

Rebuilding Our Communities:

Legal Resources to Help Your Small Business

Real Estate and Leasing and Supply Chain Issues

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Real Estate and Leasing: Agenda for Discussion

- ▶ Repairs and Replacements
- ▶ Insurance
- ▶ Casualty
- ▶ Force Majeure
- ▶ Miscellaneous

TENANT REPAIR OBLIGATIONS

- ▶ Commercial leases usually contain a section that governs the tenant repair obligations (often “Tenant Repairs” or “Condition of Premises” or the like)
- ▶ Unlike residential leases, commercial leases do not contain statute-based implied covenants of habitability (i.e. landlord repair obligations)
- ▶ The terms stated in the lease control – **read the lease!**
- ▶ In many cases, the tenant is required to maintain and repair the leased premises (but see the casualty section)
- ▶ Single tenant buildings often require the tenant to conduct certain building / exterior repairs and maintenance
- ▶ Landlords have various enforcement options (self-help, eviction, lease termination)

WHAT ABOUT THE PAYMENT OF RENT?

- ▶ Some commercial leases contain protections for tenants if the leased premises becomes unusable (i.e. damaged (partially or fully), lack of access, lack of utilities, or condemnation).
- ▶ In the case of damage, the “casualty” section of the lease is likely important (more on that later)
- ▶ Subject to the above exceptions, the tenant’s obligation to pay rent is independent of the landlord’s obligations to repair under the lease.

LANDLORD REPAIR OBLIGATIONS

- ▶ Commercial leases may (or may not) have a section that governs the landlord's repair obligations
- ▶ Often there are limited options in a lease for a tenant to enforce of any such landlord repair obligations
- ▶ More rarely, a lease may allow a tenant to pursue the remedy of self-help (make the landlord's repair on behalf of the landlord and then deduct the costs from future rents)

HOW TO ENFORCE A LEASE PROVISION

- ▶ Look for specific rights or remedies stated in the lease (including termination rights and the right to abate rent)
- ▶ Prepare a letter with a clear statement of claims that also references the appropriate lease provisions as support
- ▶ Look for a “Notices” section in the lease that specifies to whom and in which manner notices must be delivered and follow the notice delivery requirements (could mean using Fed Ex or certified U.S. Mail)
- ▶ Any negotiated agreements between the landlord and the tenant should be in writing and signed by both parties (in the form of a lease amendment).
- ▶ If desired or necessary, consider negotiating a lease termination agreement that finalizes all open lease issues (move out date, rent payments, repair obligations, etc.)

INSURANCE CLAUSES

- ▶ Which party is responsible for maintaining insurance on the property?
 - ▶ The Lease will state whether the Landlord, the Tenant or both are responsible for maintaining insurance on the property. Insurance Requirements for each party generally depend on the type of Lease.
 - ▶ **Gross Lease:** Landlord pays for the building's property taxes, insurance and maintenance.
 - ▶ **Net Lease:** Tenant is responsible for some of the additional costs associated with the property.
 - ▶ **Modified Gross or Net:** Both Landlord and Tenant responsible for certain insurance costs
- ▶ Types of Commercial Property Insurance
 - ▶ “**Named Peril**” policies cover only those perils that are listed.
 - ▶ “**All Risk**” policies cover all perils except those which are specifically excluded.
 - ▶ “**Commercial General Liability**” insurance or “**CGL**” insurance, provides coverage for bodily injury and property damage due to alleged negligence of the insured.
 - ▶ “**Personal Property**” insurance covers Tenant’s improvements other than the initial leasehold improvements to the Premises, personal property, supplies and equipment.

INSURANCE CLAUSES

▶ **Deductibles**

- ▶ A deductible is your share of an insurance claim, which you must pay before your insurer provides financial coverage.
- ▶ The lease may state which party pays the deductible, depending upon circumstance. If the lease does not have such an agreement, then the insured party would have to pay its own deductible absent anything agreed to elsewhere to the contrary.

▶ **Business Interruption Insurance**

- ▶ Business interruption insurance is insurance coverage that replaces income lost in the event that business is halted for some reason, such as a fire or a natural disaster.
- ▶ This type of insurance also covers operating expenses, a move to a temporary location if necessary, payroll, taxes, and loan payments.
- ▶ Business interruption insurance is not sold as a separate policy but is either added to a property/casualty policy or included in a comprehensive package policy as an add-on or rider.

SAMPLE INSURANCE CLAUSES

Landlord's Insurance. Landlord may, at its election, provide any or all of the following types of insurance, with or without deductible and in amounts and coverages as may be determined by Landlord in its discretion: "all risk" property insurance, subject to standard exclusions, covering the Building or Project, and such other risks as Landlord or its mortgagees may from time to time deem appropriate, including leasehold improvements made by Landlord, and commercial general liability coverage. Landlord shall not be required to carry insurance of any kind on Tenant's property, including leasehold improvements, trade fixtures, furnishings, equipment, plate glass, signs and all other items of personal property, and shall not be obligated to repair or replace that property should damage occur. All proceeds of insurance maintained by Landlord upon the Building and Project shall be the property of Landlord, whether or not Landlord is obligated to or elects to make any repairs. At Landlord's option, Landlord may self-insure all or any portion of the risks for which Landlord elects to provide insurance hereunder.

Business Interruption Insurance. During the Occupancy Period, Tenant shall maintain in effect Business Interruption Insurance, providing in the event of damage or destruction of the Premises an amount sufficient to sustain Tenant for a period of not less than one (1) year for: (i) the net profit that would have been realized had Tenant's business continued; and (ii) such fixed charges and expenses as must necessarily continue during a total or partial suspension of business to the extent to which they would have been incurred had no business interruption occurred, including, but not limited to, interest on indebtedness of Tenant, salaries of executives, foremen, and other employees under contract, charges under noncancelable contracts, charges for advertising, legal or other professional services, taxes and rents that may still continue, trade association dues, insurance premiums, and depreciation.

SAMPLE INSURANCE CLAUSES

Tenant Insurance. Tenant agrees that it shall purchase in advance and carry the following insurance at its own expense: (a) fire and extended coverage insurance insuring Tenant's personal property, furniture, trade fixtures, inventory, business record and leasehold improvements against loss from all insurable events for the full replacement value thereof; (b) insurance against interruption of Tenant's business activities; and (c) comprehensive liability insurance covering all acts of Tenant, its employees, agents, representatives and guests and insuring against all claims arising from injury to persons or damage to property in or about the Leased Premises, Building or real estate in a single limit amount of not less than \$500,000.00 for personal injury or death and not less than \$100,000.00 for property damage and fire legal liability. All such insurance shall name Landlord as an additional insured and shall provide for thirty (30) days written notice to Landlord prior to cancellation, non-renewal or material modification. Certificates of all such insurance shall be delivered to Landlord prior to occupancy of the premises by Tenant and at least thirty (30) days prior to the termination date of any existing policy. Tenant shall pay to Landlord, upon demand, as additional rent the cost of securing such insurance in the event Tenant fails to furnish certificates of insurance to Landlord. However, it is not Landlord's duty nor obligation to secure such insurance for Tenant.

CASUALTY CLAUSES

- ▶ A casualty clause, also known as a Damage and Destruction clause, outlines the rights and obligations of both the Landlord and the Tenant in the event that the leased premises are damaged or destroyed during the lease term. The following duties and obligations are typically addressed in the casualty section of the lease:
 - ▶ **Tenant's Notice Obligations:** Tenant should be obligated to promptly notify the Landlord if the leased premises are damaged by fire or other casualty.
 - ▶ **Repairs:** Typically, a lease will require the Landlord to repair and restore improvements on or about the leased premises to the extent that proceeds of casualty insurance are available to make repairs, unless the lease is terminated.
 - ▶ **Casualty Caused by Tenant:** In the event the casualty is caused by Tenant's gross negligence or intentional conduct, the Tenant typically does not have the right to terminate the lease. In addition, the lease may require the Tenant to promptly repair the damage while it continues to pay rent and all sums due under the lease.

Casualty Clauses

- ▶ **Termination in the Event of Casualty:** The lease may provide both Tenant and Landlord with the right to terminate the lease by giving the other party notice of its intent to terminate within a prescribed number of days after the occurrence of the casualty if: Landlord determines that the premises are so materially damaged by the casualty that substantial restoration is required; the premises are damaged by fire or other casualty near the end of the term of the lease (the lease would specify within the last X months of the lease term); or at any time the premises are rendered substantially untenable by the casualty.
- ▶ **Abatement of Rent:** Except for any casualty caused by Tenant's gross negligence or intentional misconduct, to the extent that the premises cannot be occupied due to the damage, Tenant's rent should be abated by the Landlord until the repairs and restoration have been completed.

SAMPLE CASUALTY CLAUSE

Casualty. If during the term of this Lease the Premises are damaged or destroyed by fire or other casualty, Landlord agrees, at its sole expense, promptly to repair and restore the Premises in the same condition they were in immediately prior to the damage or destruction. During such period of repair and restoration, the Fixed Rent shall abate or be reduced to the extent that Tenant is deprived of the full use of the Premises (the amount of such abatement shall be based on both the physical extent of the damage or destruction and the extent to which the damage or destruction causes interference with or impairment of the operation of the business of Tenant, having regard to the extent to which Tenant may be required to discontinue or alter its business operations on the Premises); provided, however, if the damage to the Premises (i) cannot be repaired or restored within one hundred twenty (120) days following the occurrence of the fire or other casualty, or (ii) the damage to the Premises can be repaired or restored within that period, but such damage is not repaired or restored during that period, then Tenant may terminate this Lease, effective as of the date of the occurrence of the fire or other casualty by giving written notice to Landlord. If Tenant elects to terminate this Lease, this Lease shall be deemed to have been terminated as of the date of the fire or other casualty, and any advance payments on account of Fixed Rent received by Landlord from Tenant for periods after the fire or other casualty shall be refunded to Tenant. Insurance proceeds with respect to the fire or other casualty shall be payable to Landlord and Tenant as their respective interests may appear.

FORCE MAJEURE – WHAT IS IT?

- ▶ Force Majeure is “any event that is unexpected by all parties, not caused by any party, and affects the relationship between them, limits the ability of either to perform a duty, or requires one to intrude on a privilege of the other.” - Bouvier Law Dictionary
- ▶ Essentially, it is an unexpected event that makes it very difficult or impossible for either Landlord or Tenant to perform their obligations.
- ▶ Traditional examples include floods, fires, earthquakes, wars, and terrorism. Recently, parties have been very interested if pandemics are included.

FORCE MAJEURE – DOES IT APPLY TO MY LEASE?

- ▶ **Step One:** Look in your lease for a clause titled “Force Majeure” or “Excused Delays.”
- ▶ **Step Two:** Review the list of events that trigger the Force Majeure clause. Specifically, look for terms similar to the following: riots, looting, civil commotions, civil disturbance, insurrection, fire, acts of military authority, etc.

FORCE MAJEURE – DOES IT HELP ME?

- ▶ Most leases will exclude “Rent” and “Monetary Obligations.”
- ▶ Other provisions that may be impacted by Force Majeure:
 - ▶ Commencement Date
 - ▶ Existing maintenance and repair obligations
 - ▶ Alterations/Improvements deadlines
 - ▶ Events of Default
 - ▶ Early termination rights

FORCE MAJEURE – SAMPLE CLAUSE #1

In the event that either party is prevented from performing or is **unable to perform any of its obligations under this Agreement** (other than a payment obligation) due to any act of God, acts or decrees of governmental or military bodies, fire, casualty, flood, earthquake, war, strike, lockout, epidemic, destruction of production facilities, **riot, insurrection**, Materials unavailability, or any other cause beyond the reasonable control of the party invoking this section (collectively, a “**Force Majeure**”), and if such party shall have used its commercially reasonable efforts to mitigate its effects, such party shall give prompt written notice to the other party, its **performance shall be excused**, and the time for the performance shall be extended for the period of delay or inability to perform due to such occurrences. Regardless of the excuse of Force Majeure, if such party is not able to perform within ninety (90) days after such event, **the other party may terminate the Agreement.**

FORCE MAJEURE – SAMPLE CLAUSE #2

Any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of God, acts of war, terrorist acts, inability to obtain services, labor, or materials or reasonable substitutes therefor, governmental actions, fire or other casualty, and **other causes** beyond the reasonable control of the party obligated to perform, **except with respect to the obligations imposed with regard to Rent and other charges to be paid by Tenant** pursuant to this Lease (collectively, a “**Force Majeure**”), notwithstanding anything to the contrary contained in this Lease, shall excuse the performance of such party for a period equal to any such prevention, delay or stoppage and, therefore, if this Lease specifies a time period for performance of an obligation of either party, that **time period shall be extended** by the period of any delay in such party’s performance caused by a Force Majeure.

RULES AND REGULATIONS

- ▶ Look out for unique lease provisions that may place restrictions on offensive, discriminatory, or violent behavior.

SUPPLY CHAIN – ARRANGEMENTS TO BUY AND SELL GOODS AND SERVICES

- ▶ Many supply arrangements are handled with relatively simple documents: *purchase orders (PO's), standard price lists, acknowledgment forms, invoices*
 - ▶ These documents may be substituted for by *emails from the buyer and the seller* that state terms and together create a contract
 - ▶ These documents may refer to *separate terms and conditions of sale provided by the buyer or the seller, or both:*
 - ▶ These may be attached to the documents, provided separately, or online on the supplier's website
 - ▶ **KEY STEP:** Locate these documents and read them for any important terms

SUPPLY CHAIN – ARRANGEMENTS TO BUY AND SELL GOODS AND SERVICES

- ▶ Complex supply arrangements – for example, for custom-made goods, high-volume commitments, long-term commitments, software, franchises, etc. – may be handled with more complex documents – master purchase agreements, master service agreements, end user license agreements
 - ▶ These documents often include more complex terms
 - ▶ These documents may refer to separate terms and conditions of sale – attached to the documents, provided separately, or online on the supplier’s website
 - ▶ These documents may call for advice from a lawyer
 - ▶ **KEY STEP:** Locate these documents and read them for any important terms

SUPPLY CHAIN – ARRANGEMENTS TO BUY AND SELL GOODS AND SERVICES

- ▶ The terms for supply arrangements in reopening a business may not be very different from supply arrangements from running the business earlier
- ▶ **Some terms may be negotiable – consult with a lawyer?**
- ▶ Key terms to check:
 - ▶ *Description of the goods*
 - ▶ *Pricing*
 - ▶ *Payment terms* – how many days to pay? Pay in advance vs. on delivery vs. after inspection and acceptance? Combination of those? Late fees? Responsibility for costs or fees on cancellation?
 - ▶ *Delivery terms* – location, timing

SUPPLY CHAIN – ARRANGEMENTS TO BUY AND SELL GOODS AND SERVICES

- ▶ Key terms to check (cont.):
 - ▶ *Warranties* – products meet specifications, serve a particular purpose, are new – what remedy? return/replacement/refund
 - ▶ Sellers of goods have to use particular language to “disclaim” (avoid) some warranties – check with a lawyer
 - ▶ *Returns*
 - ▶ *Force majeure* – discussed earlier – exceptions from performing the contract if a major unforeseen event occurs
 - ▶ *Risk allocation – limitation of liability*

Questions?

Upcoming Webinars

- ▶ Thursday June 18, 2020: 2:00 – 3:00 p.m. Construction
- ▶ Presenters will discuss key issues to consider when planning for rebuilding, precautions regarding contractors, and tips to manage the process.
- ▶ Friday June 19, 2020 session has been CANCELED due to Juneteenth holiday.

Need Help? Contact Us For Pro Bono Assistance!

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Look for materials from upcoming webinars to find Team Members for other Areas of Expertise!

Questions can also be submitted by contacting Dorsey Pro Bono Counsel Alysia Zens at zens.alysia@dorsey.com or 612-752-7333.

In addition to the information above, if you need legal assistance with business law needs, LegalCORPS client intake lines are available for small business owners and nonprofits in Minnesota, by calling 612-752-6687. The intake line will be staffed Monday through Friday from 9:00 a.m. to 4:00 p.m.