercial tenant fails to give notice of an option exercise in the exact time and manner required by the lease, it can lose this right. Courts have never allowed a tenant to exercise an option that lapsed through no fault of the landlord. It is very important for both parties to keep track of the option deadline and comply with all requirements, including notice provisions, to avoid disputes over option rights.

ASSIGNMENTS

This term allows a tenant to assign the lease to someone else with the landlord's consent. You should be aware that a tenant's

change of ownership may trigger this clause. In other words, even if the company remains the tenant, a change in its ownership—whether from a stock sale or marital dissolution—may qualify as an “assignment” that requires the landlord's consent. It is important to negotiate this term in anticipation of any changes in ownership.

TENANT IMPROVEMENTS/DUE DILIGENCE DEADLINES/RENT COMMENCEMENT DATES

It is not uncommon in commercial tenancies for the tenant to have a due diligence and build out period for their intended use and build-out of their tenant improvements. The due diligence period will frequently be a condition to the tenant's obligations to move forward with the tenancy and they need to act diligently in ascertaining, in good faith, whether they can obtain the governmental approvals needed to proceed. Failing to timely perform such due diligence or notifying the landlord of the failure to obtain the necessary approvals often leads to misunderstandings and litigation between the parties about whether the tenant is bound to proceed and when they must commence paying rent. Carefully negotiating these provisions in a clear way are especially critical given the delays and increasing scrutiny tenants and landowners are experiencing with governmental agencies whose approvals and permits are required.

Despite our best efforts, it is impossible to anticipate every risk and disputes invariably occur. In these circumstances, it is important to be reasonable.

During the pandemic, I saw landlords accommodating tenants to help them stay in business. I also saw tenants demand steep rent abatements or other one-sided terms, which were likely to lead to lawsuits rather than resolutions.

If you need to renegotiate the lease to address unforeseen circumstances, you are more likely to succeed by making reasonable proposals that make sense for both sides. Parties that want to stay in business together find ways to resolve disputes rather than litigate them.



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