VOL. 35 ISSUE 3 | 2015 FALL/WINTER

International Council of Shopping Centers, Inc.
1221 Avenue of the Americas, 41st floor, New York, NY 10020-1099
Phone (646) 728-3800

ICSC

# SHOPPING CENTER LEGAL UPDATE

## THE LEGAL JOURNAL OF THE SHOPPING CENTER INDUSTRY

### In Depth



### Case Briefs



### From Canada



**Shopping Center Legal Update** is published by the Legal Department of the International Council of Shopping Centers, Inc., 1221 Avenue of the Americas, 41st floor, New York, NY 10020-1099.

**Editor-in-Chief:** Stephanie McEvily, Esq.

# *Force Majeure*—Shopping Center Wars—When the "Force" Is Not with You

*Jerry Reichelscheimer**
*Akerman LLP*
*New York, NY*

While seldom applicable and often overlooked, the "*force majeure*" provision in a contract or lease is a powerful provision that requires careful thought and drafting at the outset of negotiations and that must be carefully read to ensure that it applies to a certain fact pattern.

Consider the New York Supreme Court (trial court—Nassau County) case *LIDC I v. Sunrise Mall, LLC*.[1] The plaintiffs, LIDC I, LLC LIDC III, LLC and LIDC IV, LLC (collectively "LIDC"), sought to obtain a Yellowstone injunction to toll the cure period of the LIDC under its leases with Sunrise Mall LLC ("Mall") in order to avoid termination of the leases on the basis of separate notices of default served on LIDC by the Mall. LIDC sought to obtain a Yellowstone injunction "to maintain the status quo so that a commercial tenant may protect its valuable property interest in the lease while challenging the landlord's assessment of its rights."[2]

In order to grant a Yellowstone injunction, a court requires the following elements to be demonstrated by the tenant seeking such injunction:

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

**The Facts of the Case**

LIDC I, LLC, LIDC III, LLC and LIDC IV, LLC each entered into separate leases with the Mall, with the intent to construct three separate restaurants in the shopping center known as the Westfield Sunrise. According to the facts of the case, the leases contemplated that rental payments due under each lease would not commence until the earlier of January 15, 2014, and the date each restaurant opened for business. The period contemplated was to permit each tenant to perform construction of the restaurants.

In August 2013, the Commissioner of Building and Planning of the Town of Oyster Bay (the municipality in which the shopping center was located) issued a stop work order based on purported violations of the Town Code requirement that the contractor have an apprenticeship program in place. As a result of such alleged violation, the building permits were subsequently revoked by the Commissioner of the Department of Planning and Development of the Town. The contractor for LIDC commenced an Article 78 proceeding (a proceeding under Article 78 of the New York Code, in which a party asserts that a municipality's action was both arbitrary and capricious) against the Town of Oyster Bay by order to show cause on September 13, 2014.

Upon execution of the order to show cause, the stop work order of the Town was lifted, and the court temporarily stayed the revocation of the building permits pending the outcome of the proceeding. On November 8, 2013, the court granted an Article 78 petition and allowed the work to continue. The court directed submission of a judgment and offered to "so order" the transcript for possible appeal. According to a representative of LIDC, there were discussions between the Town and the Mall concerning the settlement of certain issues between the Town and the Mall, which delayed submission of the judgment to the court until July 2014, when the Mall sought entry of a judgment.

Although entry of the judgment in connection with the Article 78 proceeding was not sought until July 2014, rental payment was already in dispute between the parties prior to that date. According to the court record, on January 13, 2014, LIDC advised the Mall in writing that due to the actions of the Town building commissioner, the Mall, LIDC and other tenants all "experienced extreme difficulty" and that LIDC was prevented from fulfilling its obligations under the lease. As a result thereof, LIDC asserted that a *force majeure* event had occurred, thus tolling all of LIDC's obligations under the leases, including, but not limited to, the commencement of rent, until the matter was resolved.[4]

According to the court decision, the leases between LIDC and the Mall each contained *force majeure* clauses excusing the delay in the performance of the applicable leases based upon restrictive governmental laws or controls, or delayed governmental or municipal action. The leases each expressly excluded financial hardship from the *force majeure* clause. In its decision, the court also noted that the clauses expressly provided that the occurrence of any such event shall not excuse the tenant's obligation to pay rent "from and after the 'Commencement Date.'"[5]

In reply to the January 13, 2014, letter, the Mall's counsel replied that construction delays were caused by LIDC's failure to comply with the required apprenticeship program, and that regardless, the *force majeure* provision did not excuse the payment of rent.

LIDC failed to pay rent under each of the leases: As a result, the Mall served notices of default on September 5, 2014, threatening termination of the leases unless the rent was paid prior to the expiration of the cure periods.

The record of the court indicated that LIDC did not challenge the Mall's assertion that the work was stalled because LIDC did not have the necessary funds to complete the work. LIDC contended that the Mall did not provide financial assistance as promised in the leases, arguing that it was the Mall's breach of its obligations to provide the funding that led to the inability to complete the project.[6] The court noted that the payments under the leases were supposed to be reimbursement for construction expenses incurred by LIDC, but LIDC did not assert that such costs were actually incurred and paid by LIDC.

In order to invoke a *force majeure* provision as a basis for excusing performance, one must be able to establish that the *force majeure* event be a "legal or physical restraint and not merely an economic one."[7]

**The Court's Decision**

Based on the facts as described above, the court denied LIDC's motion for a Yellowstone injunction. The court held that while

> the Town's actions were sufficient to invoke the *force majeure* clause as a result of governmental action—which is not disputed by the defendant on this motion—at least until the issuance of a final determination of the Article 78 proceeding in the contractor's favor. However, it also finds that rent is excepted under the leases' *force majeure* clause, and non-payment of rent is the stated default.[8]

The court then turned to the issue of whether the Commencement Dates under each of the leases were valid and enforceable and whether the Mall interfered with LIDC's ability to open for business so it could pay rent. Based on the facts presented to the court, the court concluded that:

> . . . Even assuming that the tenants [LIDC] were asked to "hold off" on entering a judgment there is no denial . . . that the contractor was no longer on the job as of November, 2013. That contractor was not replaced by the tenants. Critically, there is also no denial that the tenants [LIDC] were urged by the Mall to hire a new contractor and to proceed with the construction, as opposed to submission of the judgment, after the Court vacated the Town's Stop Work order and directed reinstatement of the building permits.[9]

The court finally concluded that

> without establishing a cause attributable to the Mall, the plaintiffs [LIDC] have not completed construction, have no operating businesses generating income, and have not pointed to any other independent source of funds, or that access to sufficient funds to cure the rent default is imminent.[10]

**Lessons Learned**

This case helps illustrate that both tenants and landlords should consider the following:

1. Because most well-drafted *force majeure* clauses contain provisions that do not excuse a tenant's obligation to pay rent, it is imperative that a tenant consider the basis for its claimed "inability to perform" before invoking a *force majeure* defense. A tenant needs to determine as its threshold issue whether the excuse for its inability to perform arises out of an economic basis or a physical or legal event as defined within the *force majeure* provision.
2. When drafting a "Commencement Date" provision tied to a monetary obligation, a tenant or landlord should consider including a *force majeure* exception such that to the extent the *force majeure* event delays the completion of work or other condition tied to the Commencement Date, such *force majeure* event would extend out the Commencement Date. In this case, the Commencement Date (which triggered the rent commencement) was specifically tied to the earlier of a set date and the opening of the business to the public. If the tenant had tied the Commencement Date to the *force majeure* event, the tenant could have taken the position that the tenant was entitled to an extension of the Commencement Date for the period during which the Town's stop work order was in effect. As the case indicated, the period after the court lifted the Town's stop work order would not have been permitted to extend out the Commencement Date in such a circumstance because there was no longer any legal impediment to complete the construction.
3. This case underscores the point that once a *force majeure* event has ceased, a party (regardless of whether it is a tenant or a landlord) must recognize that it is no longer an impediment and must resume its obligations.

While the *force majeure* clause is often considered as an afterthought that is rarely implemented, it is precisely the unforeseen circumstances contemplated by the *force majeure* clause from which clients need protection to ensure that they are not boxed into specific time periods and performance obligations set forth in other contractual or lease provisions that they are unable to satisfy.

***Jerry Reichelscheimer** is a Partner with Akerman LLP in New York, NY. His practice focuses primarily on commercial real estate transactions, with an emphasis on commercial leasing, acquisitions, sale and loan transactions.

[1] *LIDC I v. Sunrise Mall*, LLC 2014 NY Slip Op 24331 Oct. 27, 2014.
[2] *225 East 36th St. Garage Corp. v 211 East 36th Owners Corp.*, 211 AD 2d 420, 421.
[3] *Id*.
[4] *LIDC I v. Sunrise Mall, LLC,* 2014 NY Slip Op 24331 Oct. 27, 2014, from the court record.
[5] *Id*.
[6] *Id*.
[7] *See* Damian McNair, "Asia Pacific Projects Update DLA Piper—*Force Majeure* Clauses."
[8] *LIDC I v. Sunrise Mall, LLC* 2014 NY Slip Op 24331 October 27, 2014, from the court record.
[9] *Id*.
[10] *Id*.

# Calculating Rejection Damages Under Bankruptcy Code § 502(b)(6)

*Dustin P. Branch**
*Katten Muchin Rosenman LLP*
*Los Angeles, CA*

The United States Bankruptcy Code (the "Code") provides a formula for the calculation of future damages (known as rejection damages in bankruptcy) under 11 U.S.C. § 502(b)(6). It limits the damages that landlords may claim for the rejection of their leases (the "Rejection Damages Cap").[1] Despite codifying the formula for determining rejection damages under § 502(b)(6), bankruptcy courts remain split on how to interpret this section.

**Statutory History and Overview**

Section 502(b)(6) represents a statutory attempt to balance compensation to landlords for their future damages arising from a rejection of the lease, and the intent to limit landlord claims so that they are not so large as to prevent other unsecured creditors from a meaningful recovery from the estate. Under state law, the general rule is that landlords are entitled to assert damages for all rent and charges that accrue through the remaining term of the lease upon a default under the lease that leads to the tenant vacating the leased premises. To accomplish this goal, § 502(b)(6) replaces the landlord's future damage claim under state law with the Rejection Damages Cap, as set forth in § 502(b)(6)(A), as follows:

> (b) [T]he court, after notice and a hearing, shall determine the amount of such claim . . . as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—
>
> (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—
>
> (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—
>
> (i) the date of the filing of the petition; and
>
> (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property;

Initially, landlords were not afforded any claim for damages resulting from the premature termination of a lease, as such damages were considered contingent and not capable of proof. *See In re Connectix Corp*.[2] A compromise was later added to the *Bankruptcy Act* to permit landlords some claim for future rent, limiting such claim to the year next succeeding the date of surrender or reentry in a liquidation, and for the next three succeeding years in a rehabilitation case.[3]

Section 502(b)(6) continued the *Bankruptcy Act's* limitation on landlords' claims for future rent through the Rejection Damages Cap. While determining rejection damages would seem an easy exercise of merely applying § 502(b)(6), this has not proven to be the case. The venue of the bankruptcy case can significantly impact (a) the amount of the rejection damage cap and (b) the charges that are subject to that cap. In short, courts are divided as to whether the 15 percent limit should be applied to the total rent due for the remaining term of the lease, or the total time remaining under the lease. Bankruptcy courts also disagree as to which damages "[result] from the termination of the lease" and, as a result, which damages are subject to the rejection damages cap and which damages may be asserted independently of the Rejection Damages Cap. This article discusses the evolution of the § 502(b)(6), and the split of authority that exists with respect to each of the above issues, as highlighted in the recent decision of *In re Filene's Basement, LLC*.[4]

**Rent vs. Time Method of Calculating the Rejection Damages Cap**

Bankruptcy courts across the country differ in how they interpret the Rejection Damages Cap in those cases where 15 percent of the remaining term of the lease exceeds one year. When this factual circumstance exists, bankruptcy courts differ in the way they interpret "15 percent, not to exceed three years, of the remaining term of such lease" to calculate the Rejection Damages Cap. One line of cases holds that the Rejection Damages Caps is derived by multiplying the total remaining rent and charges due under the lease by 15 percent. This is known as the "rent" approach. The other line of cases holds that the Rejection Damages Cap is derived by multiplying the total term remaining by 15 percent. This is known as the "time" approach. This distinction is not simply academic, as the method employed can significantly impact the Rejection Damages Cap.

Courts that support the "rent" approach to the Rejection Damages Cap hold that this approach properly allows landlords to recover damages based on rent increases the parties bargained for when they entered into the lease. *In re Andover Togs, Inc.*[5]; *In re Gantos*[6]; *In re Today's Woman of Florida, Inc.*[7]; *In re CommuniCall Cent., Inc.*[8] This approach also recognizes that landlords retain all the risks and benefits as to the value of the real estate at the termination of the lease, and thus necessarily consider the risk of a tenant's bankruptcy filing when negotiating a lease. *In re Gantos*.[9]

Courts that favor the time approach often look at § 502 as a whole, noting that the section generally speaks in terms of time periods for which rent is due after termination of the lease. *In re Allegheny Intern., Inc.*,[10]; *In re Bob's Sea Ray Boats, Inc.*,[11]; *In re Connectix Corp.*[12] In addition, courts have held that because the phrase "not to exceed three years" immediately follows "15 percent," 15 percent must refer to the term remaining rather than the rent remaining. *In re Heller Ehrman LLP*.[13]

**Damages Arising From the Termination of a Lease**

The other primary divergence of interpretation with respect to § 502(b)(6) relates to exactly which charges are subsumed within the Rejection Damages Cap, and which claims survive such that they can be claimed in addition to the Rejection Damages Cap. Section 502(b)(6) provides that a landlord's damages must "result" from the termination of a lease of real property to be included in the Rejection Damages Cap, but courts are divided over whether to apply a narrow or broad approach to determining whether damages "result" from the termination of a lease.

Courts advocating the broad approach hold that landlords are properly entitled to a single capped claim under § 502(b)(6) for all post-petition and post-rejection breaches of the lease—meaning that even items not denominated or properly considered "rent" are subject to the cap. This perspective, they argue, is supported by the legislative intent behind § 502(b)(6), as the section was designed to limit lessor's damages resulting from the rejection. See *In re New Valley Corp.*[14]; *In re Foamex Int'l, Inc.*[15]; *In re McSheridan.*[16]

Courts taking a broad approach also hold that a landlord's claim for deferred maintenance expenses qualifies as damages "resulting from" lease termination. *In re New Valley Corp.*[17]; *In re Gatti's Inc.*[18] Several courts have found that many costs are incurred in attempting to re-let the property covered by a rejected lease, e.g., attorney fees, brokers' fees, taxes, and costs for remodeling and reconstruction necessary to make the property suitable for a new tenant. These costs constitute "damages resulting from the termination of a lease of real property," which are subject to the § 502(b)(6) ceiling. *See In re McLean Enterprises, Inc.*[19]; *In re Storage Technology Corp.*[20]; *In re Goldblatt Bros., Inc.*[21]; *In re City Stores Co.*[22]

Courts that take a narrow view characterize damages that are a "breach of lease covenant" as distinct from lease termination damages. *In re Atlantic Container Corp.*[23]; *In re Best Prods. Co. Inc.*[24] These cases compare § 502(b)(6) to its predecessor, former 11 U.S.C. § 63(a)(9), to point out that the current statute omits language that previously included "damages or indemnity under a covenant contained in such lease" as falling within the damages cap. *See Atl. Container Corp.*[25]; *In re Best Prods. Co. Inc.*[26] Thus, damages for repairs needed to the property post-termination, if characterized as a pre-petition breach of the covenant to maintain and repair, may fall outside of the § 502(b)(6) limit. *Id.*; see also *In re Bob's Sea Ray Boats, Inc.*[27]

**The *Filene's Basement* Decision**

The *Filene's Basement* decision addressed two issues: (a) whether "15 percent" in § 502(b)(6)(A) refers to the remaining term or remaining rent due under the lease; and (b) whether the landlord's claim for damages associated with the removal of abandoned fixtures and furniture, and for satisfaction of a mechanics' lien, fell within the Rejection Damages Cap.

In *Filene's Basement,* the dispute revolved around the proof of claim filed by a landlord after the rejection of a lease. The debtors objected to the claim on several grounds, including that the rejection claim was calculated using the rent method, and instead, should be recalculated using the time method. The bankruptcy court agreed with the debtors and sided with other courts in the Third Circuit by adopting the time approach. The court found that the statutory language was not ambiguous, despite the conflicting position of other bankruptcy courts, and concluded that "a natural reading of this language supports the 'time' approach." *Filene's*,[28] *citing Price v. Delaware State Police Federal Credit Union (In re Price).*[29] In addition, the court found that the phrase "without acceleration" in § 502(b)(6)(A) further supports a time approach, based on an interpretation that using the rent approach would render this language superfluous. Taking 15 percent of all rent including escalation in rent would be tantamount to effecting an acceleration. *Id.*, citing *In re Iron-Oak Supply Corp.*[30]

The court in *Filene's* agreed with those cases that view the statute's context as generally temporal:

> [T]he statute is generally written in terms of time: the calculation of the cap begins following the earlier of two dates, the date of petition or repossession, the maximum cap is worded in terms of time, three years, and the statute requires the rent to be calculated "without acceleration." *In re Heller Ehrman LLP.*[31]

The *court* found that legislative history and policy further support the time approach, and noted that the draft of the 1978 Bankruptcy Code continued the *Bankruptcy Act´*s limitation on landlord claims for lease rejection damages, but introduced the percentage calculation. The calculation replaced the time provisions employed in the *Bankruptcy Act*, but did not indicate congressional intent to move away from a time-based measurement of damages. *See Connectix Corp.*[32] Furthermore, a House Judiciary Report from 1977 regarding an earlier version of the statute referred to the "remaining lease term." *Connectix Corp.*[33] As a result of its findings, the court ordered the landlord to recalculate its claim in accordance with the time approach.

With respect to which damages "result" from the termination of the lease, and as a result, are subject to the Rejection Damages Cap, the court in *Filene's* adopted the more narrow view of consequential damages. Citing *In re El Toro Materials, Inc.*,[34] the court concluded that landlords may mitigate their lost rental income by re-leasing or selling the premises, but "collateral damages" bear only a weak correlation to the amount of rent negotiated at the inception of the lease.[35] Moreover, the broad view of consequential damages articulated in cases such as *McSheridan*[36] leaves landlords in a materially worse position than other creditors or holders of collateral damages claims.[37]

However, the court in *Filene's* took a more broad view of § 502(b)(6) in connection with damages arising from the removal of abandoned furniture and fixtures. The court held that these damages are also subject to the Rejection Damages Cap because these costs only arise in connection with the rejection of the lease. As a result, they properly fall within the scope of the § 502(b)(6) cap. The court found that costs associated with the removal of a mechanic's lien, however, did not solely arise due to the rejection of the lease, and that the landlord could make a separate claim for such costs incurred in removing the mechanic's lien.

**Conclusion**

The choice between using the rent vs. time method of calculating the Rejection Damages Cap may be significant where termination or rejection of a lease occurs with substantial term remaining, and where there are increases in rent over such term. While a strict reading of § 502(b) may seem to support the time approach, is this consistent with the policy behind the Rejection Damages Cap? Section 502(b)(6) is meant to strike a balance by compensating landlords for their future lease damages, while not overwhelming the claims of other unsecured creditors. If the Rejection Damages Cap calculation is interpreted to take a snapshot of the rent and charges at the time of rejection, does the time method adequately compensate landlords for future damages arising under their negotiated leases? Section 502(b)(6) already reduces such future claims by 85 percent where such damages exceed one year's rent and charges, as compared to what the landlord would be entitled to claim under state law. No other creditor faces such a statutory reduction, and depriving landlords of 15 percent of their actual pecuniary losses under the negotiated terms of their leases seems draconian and contrary to the policy of the Code.

The increases in rent and charges that accrue throughout the term of a lease are legitimate components of a landlord's damages, and should not be subject to elimination through the Rejection Damages Cap calculation. The implication that a rent approach would render § 502(b)(6)'s language "without acceleration" superfluous seems to misinterpret the statute and should not be basis for using the time method.

The purpose of § 502(b)(6) is in itself to accelerate the future damages of landlords to a fixed and reduced Rejection Damages Cap. A more consistent interpretation of the phrase "without acceleration" would put the phrase in the context of lease provisions that accelerate the entire balance due under the lease upon termination. In those leases, landlords could argue that the entire balance is due immediately. Thus, one year of rent and charges is really the entirety of the lease charges due to the acceleration clause. It seems more likely that § 502(b)(6) was seeking to prevent this circumstance from occurring through its use of the phrase "without acceleration." This concept is distinct from the gradual escalation in the rent and charges that is part of most leases.

With respect to determining which damages result from termination of a lease, excluding collateral damages, does offer better protection to landlords from additional damages that relate only tangentially to rejection or termination. A narrow view of damages that fall within the Rejection Damage Cap advances the policy of limiting landlords' future rent and charges, while not providing debtor-tenants *carte blanche* to leave landlords responsible for claims beyond such rent and charges. Bankruptcy policy is not served by shifting to landlords the cost of removing mechanics' liens, or even costs associated with a tenant's failure to comply with clean-up and repair work negotiated in the leases.

While these are the latest in a line of cases discussing damages under § 502(b)(6), they do not settle the dispute. Practitioners should be aware of the case law in their jurisdictions so they can advise their clients (whether creditors or debtors) on the correct calculation of these damages.

***Dustin P. Branch** is a Partner in the Los Angeles, CA, office of Katten Muchin Rosenman LLP. His practice focuses on the representation of commercial and shopping center owners, developers, and managers in various restructuring and litigation capacities, including tenant bankruptcies.

[1] All subsequent references to sections are to 11 U.S.C. § 101, *et seq.*
[2] 372 B.R. 488, 491 (Bankr. N.D. Cal. 2007).
[3] 11 U.S.C. § 63(a)(9).
[4] Case No. 11-13511, 2015 WL 1806347 (Apr. 16, 2015).
[5] 231 B.R. 521, 540-41 (Bankr. S.D.N.Y. 1999).
[6] 176 B.R. 793, 96 (Bankr. W.D. Mich. 1995).
[7] 195 B.R. 506, 508 (Bankr. M.D. Fla. 1996).
[8] 106 B.R. 540, 544 (Bankr. N.D. Ill. 1989).
[9] 176 B.R. at 796
[10] 145 B.R. 823, 828 (W.D. Pa. 1992).
[11] 143 B.R. 229, 231 (Bankr. D.N.D.1992).
[12] 372 B.R. 488, 493 (Bankr. N.D. Cal. 2007).
[13] 2011 WL 635224, at *2-3 (N.D. Cal. Feb. 11, 2011).

[14] No. Civ.A. 98-982, 2000 WL 1251858, at *9 (D.N.J. Aug. 31, 2000).
[15] 368 B.R. 383, 393-94 (Bankr. D. Del. 2007).
[16] 184 B.R. 91, 102 (9th Cir. B.A.P. 1995).
[17] No. Civ.A. 98-982, 2000 WL 1251858, at *9 (D.N.J. Aug. 31, 2000).
[18] 162 B.R. 1004, 1011 (Bankr. W.D. Tex. 1994).
[19] 105 B.R. 928, 936 (Bankr. W.D.Mo.1989).
[20] 77 B.R. 824, 825 (Bankr. D.Colo.1986).
[21] 66 B.R. 337 (Bankr. N.D.Ill.1986).
[22] 23 B.R. 201, 204 (Bankr. S.D.N.Y.1982).
[23] 133 B.R. 980, 987 (Bankr. N.D. Ill 1991).
[24] 229 B.R. 673, 679 (Bankr. E.D. Va 1998).
[25] 133 B.R. at 987.
[26] 229 B.R. 673, 679 (Bankr. E.D. Va 1998).
[27] 143 B.R. 229, 231 (Bankr. D.N.D. 1992).
[28] 2015 WL 1806347, at 9.
[29] 370 F.3d 362, 369 (3d Cir. 2004).
[30] 169 B.R. 414, 420 (Bankr. E.D. Cal. 1994).
[31] 2011 WL 635224, at *2-3 (N.D. Cal. Feb. 11, 2011).
[32] 372 B.R. at 493.
[33] *Id.* at 493-94.
[34] 503 F.3d 978, 981-82 (9th Cir. 2007).
[35] *Id.* at 980.
[36] 184 B.R. 91 (B.A.P. 9th Cir. 1995), *overruled by El Toro*, 503 F.3d at 980.
[37] 503 F.3d at 980.

# Assignor and Sublandlord Liability: Post-Assignment or Post-Sublease

*Joshua R. Chupack*
*Pedersen & Houpt*
*Chicago, IL*

While tenants frequently transfer their rights and obligations in leases by assignment or sublease, such transfers often do not relieve the assigning and subleasing tenants of liability to their landlords in connection with their leases. This article will provide an overview of a tenant's potential liability to its landlord after entering into an assignment or sublease in compliance with its lease. It will not address a tenant's liability to an assignee or subtenant or due to a tenant's breach of an assignment/sublease lease provision.

**Background: Privity of Estate and Privity of Contract**

A real estate lease is both (1) a conveyance of a leasehold estate in land, which creates privity of estate between a landlord and a tenant and (2) a contract, which creates privity of contract between a landlord and a tenant.[1] Privity of estate is a connection between the estates of separate parties, and in the leasing context, it is based on a shared interest in a leased premises. Privity of contract, however, is a connection between separate parties based on agreement.[2]

Each form of privity creates separate rights and obligations. A party that maintains privity of estate, for example, is obligated to perform (and may be liable for) those covenants that touch and concern the land and are deemed to run with the land, such as the covenant to pay rent and taxes.[3] A party that maintains privity of contract, however, is obligated to perform (and may be liable for) all contractual lease provisions. As described below, a tenant's assignment of a lease terminates privity of estate between landlord and tenant, whereas a tenant's sublease does not terminate privity of estate or privity of contract. As a result, depending on whether a tenant enters into an assignment or a sublease, different rights and obligations terminate between a landlord and a tenant, thereby affecting a tenant's potential liability.

***Assignments***

A tenant assigns its lease when it transfers its entire leasehold interest/estate, including the whole term (without retaining any reversionary interest), to an assignee, and the assignee steps into the tenant's shoes and acquires all the tenant's rights in the lease.[4] A "reversion" is a present right to a future interest retained by a grantor, often to reenter or repossess the premises.[5] Upon lease assignment, a tenant ceases to have privity of estate with a landlord (which is transferred to the assignee).

Since privity of estate between a landlord and a tenant is severed by assignment, but privity of contract remains post-assignment, a tenant remains bound by and contractually liable to a landlord for its failure to perform the express obligations and covenants it assumed under its lease.[6] A tenant's privity of contract and potential liability to a landlord for lease obligations remain until the end of the lease period.[7] Regardless of whether an assignee complies with its obligations, and if an assignee takes any actions that cause a tenant to violate its lease with the landlord, the tenant remains liable to the landlord for its lease obligations.[8]

Because both a tenant may be liable to its landlord (due to the tenant's privity of contract with the landlord) and the tenant's assignee may be liable to the landlord (due to the assignee's privity of estate with the landlord), a tenant and its assignee may be held jointly and severally liable for certain lease obligations, and a landlord generally can sue either tenant, its assignee, or both.[9] Some courts hold that when a lease is assigned, the assignee assumes the obligation of principal obligor for the performance of the tenant's lease covenants, and the tenant becomes a surety to the landlord for the assignee's performance.[10] Even though both a tenant and its assignee may be liable to a landlord for the same debt, the landlord is only entitled to one payment of such debt.[11]

A tenant is not relieved of its lease obligations, notwithstanding the fact that a lease may state it is binding on a tenant's assignees, a landlord consents to the assignment, or a landlord accepts rent payments or the performance of other lease obligations from an assignee.[12] A tenant remains liable to a landlord unless the landlord relieves the tenant through an express or implied agreement, a novation, a release, or some other act inconsistent with continuing contractual liability.[13] If a landlord and a tenant's assignee, for example, directly enter into a new or substitute lease, either expressly or implicitly through their conduct, the tenant's obligations to the landlord may cease.[14] If a landlord and a tenant's assignee materially vary the original lease terms, their conduct can amount to a new lease, a surrender of the original lease by operation of law, and thereby relieve the tenant of its lease obligations.[15] A tenant, however, will not be relieved of its lease obligations by lease modifications which inure to the tenant's benefit or modifications that increase the tenant's liability but are permitted under the terms of the original lease.[16]

*Subleases*

A tenant subleases when it transfers less than its entire leasehold interest/estate and retains a reversionary interest in the leasehold.[17] If a tenant does not transfer any portion of the term, however small, even a single day, the transfer is a sublease.[18] Upon a sublease, a tenant retains both privity of estate and privity of contract with a landlord (and the subtenant lacks privity of contract and privity of estate with a landlord).[19] A new landlord-tenant relationship is created thereby between the original tenant (acting as landlord) and the subtenant (acting as tenant).[20]

Since both privity of estate and privity of contract remain post-sublease, a tenant remains liable to a landlord for its lease covenants and obligations, such as the obligation to pay rent, as if no sublease existed.[21] A tenant may be liable for the acts, omissions and negligence of its subtenant, whether or not the tenant knew of such violations.[22] If a subtenant, for example, holds over past the expiration of a lease term, the tenant can be liable for paying rent during the subtenant's holdover.[23]

Notwithstanding the fact that a lease may expressly permit a tenant to sublease, the landlord has knowledge of a sublease, or a landlord accepts rent payments from a subtenant (including allowing a subtenant to deduct its repairs costs from rent), the tenant is not relieved of its lease obligations.[24] The tenant remains liable to the landlord, unless the landlord elects to treat the subtenant as a substitute tenant under the lease based on an express or implied agreement by the landlord to accept the subtenant as his tenant in lieu of the tenant and thereby render the subtenant liable to the landlord as the new tenant.[25]

*Limiting/Mitigating Liability*

While a lease assignment or sublease does not terminate a tenant's liability to its landlord, a tenant can limit its post-assignment or post-sublease exposure to its landlord by negotiating with its landlord its post-assignment or post-sublease rights and obligations, either at the time the tenant negotiates its original lease with its landlord or when the tenant negotiates an assignment or sublease with a potential assignee or subtenant. To further mitigate its liability, when a tenant enters into an assignment or sublease, the tenant should include terms that permit the tenant to hold its assignee or subtenant responsible for any liabilities that the tenant may face from its landlord.

**Joshua R. Chupack** is an Attorney in Pedersen & Houpt's Real Estate and Financing Practice Group, Corporate and Business Counseling Practice Group, and Labor and Employment Law Practice Group. Mr. Chupack focuses his practice on advising owners, developers, investors, lenders, landlords and tenants in all forms of real estate transactions and on a wide variety of business matters. The views and opinions expressed in this article are his own and do not represent the views and opinions of his employer or any other party.

1 *Vallely Invs. v. Bancamerica Commercial Corp., 88 Cal. App. 4th 816, 822 (Cal. App. 4th Dist. 2001).*

2 *Ballentine's Law Dictionary, 3rd Edition, Matthew Bender & Company, Inc., December 8, 1998.*

3 *Riverbend Investors v. Progressive Surface Preparation, L.L.C., 255 Mich. App. 327, 335 (Mich. Ct. App. 2003); Chicago Title & Trust Co. v. GTE Directories Corp., 1995 U.S. Dist. LEXIS 6361 (N.D. Ill. 1995); Davidson v. Minnesota Loan & Trust Co., 158 Minn. 411, 416 (1924).*

4 *Tawes v. Barnes, 340 S.W.3d 419, 429 (2011); Patton v. Massey, 2010 Tenn. App. LEXIS 499 (Tenn. Ct. App. 2010); 718 Assocs., Ltd. v. Sunwest N.O.P., Inc., 1 S.W.3d 355, 360 (Tex. App. 1999); Italian Fisherman, Inc. v. Middlemas, 313 Md. 156, 163 (Md. 1988).*

5 *718 Assocs., Ltd. at 361.*

6 *Patton v. Massey, 2010 Tenn. App. LEXIS 499 (Tenn. Ct. App. Aug. 4, 2010); Morse & Hamilton Ltd. Pshp. v. Gourmet Bagel Co., 2000 Ohio App. LEXIS 4492 (Ohio Ct. App., 2000); Italian Fisherman at 163; Kornblum v. Henry E. Mangels Co., 167 So. 2d 16, 18 (3d Dist. 1964); Springer v. De Wolf, 194 Ill. 218, 221 (1901); Consolidated Coal Co. v. Peers, 166 Ill. 361, 366–367 (1896).*

7 *Pike Corp. v. Glascock, 17 Va. Cir. 447, 449 (Va. Law & Eq. Ct. 1961).*

8 *B&G Props. Ltd. P'ship v. OfficeMax, Inc., 2013-Ohio-5255, P18 (Ohio Ct. App. 2013).*

9 *Id.; Pike Corp. v. Glascock, 17 Va. Cir. 447, 449 (Va. Law & Eq. Ct. 1961).*

10 *B&G Props. Ltd. P'ship at 10; Morse & Hamilton Ltd. Pshp. v. Gourmet Bagel Co., 2000 Ohio App. LEXIS 4492 (Ohio Ct. App., Franklin County Sept. 29, 2000); Corner Assocs. v. W. R. Grace & Co., 1999 U.S. App. LEXIS 2606 (4th Cir. Va. 1999); Meredith v. Dardarian, 83 Cal. App. 3d 248, 252 (2d Dist. 1978); De Hart v. Allen, 26 Cal. 2d 829, 832 (1945).*

11 *Hamlen v. Rednalloh Co., 291 Mass. 119, 126 (1935).*

12 *Morse & Hamilton Ltd. Pshp. at *5-6; Chicago Title & Trust Co. v. GTE Directories Corp., 1995 U.S. Dist. LEXIS 14331 (N.D. Ill. 1995); LaSalle Nat'l Bank v. Bachmann, 108 B.R. 1013, 1016 (N.D. Ill. 1989); De Hart at 832.*

13 *Shadeland Dev. Corp. v. Meek, 489 N.E.2d 1192, 1196 (Ind. Ct. App. 1986); Broida v. Hayashi, 51 Haw. 493, 495 (1970).*

14 *Morse & Hamilton Ltd. Pshp. v. Gourmet Bagel Co., 2000 Ohio App. LEXIS 4492 (Ohio Ct. App., Franklin County Sept. 29, 2000).*

15 *Jedco Dev. Co. v. Bertsch, 441 N.W.2d 664, 667 (N.D. 1989); Meredith at 255; Walker v. Rednalloh Co., 299 Mass. 591, 595 (1938).*

16 *Jedco Dev. Co. at 667.*

17 *Shadeland Dev. Corp. at 1199; In re Miami Dyeing & Printing, Inc., 14 B.R. 947, 950 (Bankr. S.D. Fla. 1981).*

18 *Spears v. Canon De Carnue Land Grant, 80 N.M. 766, 768 (N.M. 1969); Jaber v. Miller, 219 Ark. 59, 61 (Ark. 1951).*

19 *Italian Fisherman, Inc. at 163.*

20 *Id.; Jaber at 61.*

21 *Shadeland Dev. Corp. at 1199; Tefft v. Apex Pawnbroking & Jewelry Co., 75 A.D.2d 891 (N.Y. App. Div. 2d Dep't 1980).*

22 *First Trust & Sav. Bank v. Raklios, 247 Ill. App. 183, 193–194 (Ill. App. Ct. 1928).*

23 *Sullivan v. George Ringler & Co., 59 A.D. 184 (N.Y. App. Div. 1901).*

24 *Step Ahead, Inc. v. Lehndorff Greenbriar, Ltd., 171 Ga. App. 805, 807 (Ga. Ct. App. 1984); Rourke & Dunn v. Bozarth, 1924 OK 617, P11 (Okla. 1924).*

25 *Step Ahead, Inc. at 805 (Ga. Ct. App. 1984); Rourke & Dunn at 11.*

# Texas Title Insurance—Survey Coverage

*Mitchell S. Block**
*Smith, Robertson, Elliott & Douglas, L.L.P.*
*Austin, TX*

Texas is the only state in the nation that does not follow the guidance of the American Land Title Association ("ALTA"). Texas has not adopted the title insurance policy and endorsement forms promulgated by ALTA. Instead, Texas title insurance companies use policy and endorsement forms promulgated by the Texas Land Title Association ("TLTA"). One area of coverage, or rather lack of coverage, that sets Texas apart from the rest of the nation, relates to survey matters.

Texas title policies contain a standard printed exception for "Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements."[1] This exception can be amended to read "shortages in area" by providing the title company with a complete and current survey (in plat/map form with field notes when appropriate), performed and properly certified by a surveyor acceptable to the title company and paying an additional premium. This is the same in the ALTA states. The premium for this amendment is 15 percent of the cost of the owner's title policy for commercial properties.

Texas and the ALTA states also offer additional survey-related coverage through:

- Restrictions, Encroachments, Minerals Endorsements providing coverage against a violation of an enforceable covenant, condition, limitation or restriction in a document or instrument in effect at the date of the policy ("Covenant");
- Enforced removal of an improvement as a result of a violation of a building setback line shown on a plat or subdivision recorded or filed in the public records, unless an exception in Schedule B of the policy identifies the violation;
- Notice of a violation of an enforceable Covenant relating to environmental protection;
- Enforcement of a private right in a Covenant;
- An encroachment onto the property or from the property onto adjoining land;
- Damage to an improvement on the property that encroaches onto an easement resulting from exercise of the right to maintain the easement; and
- Damage to an improvement resulting from the future exercise of a right to use the surface of the land for the extraction or development of minerals or any other subsurface substances excepted from the description of the land or excepted in Schedule B. *Restrictions, Encroachments, Minerals Endorsement – Owner's Policy (TLTA Form T-19.1)*. This is also the same in the ALTA states.

Other survey-related endorsements that are available both in Texas and in ALTA states include access to public streets from the property and contiguity of the overall property. A survey acceptable to the title insurance company must be provided in order to obtain these endorsements. The cost for such endorsements is relatively nominal.

Title insurance companies in ALTA states are also permitted to offer additional survey coverage in the form of "Same as Survey" endorsements. These endorsements insure against loss or damage sustained by the insured by reason of the failure of the land as described in Schedule A to be the same as that identified on the named survey. This type of endorsement is not available in Texas.

Issues related to matters revealed on a survey, the extent of coverage under a Texas title insurance policy, including Endorsement 19.1 coverage, were analyzed in detail by the Fifth United States Circuit Court of Appeals in the 2014 case, *Lawyers Title Insurance v. Doubletree Partners, LP*.[2] *Doubletree* is best described as a title insurance exam for the Fifth Circuit, and the opinion sets forth a lodestar for:

"A. negotiating and drafting contracts of sale and closing documents;
B. scrutinizing title commitments, exception documents, surveys, and title policies;
C. lodging title objections; and
D. purchasing Endorsement Form T-19.1.

Indeed, the *Doubletree* lodestar is a judge-proscribed instruction manual for lawyering real estate deals to:

1. Properly allocate title and surveys risks; and
2. Maximize title insurance coverage.

Thus, the opinion should have a dynamic impact upon the practice of real estate law in Texas."[3]

**The Fifth Circuit's Lodestar for Allocating Title and Survey Risks and Maximizing Title Insurance Coverage**

Doubletree Partners, L.P. ("Doubletree") contracted to purchase a special events center known as Doubletree Ranch from the family that owned it. Doubletree closed on the purchase, and Lawyers Title Insurance Corporation ("LTIC") issued its title insurance policy. LTIC also

> offered to provide Doubletree "a more complete title insurance policy" that would insure "against loss because of discrepancies or conflicts in boundary lines, encroachments or protrusions, or overlapping of improvements, excluding from the coverage specific matters disclosed by the survey," if Doubletree obtained a survey of the property and paid an additional premium.[4]

A survey was prepared and submitted to Doubletree and LTIC. The survey showed a flowage easement (owned by the federal government for flood control purposes), which appeared to run generally along the eastern and southern boundaries of Doubletree Ranch. Doubletree planned to use the flowage easement area, as shown on the survey, for landscaping only. The survey did not show any encroachment of the flowage easement over any of the areas that Doubletree intended to develop on Doubletree Ranch.

LTIC accepted the survey, and Doubletree paid the additional 15 percent premium to obtain "survey coverage." Title to Doubletree Ranch was conveyed to Doubletree at closing pursuant to a deed in which Doubletree took title "subject to" the flowage easement "shown on the survey."

Due to a software printing error, the original policy failed to include many of the encumbrances listed as exceptions, including the flowage easement. The original policy also failed to include the agreed-upon survey coverage. Sometime thereafter, LTIC issued its corrected title insurance policy, which included the flowage easement exception as reflected in the final title commitment, as well as the standard survey exception as amended to reflect the purchase of survey coverage. Doubletree appealed the magistrate judge's grant of LTIC's motion for summary judgment and denial of Doubletree's cross-motion for summary judgment on Doubletree's breach of contract claims and extracontractual claims. The Fifth Circuit held that the magistrate judge had correctly reformed the original policy to match the corrected policy.

The Fifth Circuit determined that

> Three provisions of the reformed policy are relevant to determining whether the survey error is covered, and therefore whether Lawyers Title breached the contract by failing to indemnify Doubletree for the error: (1) the survey coverage clause, (2) the flowage easement exception, and (3) the policy's exclusion 3(a).[5]

The Fifth Circuit then analyzed the survey coverage clause issue. In *Shaver v. National Title & Abstract Co.*,[6] the Texas Supreme Court ruled that easements are a type of defect covered by title insurance policies in Texas, unless a valid exception or exclusion applies.[7] "Texas law requires title insurers to use policy provisions approved by the Texas Department of Insurance."[8]

LTIC argued that survey coverage does not cover all alleged defects in the survey, but covers only errors in identifying the boundaries of the property and any encroachments affecting those boundaries. More specifically, LTIC argued that the larger scope of the flowage easement is not covered because it is not a "boundary line" or "encroachment" within the meaning of the language deleted from the standard survey exception. LTIC also argued that the exception for the flowage easement precludes coverage of the flowage easement, regardless of the actual size or location of the easement. Doubletree argued that the survey coverage it purchased covered all errors in the survey, including the error in describing the location of the flowage easement. The Fifth Circuit ultimately agreed with Doubletree:

> As to whether the survey coverage clause in the corrected policy provides coverage for the survey error in locating the flowage easement, we hold that both parties' interpretations of the clause are reasonable. As a result, we must adopt Doubletree's interpretation.[9]

Because the corrected policy was ambiguous and subject to at least two interpretations, the Fifth Circuit was entitled to consider "extraneous evidence to determine the true meaning of the instrument."[10] This included LTIC's letter offering to provide Doubletree more complete title insurance coverage by amending the standard survey exception. LTIC stated in this letter:

> In the interest of providing you with a more complete title insurance policy, if a qualifying survey has been required by your lender, we will collect the appropriate premium from you . . . and amend your title insurance policy to insure you against loss because of discrepancies or conflicts in boundary lines, encroachments or protrusions, or overlapping of improvements, excluding from the coverage specific matters disclosed by the survey. . ..
> Because the approximate location of the flowage easement was in fact depicted on the survey, Doubletree had even more reason to believe that coverage of the flowage easement would be excluded only to the extent disclosed on the survey.[11]
>
> . . ..
>
> The purpose of the survey exception is to exclude coverage *when the insured fails to provide the insurer with a survey*. From a search of relevant public records, a title company cannot ascertain the risks that an accurate survey would disclose. It is for this reason that the title company puts that risk on the insured, *who can control it either by*

> *obtaining a survey or arranging for the elimination of the survey exception*. Thus, the very purpose of a survey exception is to exclude from coverage errors that would be revealed not by a search of public records, but by an accurate survey. *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 116 N.J. 517, 562 A.2d 208, 217 (1989).[12]
>
> . . ..
>
> Thus, one reasonable reading of the survey coverage here would be that it covers not just encumbrances on the boundaries of the property, but also encumbrances lying wholly within the property. . .. This reading of the policy is also consistent with two Texas cases, as well as another New Jersey case. Each of these three cases holds that title defects are covered when the defect is not revealed due to a survey error and when language in the policy suggests there would be coverage for such errors.[13]

Since the survey coverage clause in the corrected policy was susceptible of more than one reasonable interpretation, Texas law mandated that the Fifth Circuit adopt Doubletree's interpretation where Doubletree was the insured and its interpretation was reasonable.[14]

**Survey Error**

With respect to the issue of whether or not the flowage easement exception contained in the corrected policy precluded coverage for the survey error in this case, LTIC argued that the addition of the phrase "and shown on survey" to the exception was simply a notation to indicate that the surveyor identified the easement as affecting the property and that such addition did not affect the substance of the exception.

In its briefing, LTIC argued in the alternative that the district court was correct in concluding that the phrase, "and shown on survey," actually expanded the scope of the flowage easement exception, precluding coverage for the flowage easement as it exists in the real property records and as it is described in any other documents, such as the survey. Doubletree argued that the addition of the phrase to the flowage easement exception limited the exception to cover the easement only to the extent the easement was shown in the real property records and on the survey. Thus, any error in identifying the location of the easement in the survey would not be excepted from coverage.

The Fifth Circuit held that both parties' interpretations were reasonable.

> Just as the survey coverage clause was susceptible of multiple reasonable interpretations, so too is the flowage easement exception. Therefore, we again must adopt Doubletree's interpretation since Doubletree is the insured and its interpretation is reasonable.[15]

**Undisclosed Magnitude**

The last issue considered by the Fifth Circuit was whether or not exclusion 3(a) in the corrected policy precluded coverage of the undisclosed magnitude of the flowage easement. That portion of the policy provided:

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of: . . . 3. Defects, liens, encumbrances, adverse claims or other matters: (a) created, suffered, assumed or agreed to by the insured claimant[.][16]

LTIC argued that the district court was correct in concluding that Doubletree "suffered, assumed, or agreed" to the flowage easement as a defect in title under exclusion 3(a) by virtue of three documents—the sales contract, in which Doubletree agreed to purchase the property with the easement listed as a title defect; the deed stating that title was being conveyed "subject to" the flowage easement and the final title commitment, in which the flowage easement was specifically identified as an exception.

The Fifth Circuit found that Doubletree did not suffer, assume or agree to the undisclosed magnitude of the flowage easement for three main reasons:

> First, all four documents at issue include the "and shown on survey" language that the corrected policy contains. Because the survey failed to disclose the full extent of the easement, Doubletree did not suffer, assume, or agree to the full extent of the easement as a defect in title.
>
> Second, Doubletree did not suffer, assume, or agree to the undisclosed magnitude of the flowage easement because it did not have the requisite intent to do so. . . . Here, if Doubletree intended to acquire the property with the flowage easement as a title defect, it only intended to do so to the extent that the easement was shown on the survey.[17]
>
> Third, in addition to intent, the term "suffered, assumed, and agreed to" requires knowledge of the extent of the title defect . . . . Although Doubletree was aware that a flowage easement affected the property, it did not know the extent of the flowage easement. Doubletree had some knowledge of the flowage easement as a defect in title, but certainly not full knowledge of the extent of that defect. An insured does not suffer, assume, or agree to an encumbrance under this exclusion when it lacks knowledge of the true scope of the encumbrance. . . . Most importantly, exclusion 3(a) would completely nullify the survey coverage if interpreted as Lawyers Title suggests.[18]

**Conclusion**

As always, be careful with your drafting, and be thorough in your review of title and survey matters. This is not the place to take shortcuts in your documents. J. Edwin Martin's article[19] contains several valuable practice pointers.

*Mitchell S. Block is Of Counsel with Smith, Robertson, Elliott & Douglas, L.L.P. (www.smith-robertson.com) in Austin, TX. His practice focuses primarily on commercial real estate transactions, including leasing on behalf of both tenants and landlords, acquisitions, sales and sale/leasebacks.

[1] *TLTA Form T-1, effective January 3, 2014.*

[2] 739 F.3d 848 (5th Cir. 2014).

[3] J. Edwin Martin, *The Fifth Circuit's Lodestar for Allocating Title and Survey Risks and Maximizing Title Insurance Coverage*, Real Estate, Probate, and Trust Law Reporter, Vol. 53, No. 1, p. 56.

[4] *Doubletree* at 853.

[5] *Id.* at 858.

[6] 361 S.W.2d 867 (Tex.1962), *overruled on other grounds by S. Title Guar. Co. v. Prendergast*, 494 S.W.2d 154, 158 (Tex.1973).

[7] *Doubletree*, at 859.

[8] *Ibid.*

[9] *Id.*, at 860.

[10] *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333–34 (Tex.2011).

[11] *Id.* at 862.

[12] *Ibid.* (emphasis added, internal citation omitted).

[13] *Id.* At 863, citing *Dallas Title & Guaranty Co. v. Valdes*, 445 S.W.2d 26 (Tex.Civ.App.-Austin 1969, writ ref'd n.r.e.); *Lawyers Title Insurance Corp. v. McKee*, 354 S.W.2d 401 (Tex.Civ.App.-Fort Worth 1962, no writ); and *MacBean v. St. Paul Title Insurance Corp.*, 169 N.J.Super. 502, 405 A.2d 405 (N.J.Super.Ct.App.Div.1979).

[14] *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991).

[15] *Id.* At 866, citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991).

[16] *Ibid.*

[17] *Doubletree*, at 867.

[18] *Id.* at 868.

[19] *The Fifth Circuit's Lodestar for Allocating Title and Survey Risks and Maximizing Title Insurance Coverage, supra,* n. 3.

# Why Publicly Congratulating Your Favorite Athlete Could Cost You Millions

*Gary S. Kessler**
*Philip G. McNicholas***
*Kessler Collins PC*
*Dallas, TX*

**Introduction**

Imagine driving westbound on I-90 past Fenway Park when you spot a billboard reading: "Congratulations to Tom Brady and the New England Patriots for winning Super Bowl XLIX! Come celebrate with your friends at Dunkin' Donuts."

Surely, the laudatory message would appear innocent enough to an unwitting passerby. Dunkin' Donuts, a Massachusetts-based company, is merely celebrating a local sports figure and his team's successes, not unlike the rest of the northeasterly region of the United States. However, assuming Dunkin' Donuts® did not obtain permission from Tom Brady and the Patriots to use their names on the billboard, the chain could face a lawsuit for an incredible amount of damages, regardless of the billboard's intent.

As one might expect, sports franchise and athlete names typically cannot be used for a commercial purpose without consent. But many advertisers attempt to circumvent the applicable laws through an assortment of creative methods. One such device is to congratulate an athlete or sports team for a particular achievement.

This article will explore the laws governing the unauthorized use of a celebrity's name or likeness. We will discuss the breadth of protection for celebrities, the amount of damages an unauthorized user could face if found liable, and whether there are any permissible ways to refer to a celebrity in advertising without creating liability. We will also discuss a recent federal lawsuit involving an advertisement in *Sports Illustrated* in which a supermarket chain congratulated Michael Jordan for his election to the Professional Basketball Hall of Fame—a jury decided that Jordan's name was used for exploitative purposes without his consent and awarded him seven-figure damages.

**Background on Celebrities' Right of Publicity**

In the earlier example, Tom Brady and the New England Patriots were congratulated on the same billboard but their rights protecting against the unauthorized use of their names derive from two distinct legal sources. Tom Brady is a celebrity, whose rights are protected by his "right of publicity" and possibly the right against misappropriation of name or likeness (a branch of the right against invasion of privacy). The New England Patriots, as an entity, are not protected by the right of publicity but are afforded trademark protection. For the purposes of this article, we will focus on an individual's rights.

A celebrity is protected from the unauthorized use of his/her likeness or image by his/her right of publicity. The right of publicity is often described as the "inherent right of every human being to control the commercial use of his or her identity." Historically, the right of publicity has been held only by celebrities, since the image of non-celebrities generally does not hold any significant value. In contrast, non-celebrities possess a parallel right against "misappropriation of name or likeness," which is a branch of invasion of privacy laws. Recently, jurisdictions have begun allowing celebrities and non-celebrities to use the highly similar legal protections interchangeably.

States enforce the right of publicity using common law, statutory law or sometimes both. For example, California courts provide common law protection to individuals, but its legislature also enacted a statute reading:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.[1]

The uniform test to determine when a celebrity's right to publicity has been violated requires (1) the misappropriation of a protected attribute (2) for a commercial, exploitative purpose (3) without consent.[2] Most jurisdictions have adapted some variation of this test. For instance, Texas courts consider these three elements: (1) the defendant appropriated the plaintiff's name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose; (2) the plaintiff can be identified from the publication; and (3) there was some advantage or benefit to the defendant.[3] Illinois courts employ a similar test for both common law and statutory claims, except the second element focuses on lack of consent.[4]

The first element—misappropriation of a protected attribute—requires a plaintiff to show that the defendant appropriated attributes of the plaintiff protected by law. Attributes may extend beyond name or likeness. As one example, multiple courts have held that a celebrity's voice is a protected attribute. One court even held that a robot resembling Vanna White qualified as an appropriation of her likeness.[5] The second element—a commercial, exploitative purpose—means the plaintiff's name or likeness must be used in advertising or promoting goods or services. This element is often interpreted broadly so that a plaintiff can bring a lawsuit even if his or her name or likeness is used not directly to sell products but to improve brand recognition for the advertiser. The third element—consent—means that a celebrity cannot bring a lawsuit for violation of his/her right to publicity if he/she consents to the use of the protected attributes.

### *Jordan v. Dominick's Finer Foods, LLC*

In 2009, Time, Inc. (the publisher of *Sports Illustrated*), decided to produce a commemorative issue of the magazine to congratulate Michael Jordan on his induction into the Professional Basketball Hall of Fame. Time asked several businesses to design one-page advertisements for the issue. Time specifically required that the advertising companies create content having something to do with Jordan. Dominick's, a Chicago-based supermarket chain, accepted the offer and placed an advertisement. The Dominick's ad read: "Congratulations, Michael Jordan" and "You are a cut above," and provided a $2-off coupon for steaks. Neither Time nor Dominick's obtained Jordan's consent to use his name in the advertisement.

In response to the commemorative issue, Jordan sued Dominick's and its parent company Safeway, Inc., in the Northern District of Illinois.[6] Jordan's claim arose from the *Illinois Right of Publicity Act*. Jordan's attorneys argued that the Dominick's advertisement was placed for a "commercial purpose" to benefit Dominick's, primarily because of the attached $2-off coupon, and that no consent was given. Jordan obtained summary judgment as to Dominick's liability for violating his right of publicity, and the lone issue remaining in the case was the amount of Jordan's damages.

Jordan asserted that he should be compensated $10 million for the ad. He alleged that he would not have signed a single-ad deal with Dominick's since he testified that he has spent over 30 years developing his "brand" and he was unwilling to let Dominick's usurp his right to be compensated for the use of that brand. According to Jordan, he only signed long-term sponsorship deals if they were expected to be worth $10 million. As examples, he cited his deals with Nike, Hanes, Gatorade and others. In response, Dominick's hired an expert who asserted that a hypothetical single-ad deal between Dominick's and Jordan would have reasonably cost Dominick's only $126,900, and Dominick's argued that Jordan therefore should only recover that amount.

Interestingly, the judge assigned to the case, Senior United States District Judge Milton I. Shadur, openly criticized Jordan's team for what he deemed to be an unreasonable damages claim. Judge Shadur disputed Jordan's use of the value of his long-term sponsorship deals as a basis for calculating damages against Dominick's. Based on Judge Shadur's comments, Jordan's counsel filed a Motion for Recusal asserting that the judge was biased against Jordan.[7] In the order on the Motion for Recusal, Judge Shadur remarked that Jordan based his motion on his

> counsel's misleading warping of the criticism that this Court has had occasion to voice on purely legal grounds as to the extraordinarily excessive damages claim prescribed by Jordan's proposed opinion witness, in which Jordan's multimillion dollar long-term contracts with various companies to which he had hired out his name are somehow thought parallel to the one-time one-page participation by [Dominick's]. . . .[8]

Judge Shadur confirmed that "[t]his Court's view was and is that Jordan's counsel has not articulated any reasonable predicate for advancing the $10 million damages figure . . ." but refuted any bias against Jordan.[9] Judge Shadur ultimately denied Jordan's Motion for Recusal but still withdrew because his integrity was challenged and he did not want to risk any sense of impropriety.

On August 21, 2015, the jury awarded Jordan a verdict for $8.9 million in damages. Jordan announced that he would give the award to charities in Chicago, as the lawsuit was "just about protecting [his] name and [his] likeness."

Notably, Jordan filed a separate lawsuit in the Northern District of Illinois against Jewel Food Stores, Inc. (another advertiser in the 2009 commemorative issue), and Time, Inc. Unlike Dominick's, Jewel did not include a coupon in its advertisement but simply congratulated Jordan on his career and achievement. Jordan's counsel filed a nearly identical summary judgment motion on liability as in the *Dominick's* case, which was denied by United States District Judge Gary Feinerman.[10] In ruling as such, Judge Feinerman noted that, unlike Dominick's, Jewel could argue that its ad did not serve a "commercial purpose" and that Jordan's claims against Jewel "required a different and far more analytical approach."[11] The Jewel lawsuit is set for trial beginning December 8, 2015.

### Conclusion

Michael Jordan's lawsuits against Dominick's and Jewel have certainly brought celebrity right of publicity lawsuits back into the public eye. They have also likely raised questions on how to escape liability for violating a celebrity's right of publicity. In the context of this article's theme—publicly applauding an athlete for a particular achievement—the *Jewel* case seems to show that a business could possibly congratulate the athlete while evading liability by avoiding any self-promotion within the advertisement. However, the pertinent takeaway should be that any possible benefit reaped by publicly congratulating an athlete is considerably outweighed by the risk of facing substantial liability for violating his/her right of publicity.

***GARY KESSLER**, President of Kessler Collins, PC, is Board Certified in Civil Trial Practice, currently named a Texas "Super Lawyer" and has been included in the Best Lawyers in America for more than 20 years.

****PHILIP MCNICHOLAS** is an Associate at the firm, and practices mainly in commercial and real estate litigation.

[1] Cal. Civ.Code, § 3344, subd. (a).

[2] 31 Causes of Action 2d § 121 (2012).

[3] *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir.1994) (applying Texas law).
[4] *Blair v. Nevada Landing P'ship*, 369 Ill. App. 3d 318, 322–23, 859 N.E.2d 1188, 1191–92 (2006)
[5] *White v. Samsung Elec. Am., Inc.*, 917 F.2d 1395 (9th Cir. 1992).
[6] *Jordan v. Dominick's Finer Foods, LLC*; Case No. 10 C 407; In the United States District Court for the Northern District of Illinois, Eastern Division
[7] *Jordan v. Dominick's Finer Foods, LLC*, 10 C 407, 2014 WL 2750265 (N.D. Ill. June 17, 2014).
[8] *Id.* at *1.
[9] *Id.* at *2.
[10] *Jordan v. Jewel Food Stores, Inc.*, 83 F. Supp. 3d 761 (N.D. Ill. 2015).
[11] *Id.* at 769.

# 3D Printing: Potential Pitfalls for Retailers

*Jennifer B. Furey**
*Alana Van der Mude***
*Goulston & Storrs PC*
*Boston, MA*

**What Is 3D Printing?**

3D printing, or additive manufacturing, is a revolutionary method of producing goods. Similar to an ink-jet printer, a 3D printer "prints" thin layers of a material, most commonly plastics or metals (although scientists have actually used living cells in 3D printing[1]), which are applied on top of one another to produce a three-dimensional object. 3D printing relies upon computer-assisted design (CAD) software to guide the process. Specifically, CAD software is used to create and slice an image of a three-dimensional object into hundreds or thousands of individual layers. Directed by the CAD file, the printer then creates each layer, one-by-one. 3D printers are capable of building a variety of objects, from the mundane (e.g., children's toys or jewelry) to the useful (e.g., parts for a toaster or washing machine) and even to the highly controversial (e.g., functional guns as profiled in the *New York Times* and the subject of recent television crime shows).[2]

Compared to traditional manufacturing, which generally relies on economies of scale, 3D printing can produce a small number of goods at a fairly inexpensive cost per unit.[3] This advantage is significantly beneficial in certain "small-batch" manufacturing fields, such as prosthetic limbs or medical devices[4] as well as benefiting consumers using their own 3D printers to build various one-off designs.

**How Is 3D Printing Currently Being Used in Retail?**

Commercial use of 3D printers has been ongoing for decades—for example, to produce manufacturing prototypes. Once viewed as a seemingly futuristic method of manufacturing objects, 3D printers are now steadily moving from high-tech labs into the mainstream.

One area of particular interest is online retail sales. Established online 3D printing companies include Thingiverse,[5] (which is affiliated with MakerBot[6]—a major manufacturer of 3D printers), a website that people use to share designs; and Shapeways,[7] a 3D printing service and "Etsy-like" marketplace that provides a forum for designers to sell printed 3D objects. In addition, major retailers such as UPS and Staples, are creating brick-and-mortar locations for 3D printing.[8] Staples now offers 3D printers for sale to the public.[9]

Some retailers now offer 3D printing services in-store; more than 100 UPS stores throughout the country now provide 3D printing services in-store. Customers can bring a CAD file to their local UPS store, where UPS will upload the file to a three-dimensional printer, and print a finished product for the customer.[10]

Similarly, 3D Hubs is an online service that provides a list of local 3D printing shops where customers can upload a file, find a local print shop and pick up their printed 3D design within a matter of hours.[11]

**Intellectual Property and Liability Concerns with Retail 3D Printing**

As with many new technologies, the rise of 3D printing implicates a host of intellectual property and liability concerns—particularly, for retailers providing 3D printing services in their stores.

A customer seeking to 3D print a copyrighted object at a retail 3D print shop implicates potential copyright liability concerns. U.S. copyright law prohibits the reproduction of a copyrighted object and the production of a derivative work based upon the copyrighted work.[12] Although a retailer may not be directly infringing on a copyright, a retailer could potentially expose itself to secondary liability—and a potential lawsuit by a copyright owner—if the retailer assists a customer in the infringement of copyrighted materials.[13]

Unfortunately the parameters of copyright law liability in 3D printing are still being developed. New technologies often spurn copyright concerns. For example, during the early 1980s a Hollywood studio sued Sony, the manufacturer of the first VCRs, attempting to hold Sony liable for copyright infringement by VCR owners who taped and played movies without paying a license fee.[14]

Similarly, the rise of online music databases created a new wave of case law that explored when a distributer may be held liable for its customers' infringement of copyrights.[15] Although Congress has taken some actions in response to new technologies and development of copyright law—for example, the passage of the *Digital Millennium Copyright Act* and its safe harbor provisions—at this time, those protections only apply to Internet service providers and other online intermediaries; these copyright protections would not protect retailers who inadvertently facilitate copyright violations at physical retail locations.

Similarly, retailers who print patent-protected objects may be deemed liable for contributory patent infringement if proven to have knowledge of the patent.[16]

As with copyright infringement, the intersection of 3D printing and patent infringement has not yet been tested in the courts.

**Product Liability and Consumer Protection Laws**

In addition to potential intellectual property liability, 3D printing also raises questions about potential retailer liability due to the failure of products manufactured by 3D printing. If a customer-designed object causes harm to an end user, a 3D printing retailer could face liability for that harm, even if the retailer did not directly contribute to the alleged defect.[17] Product liability law is highly fact-dependent, and tort liability for defective products varies greatly state-by-state and product-by-product.

In addition to tort liability, most states have now passed consumer protection laws, which are another potential source of liability for producers and sellers of defective products. In some cases, consumer protection laws provide separate statutory liability and apply a heightened set of damages for liability. For example, in Massachusetts, G.L. c. 93A provides the potential for double or triple damages if a retailer is found liable to a consumer for a defective product.

**Conclusion and Recommendation**

Three-dimensional printing is on the rise, and provides a number of novel benefits to consumers who continue to look for retail sources and support for their 3D printing needs. However, given the host of potential liabilities that can arise from providing 3D printing services, retailers considering delving into the new world of 3D-based additive manufacturing should discuss their plans and the associated risks with counsel.

***Jennifer Furey** is a Director in the litigation group at Goulston & Storrs PC in Boston, MA, where she focuses on intellectual property and commercial litigation. She represents individuals and businesses with high-stakes commercial litigation and intellectual property matters concerning utility and design patents, trademarks, trade dress, trade secrets, false advertising and copyrights.

****Alana Van der Mude** is an Associate in the litigation group at the law firm of Goulston & Storrs PC in Boston, MA.

[1] Kevin Bulles, *EmTech: 3-D Printing Complex Kidney Components*, MIT Technology Review, Sept. 24, 2014, http://www.technologyreview.com/news/531106/emtech-3-d-printing-complex-kidney-components/

[2] Nick Bilton, *The Rise of 3-D Printed Guns*, N.Y. Times, Aug. 14, 2014, at E2 and Aug. 13, 2014, http://www.nytimes.com/2014/08/14/fashion/the-rise-of-3-d-printed-guns.html?_r=1.

[3] Benjamin Grynol, Disruptive manufacturing: The effects of 3D printing, Consultant, Deloitte, Deloitte Design Studio Canada, available at: http://www2.deloitte.com/content/dam/Deloitte/ca/Documents/insights-and-issues/ca-en-insights-issues-disruptive-manufacturing.pdf.

[4] http://enablingthefuture.org/about/; http://www.cnet.com/news/3d-printed-robotic-prosthetic-wins-uk-james-dyson-award/.

[5] https://www.thingiverse.com/

[6] www.makerbot.com

[7] http://www.shapeways.com/

[8] TJ McCue, *3D Printers Popping Up in Retail Stores*, Forbes, Apr. 17, 2015, available at http://www.forbes.com/sites/tjmccue/2015/04/17/3d-printers-popping-up-in-retail-stores/2/.

[9] http://www.staples.com/3D-Printing-Center/cat_BI878929.

[10] http://www.theupsstore.com/small-business-solutions/Pages/3D-printing.aspx.

[11] https://www.3dhubs.com/.

[12] *See* U.S. Copyright Act of 1976, 17 U.S.C. §§ 106, 501 (1976).

[13] *See Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (due to the vagueness of the Copyright Act and its definitions "courts have had to trace, case by case, a pattern of business relationships which would render one person liable for the infringing conduct of another.").

[14] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[15] *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

[16] *See* U.S. Patent Act, 35 U.S.C. § 271(c): "Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or an apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

[17] *See, e.g.* Restatement of the Law, Third, Torts: Products Liability, § 1 (1999).

# Case Briefs

*Kathryn Oberto*[*]
*Holland & Knight LLC*
*Orlando, FL*

**ADA CLAIMS**

**The Ninth U.S. Circuit Court of Appeals ruled that (i) a retail store tenant did not violate an ADA public accommodation requirement; (ii) the retail store tenant was not obligated to remediate violations in a parking lot; and (iii) a district court's grant of attorney fees was inappropriate. *Kohler v. Bed Bath & Beyond of Cal., LLC*, 780 F.3d 1260 (9th Cir. 2015).**

Chris Kohler, a disabled paraplegic, visited a Bed Bath & Beyond ("BB&B") store at the Lake Elsinore Marketplace in Lake Elsinore, CA, several times. Kohler claimed there were many architectural barriers within the store and in the parking lot, which impeded his ability to use the BB&B store including, but not limited to: (1) insufficient clearance next to the restroom door due to inadequate wall space; (2) inappropriate placement and operation of toilet paper and paper towel dispensers within BB&B's restroom, and (3) insufficient slopes and cross-slopes in the parking lot serving the BB&B store.

With respect to the restroom door clearance, the district court concluded the Americans with Disabilities Act ("ADA") Accessibility Guidelines provide a minimum floor space requirement, but not a minimum wall space requirement. Regarding the claim for inappropriate placement of toilet paper and paper towel dispensers, the district court ruled the claim not actionable because BB&B remediated the dispensers to comply with state law. The district court also decided that because BB&B did not "own, lease or operate" the shopping center parking lot, BB&B was not liable for any ADA violations in the parking lot. The district court denied Kohler's motion for summary judgment and granted BB&B's motion for summary judgment on all claims.

Afterward, BB&B moved for attorney fees. The district court concluded that (i) eight of Kohler's claims were "without any foundation"; (ii) Kohler's claim for insufficient clearance next to the restroom door was "illogical"; (iii) Kohler should have known BB&B did not own, lease or operate the parking lot because Kohler had sued the shopping center's landlord previously; and (iv) Kohler's toilet paper and paper towel dispenser claims were "frivolous." Thus, the district court awarded BB&B $59,892 for attorney fees.

Kohler appealed the district's court's grant for summary judgment and award of attorney fees to the Ninth Circuit. Specifically, Kohler appealed the claims regarding the clearance next to the restroom door and the slopes and cross-slopes in the parking lot. The circuit court quickly affirmed the district court's grant of summary judgment with respect to the clearance next to the restroom door because the ADA Accessibility Guidelines do not require a specific wall length on the side of a doorframe.

Kohler argued that the lease language designating the parking lot as a common area to be operated, maintained and repaired by the landlord was an attempt to contract away BB&B's ADA liability. In a prior decision, the federal circuit court had ruled (i) the ADA imposes concurrent obligations on the landlord, as an owner of the property, and the tenant, as the controller of the property, and (ii) a landlord could not contract away its responsibility under the ADA by shifting responsibility to its tenants.

Kohler's position sought to impose liability on BB&B, as a tenant, for a parking lot violation; but the lease did not grant control of the parking lot to BB&B. The Ninth U.S. Circuit Court of Appeals declined to accept this interpretation of the district court's decision. If it had adopted Kohler's position, the court reasoned that BB&B would have the burdensome task of suing the landlord for an injunction to cause remediation of the ADA violation. The Ninth Circuit clarified that a landlord is liable for ADA violations as the owner of the property, regardless of whether a lease exists. A tenant, however, has no legal relationship to property absent a lease granting control to the tenant. Thus, "BB&B has no liability to contract away on parts of the parking lot over which it has no control."

The Ninth Circuit reversed the district court's award of attorney fees to BB&B. The court found that a defendant in a civil rights action may recover its fees if "the plaintiff's action was frivolous, unreasonable, or without foundation." The court stated that Kohler's claims regarding the clearance next to the restroom door and the slopes and cross-slopes in the parking lot were not clearly resolved by prior case law and therefore were not frivolous.

The court also stated that the claim regarding the paper towel dispenser was rendered moot because of BB&B's voluntary remediation, but that did not make BB&B a prevailing party entitled to fees because there was "no judicially sanctioned change in the legal relationship of the parties." Additionally, the court found the claim with respect to the toilet paper dispenser was not frivolous on the basis that Kohler's claim referred to a state law requirement, rather than an ADA requirement. The court decided none of Kohler's claims were frivolous. Therefore, the Ninth Circuit affirmed the grant of summary judgment and reversed the grant of attorney fees to BB&B.

## COVENANTS

**The circuit court of Fairfax County, Virginia, ruled that a landlord breached a material covenant of a lease by not filling vacant space with an appropriate "mix" of iconic global luxury designers and retailers. *In re: Fairfax Square LLC v. Hermes of Paris, Inc.*, No. 2014-06509, 2015 Va. Cir. LEXIS 8 (Va. Cir. Jan. 13, 2015).**

Fairfax Square LLC ("Landlord") brought a complaint for declaratory judgment and permanent injunction against Hermes of Paris, Inc. ("Tenant") for a default under its January 10, 1990, lease and its addendum (the "Lease"). In response, Tenant filed a counterclaim complaint for declaratory judgment.

Landlord owns a high-end luxury retail shopping center in the Tysons Corner area of Northern Virginia (the "Shopping Center"). Tenant holds an iconic and globally recognized position in the luxury goods retail market. In order to protect Tenant's brand name and position within the global market, and as a material covenant within the Lease, Landlord agreed in the Lease,

> that the mix of tenants in the retail section of [the Shopping Center] shall be composed of quality retail establishments which sell the highest quality goods and which are "luxury" tenants selling premium brands, such as, by way of example, Tiffany's (sic), Fendi and Gucci.

The original configuration of the Shopping Center included the aforementioned luxury retail establishments.

In 2014, Landlord entered into several new leases within the Shopping Center with the following tenants: (1) Miele, a luxury appliance retailer; (2) USAA bank; and (3) Lijenquist & Beckstead, a local luxury jeweler. (Collectively 1, 2, and 3 shall be the "New Tenants.") Following the entry of the New Tenants, Tenant notified Landlord of a material breach of the Lease, alleging the mix of retailers in the Shopping Center did not satisfy the requirements of the Lease. In response, Landlord filed (i) a declaratory judgment, which contended that the mix of retail establishments satisfied the requirements of the Lease; (ii) for a permanent injunction, which sought to prevent Tenant from vacating as a bookend tenant; and (iii) a demand for attorney fees. Tenant then filed its answer and a counterclaim seeking a finding that Landlord breached the Lease by not leasing the Shopping Center to an appropriate mix of luxury tenants.

Following the consideration of parol evidence to clarify latent ambiguities present in the Lease, the court found the plain language of the Lease supported Tenant's claim that the Shopping Center lacked a mix of luxury tenants. The court found that the use of examples within the Lease "by way of example, Tiffany's (sic), Fendi, and Gucci" created a class that restricted the type of tenant that could meet the definition of "luxury tenant." The use of the specific examples limited the type of tenant to only global iconic brands.

The court distinguished Tiffany & Co., Gucci and Fendi as global icons, which design and sell their own brands. By only listing international luxury retailers that design and sell their own brand, the drafters of the Lease intended to create this specific and more restrictive class of tenant. The court found that the New Tenants and the new "mix" of tenants in the shopping center did not satisfy the requirements of the Lease. Of the remaining tenants, only Tiffany & Co. fell within the class of retailer required by the Lease. As such, the court found the "mix" of tenants inadequate to meet the terms of the Lease.

The court dismissed the injunction brought by Landlord because Tenant decided to remain in the Shopping Center and pay rent until the parties could resolve their dispute. Further, even if Tenant vacated while litigating the dispute, the court found that such conduct would not require injunctive relief because (i) Tenant occupied only 10 percent of the Shopping Center's leasable space and (ii) Tenant's presence was not required under any other lease. Consequently, Tenant's departure did not constitute irreparable harm to Landlord. The court ordered only costs to Tenant as a matter of law and found each party should pay its own attorney fees.

## EMINENT DOMAIN

**The Fourth Court of Appeal of California ruled that (i) a city's imposition of conditions that indefinitely prohibited the development of over one-third of a commercial property to preserve that property for a portion of an interchange project was an invalid taking, and (ii) the development owner's appeal did not become moot when the county subsequently took control of said interchange project and pursued a separate, direct condemnation action against the owner. *Jefferson Street Ventures, LLC v. City of Indigo*, 236 Cal. App. 4th 1175 (Apr. 21, 2015).**

Jefferson Street Ventures, LLC ("Jefferson") applied to the City of Indio ("City") for development of a shopping center. Adjacent to this shopping center, the City was planning independently to complete a major freeway interchange; however, the City was still in the process of acquiring federal approval. Specifically, the City's interchange project was still pending NEPA (*National Environmental Policy Act of 1969)* review. While the City gave estimates on when approval might be acquired, no specific dates or timeframes were made available. Jefferson and the City discussed the possibility of Jefferson continuing to build and the City taking the property for just compensation at a later date, but the City resisted this, citing the potential additional costs of demolition and tenant relocation upon construction of the interchange.

Consequently, through a series of hearings and application proceedings, the City considered Jefferson's proposal and eventually accepted Jefferson's application with certain conditions. Most notably, these conditions included that Jefferson's project master plan ("PMP") be revised to develop only 17 acres of Jefferson's 26.85-acre plot, with an additional 2.1- acre temporary no-build area pending finalization of the interchange project, which the City anticipated would be needed for interchange construction. The City admitted that Jefferson's proposed PMP was consistent with the goals and policies of the City's general plan, and that it was consistent with the City's zoning ordinances and met the requirements of the specific plan for that area.

Because of the City's imposition of conditions, Jefferson never began construction and instead immediately filed suit for a writ of mandate to approve Jefferson's original PMP, and alternatively for damages for inverse condemnation of the land restricted by the City's conditional approval. Jefferson argued that the City had no authority to condition the PMP on leaving a portion of the property undeveloped. It further contended that forcing dedication of private property, which bore no nexus to the impact of the proposed development, constituted an inverse condemnation that would, therefore, require just compensation. The trial court denied Jefferson's writ, and eventually also concluded that denying that writ precluded Jefferson's alternative claim for damages for inverse condemnation. Jefferson then appealed.

The court of appeal reversed the trial court decision, holding that Jefferson's writ be approved both for the property zone the City restricted entirely from development and the temporary 2.1-acre no-build area reserved for the interchange construction period. The court of appeal additionally instructed the trial court to determine just compensation values for the taking. It relied on three major facts: (i) Jefferson's PMP "fully satisfied all the City's requirements for development," (ii) "nothing in the record suggest[ed] Jefferson's project caused or contributed to the need for the Interchange" and (iii) the City's "primary rationale" for restricting the development was to avoid additional costs for building demolition and tenant relocation, if and when the City's interchange project was approved and funded.

The court reasoned that, while the need for flexibility in municipal planning for such an interchange could strike against an inverse condemnation action, a taking occurs when the state's desire to acquire such property in the future results in denial of land use approvals. (*See also People ex rel. Dept. of Transportation v. Diversified Properties Co. III,* 14 Cal. App. 4th 429 (1993)) The court agreed that the conditions imposed on Jefferson here were imposed to "bank" the land's then-current undeveloped status for future potential condemnation at an uncertain time.

The City argued that the portion of land affected by the conditions was not a taking because such a large portion of the land remained developable. The court rejected this argument, reasoning that this portion of the land was substantial, and that the City itself divided the land into discrete segments, so that the portion of the land could be considered on its own. The court likewise rejected Jefferson's argument that the entire land was taken, not just the portion restricted, because the portion restricted was so clearly identified in hearings.

The court additionally addressed a mootness question regarding the fact that the County of Riverside ("County") had taken over the interchange project during the instant appeal, and further that the County was pursuing direct condemnation against the same Jefferson land. The City argued that the appealed issues must be moot to avoid possibly duplicative just compensation, but the court disagreed, reasoning that (i) the County's action could be abandoned, (ii) the County's action might not encompass the entire land at issue in the instant appeal and (iii) any possible duplicative damages would be resolved on remand.

***Kathryn Oberto** is a Partner at Holland & Knight, resident in the Florida office.

# Using (or Abusing?) the Use Clause

*Deborah Watkins**
*Monica Pak***
*Daoust Vukovich LLP*
*Toronto, Ontario, Canada*

At the heart of any successful shopping centre is a deliberate merchandising plan that maintains the right quality and variety of tenancies. One of the ways landlords control this balance is by way of lease provisions that prescribe each tenant's permitted use.

However, the ability of landlords to coordinate and execute their leasing plans may be compromised (with potentially drastic consequences for tenants too) in light of the recent decision in *2249778 Ontario Inc. v. Smith* (c.o.b. *Fratburger*), No. C58342, 2014 ONCA 788, November 7, 2014 ("*Fratburger*"). In the *Fratburger* case, the landlord leased premises in a strip mall to a tenant for the operation of a "fast food restaurant." The use clause described the types of products that could be sold in the premises (hamburgers, hot dogs, etc.) and specified that, as ancillary to the primary use, a portion of the premises could be used for offices, but went on to stipulate that the premises were to be used "for no other purpose."

The tenant installed an ATM on the premises. The landlord objected, arguing that the ATM fell outside of the tenant's use clause. When the tenant refused to remove the machine, the landlord applied to the court for two things: (1) a declaration that the lease did not permit an ATM on the premises and (2) an order requiring the tenant to remove it.

At trial, the court found that the tenant's use of the ATM was for appropriate business reasons since it assisted the tenant in "keeping his costs low and his clients happy." The court held that the ATM did not change the purpose of the premises as a fast food restaurant. As the court put it: "[t]he primary focus of the establishment and the attendance of its patrons, is for the consumption of food." The landlord appealed.

In upholding the trial court's decision, the Ontario Court of Appeal observed that the lease did not define the meaning of a "fast food restaurant." Further, the court noted that the lease was silent on other "critical" equipment such as cash registers and debit terminals, which the court held were implicitly included in the permitted use of the premises. Since nothing in the lease specifically prohibited the installation of an ATM on the premises, the court determined that the tenant should be entitled to have one.

### ***Fratburger's*** **Fallout**

This decision came as a surprise to many in the commercial leasing industry. In holding that "it is open to parties to a commercial lease to specifically include the installation and operation of an ATM as a prohibited activity in the lease," the court's decision opens the door to the argument that unless a particular use is explicitly carved out of a use clause, a tenant should be entitled to incorporate related or ancillary activities and uses in its business operations without the need to seek approval from the landlord.

The effect this approach will have on a landlord's ability to control the various uses of its tenants (and the merchandising mix of the shopping centre) is interesting, to say the least. Landlords may be wondering how they will implement leasing plans if they cannot predict the range of activities that will be part of each tenant's operations. Tenants also have cause for concern. In a landscape where landlords cannot effectively control the activities conducted by their tenants, the protection afforded by an exclusive covenant may be compromised.

The court's approach in *Fratburger* also raises contractual interpretation concerns. Basic principles of contractual interpretation seek to apply the intent of the parties at the time of the formation of the agreement. In doing so, courts will often refer to the plain and ordinary meaning of the words employed. The term "fast food restaurant" does not suggest that an ATM is necessary for the functioning of the business. In holding that the operation of an ATM should be included in the meaning of a "fast food restaurant," the court implied an intention that does not seem to be supported by a plain reading of the lease terms.

The court did try to limit the scope of this case by stating "this case is confined to these parties and interpretation of this particular lease." Unfortunately, this statement is somewhat gratuitous, as all cases turn on their facts. Moreover, little guidance was provided regarding which facts led to the court's conclusion. It may be that the court believed that the ATM was no more than another payment method, not unlike the use of a debit card. But, would the court have come to a different conclusion if there had been a bank tenant in the plaza with an exclusive on the operation of banking activities? Or, what if there had been a neighbouring convenience store tenant with an ATM on its premises? Would the court have taken into consideration the proximity of that ATM? The court's lack of detail makes it hard to understand how the court drew its conclusions.

**Next Steps**

If the Ontario Court of Appeal's decision in the *Fratburger* case reveals a judicial preference toward interpreting use clauses expansively, it might not be wise for landlords merely to delineate—in the use clause—the types of activities that are **permitted** on the premises. (It seems the limiting phrase that typically concludes most use clauses—"and for no other purposes"—is not to be relied on as a means of constraining and limiting a tenant's use of its premises.) While tenants are naturally disposed toward a simple generic use clause (to allow flexibility in their business practices), landlords now have even greater reason to insist on a detailed description of the scope of both the tenant's permitted **and prohibited** activities. It remains to be seen whether this decision will result in a movement toward drafting use clauses as expansive lists of specific permitted and prohibited uses. What is certain, though, is that landlords and tenants alike are left in very murky waters when interpreting use clauses.

*DEBORAH WATKINS is a Partner at Daoust Vukovich LLP and is a leading lawyer in Canada in the area of commercial leasing, acting for developers, landlords and tenants. She has expertise in negotiating and drafting all types of commercial lease documentation for many different uses, including office, retail and industrial, in many different contexts, including office buildings, mixed-use complexes, enclosed regional shopping centres, open-air power centres and single use properties.

**MONICA PAK is an Associate at Daoust Vukovich LLP. Her practice focuses on commercial retail, office and industrial leasing for both landlords and tenants.

# Civil Forfeiture—What You Don't Know Could Hurt You

*Monica Pak**
*Daoust Vukovich LLP*
*Toronto, Ontario, Canada*

Property owners may be surprised to learn that eight Canadian provinces have enacted legislation allowing the government to seize property that is associated with unlawful activity. The procedure is called "civil forfeiture."

Recently, this powerful right has been pulled into the limelight, as controversy surrounds the unusually aggressive approach taken by civil forfeiture offices in British Columbia. A British Columbia court described a recent seizure as an example of "zealous measures outside the proper bounds of its home statute."

Before property owners begin to fret about whether their property is at risk, however, they should bear in mind that in Ontario, at least, the incidents of civil forfeiture appear to remain within the intended scope of the legislation.

Still, an understanding of what civil forfeiture actually is and how it works may help landlords better protect themselves against this risk (however remote).

**How the Process Works**

In Ontario, the *Civil Remedies Act* came into force in 2002. While the Act does not itself impose criminal penalties, it grants civil courts the power to freeze, take possession of, or forfeit to the Crown, property acquired through, or likely to be used for, unlawful activity.

The scope of unlawful activity under the Act is extremely broad, referring to any act that is an "offence under an Act of Canada, Ontario or another province or territory in Canada." It also includes activities committed in foreign jurisdictions that would be offenses under Canadian law if committed in Ontario.

The Act focuses solely on the connection between the property in question and the conduct of unlawful activity. There is no requirement that criminal charges be laid or convictions obtained. The Crown need only prove, on a *balance of probabilities*, that the property was used to engage in an offence (or obtained through proceeds of an offence). This is of concern for landlords/owners since illegal activities carried on by a tenant could put a landlord's property at risk, even where the owner took no part in them.

The process of obtaining a civil forfeiture order begins when a designated institution (e.g., the police) submits a case to the reviewing authority (a designated independent Crown counsel). If the reviewing authority concurs that the case meets the required criteria, a proceeding to obtain a forfeiture order may commence. Real and personal property may be seized under the Act, as well as any interest in property. For example, a court could order the seizure of funds acquired through an illegal operation, or the property in which the illegal operations were conducted.

**Narrow Protection Under the Act**

The Act provides some protection for owners. Section 7 defines a "responsible owner" as someone who "has done all that can reasonably be done to prevent the property from being used to engage in unlawful activity."

Meeting this standard involves a variety of steps, including:

(a) Promptly notifying law enforcement whenever the owner knows or ought to know that the property has been or is likely to be used to engage in unlawful activity, and

(b) Refusing or withdrawing any permission that the person has authority to give, and which the person knows or ought to know has facilitated, or is likely to facilitate, the property being used for an unlawful activity.

Where an owner meets the criteria, courts must make the order necessary to protect the owner's interest—except if it clearly would not be in the interests of justice.

**A Recent Case**

In the case of *Ontario (Attorney General) v. $4,067,685.10 in Canadian Currency (In Rem)*, the Attorney General brought a motion to preserve the proceeds from the sale of a property pending a civil forfeiture hearing. The property in question had been used by tenants to operate a large-scale marijuana-growing operation and was later associated with a stock fraud scheme. The court noted that a property may qualify as "proceeds of unlawful activity" where the mortgage on the property was paid down using proceeds of the unlawful activity. In this case, however, the court found no evidence to support the assertion that the rent paid by the tenants was used to make mortgage payments, and concluded there were no grounds to believe that the property was proceeds of crime.

Though the property had housed illegal operations and was therefore an instrument of unlawful activity, the owner established that it had no knowledge of that activity. As no credible evidence of wrong-doing by the owner was established, the court held that the owner should not be further deprived of its property. The Attorney General's motion was refused.

The Attorney General sought leave to appeal on the basis that a lease of the property had been listed as an asset in a prospectus filed by a company that was later associated with a stock fraud scheme. The Attorney General argued that the lease lent an air of legitimacy to the prospectus and acted as an inducement to potential investors, making the property an instrument of unlawful activity. The court disagreed, finding no reasonable grounds to believe that the property was likely to be used to engage in unlawful activity.

In other words, there was no "nexus" between the stock fraud scheme and the lease of the property referred to in the prospectus. At most, the court held, the prospectus could be seen as a source of information for potential investors engaging in the legitimate activity of purchasing stock in the company.

**Finding Peace of Mind in the Lease**

There is a dearth of law on the application of this Act, which leaves landlords and owners unsure of the scope of their obligations. Thankfully, there are a handful of lease clauses that may help landlords to minimize their exposure.

- **"All applicable laws":** Leases should include a provision requiring the tenant to abide by "all applicable laws." This provides evidence that the landlord did not grant permission to the tenant to conduct unlawful activities in the premises, and may also provide grounds for the landlord to terminate the lease.
- **Termination rights:** Leases often include a list of occurrences that are treated as "events of default," entitling the landlord to terminate following a cure period. Timely default notices should be sent, particularly to suspicious tenants, and, if necessary, prompt terminations effected where defaults are not remedied in time.
- **Entry rights:** Most leases grant landlords the right to enter the premises in certain circumstances (e.g., in emergencies or for periodic inspections). If, during the course of an entry, the landlord discovers suspicious activities, the landlord may rely on the above lease provisions to halt these activities or even terminate the lease.

**Conclusion**

Where a landlord's suspicions are high, its first recourse should be to alert the authorities. Though the lack of judicial guidance raises more questions than answers regarding the extent of the landlord's obligation to monitor its tenants, a properly crafted lease should provide the necessary tools to put an end to suspicious activity in a premises or to terminate a lease altogether.

*MONICA PAK is an Associate at Daoust Vukovich LLP in Toronto, Ontario, Canada. Her practice focuses on commercial retail, office and industrial leasing for both landlords and tenants.

# Be Clear and Unequivocal If You Want to Exercise an Option to Renew

*Blair Rebane**
*Hunter Parsons***
*Borden Ladner Gervais LLP*
*Vancouver, BC*

**Introduction**

Many commercial leases provide that the tenant may renew the lease for a fixed number of years subject to the tenant's performing certain conditions precedent to the exercise of the option to renew. Typically, these conditions precedent include the payment of rent on a timely basis, the performance of any other covenants or obligations that the lease imposes on the tenant and the tenant's providing notice to the landlord regarding its exercise of the option to renew. It is not entirely uncommon for a tenant to want to exercise its option to renew, even though it has failed to fulfill the conditions precedent to the exercise of the option to renew contained in the lease.

In the recent decision of *The Zone Bowling Centre (2002) Ltd. v. 14100 Entertainment Blvd. Investments Ltd.,* 2015 BCSC 524, the British Columbia Supreme Court considered what relief, if any, was available to a tenant who failed to fulfill the conditions precedent to the exercise of the option to renew contained in a lease. The case highlights the importance of tenants ensuring that they fulfill the conditions precedent contained in a lease if they want to renew it. This case also emphasizes the court's reluctance to relieve a tenant from its failure to fulfill the conditions precedent to the exercise of an option to renew contained in a lease.

**Background**

In 2004, The Zone Bowling Centre (2002) Ltd. (the "Tenant") entered into a 10-year lease of commercial property with 14100 Entertainment Blvd. Investments Ltd. (the "Landlord") for the purpose of running a bowling alley. The initial term of the lease expired on April 30, 2014.

The lease gave the Tenant an option to renew if:

1. The Tenant gave written notice to the Landlord stating that it was exercising the option to renew;
2. The Tenant's written notice was given not earlier than 12 months before the expiration of the term and not later than nine months before the end of the term; and
3. At the time that notice was given, the Tenant was not in breach of any covenant or condition of the lease.

During the course of the initial term of the lease, the Tenant was frequently late in paying rent and on some occasions the Tenant's rent cheques were returned "NSF," although the Landlord accepted rent on this basis. Between June and September 2013, the Tenant was behind on its rent payments on numerous occasions.

The lease provided that the Tenant was to exercise its option to renew on or before July 31, 2013. In August 2013, the Tenant's representative had a conversation with the Landlord's agent about exercising the option to renew the lease. There was conflicting evidence about the nature of this conversation. The Tenant's representative said that he told the Landlord's agent that the Tenant was exercising its option to renew the lease. The Landlord's agent said that the Tenant's representative merely stated that the Tenant would be interested in exercising the option to renew.

In December 2013, the ownership of the property changed and the new owner's agent emailed the Tenant and asked whether the Tenant would be interested in renewing the lease. By reply, the Tenant stated that ". . . our intention is to renew our lease term"; however, the Tenant did nothing further to exercise its option to renew the lease.

In April 2014, the Landlord's agent sent the Tenant a draft lease renewal agreement that contemplated an additional five-year term. The Tenant made a number of amendments to the draft agreement (e.g., changing the term from 5 to 15 years). The amendments were not accepted by the Landlord, and negotiations between the Landlord and the Tenant broke down in July 2014. At this time, the Landlord took the position that the lease option went unexercised and that the Tenant was an overholding tenant on a month-to-month tenancy. In response, the Tenant filed a Petition against the Landlord in the Supreme Court of British Columbia, where the Tenant sought a declaration from the court that it had properly exercised the option to renew the lease.

**Position of the Parties**

The Tenant argued that the Landlord had accepted late rent payments throughout the initial term of the lease, and had therefore waived the Landlord's right to insist upon strict compliance with the lease and, specifically, the conditions precedent to the exercise of the option to renew. The Tenant argued that it exercised the option to renew in its August 2013 conversation with the Landlord's agent. Since strict compliance with the conditions of the lease had been waived by the Landlord's conduct, the Tenant argued that this conversation was sufficient to exercise the option to renew.

The Landlord argued that the Tenant failed to satisfy the conditions precedent required to exercise the option to renew the lease and, as a consequence, the Tenant became an overholding tenant on a month-to-month tenancy.

**Decision**

The court agreed with the Landlord and held that the Tenant had not properly exercised its option to renew the lease. The court did not have to resolve the conflicting evidence regarding the August 2013 discussion because oral notice was insufficient to trigger the option to renew in any event.

Further, since the Tenant was behind on rent payments in August 2013 (when the Tenant says it gave oral notice to renew), the Tenant was in breach of its lease obligations at the time of the alleged notice. Even if oral notice were sufficient to trigger the option to renew, the Tenant was unable to meet the third condition precedent to exercise the option to renew the lease (i.e., not being in breach of the lease at the time notice was given).

The court rejected the Tenant's argument that the Landlord waived strict compliance with the terms of the lease by accepting late rent payments during the initial term of the lease, stating that:

> While the acceptance by the respondents of late payments of rent could amount to a waiver of the breach of the payment conditions of the lease and prevent the respondents from terminating on that basis, in my view the acceptance of late rent does not result in a waiver by the respondents of the preconditions to the exercise of the renewal option. Even if it does, it is my view that it does not amount to a waiver of the condition that notice in writing be given by no later than July 31, 2013. A waiver of that condition would have had to have been express and in writing.

The court went on to hold that at no time did the Landlord make any promise to the Tenant that demonstrated a reasonable intention to the Tenant that it did not need to give written notice to exercise the option.

Although the Tenant failed to exercise its right to renew the lease properly by the July 31, 2013 deadline, it was still open to the parties to negotiate a renewal of the lease. Indeed, the Landlord and the Tenant continued negotiations for a full year after the expiration of the renewal option.

The court found that the Landlord did not waive its right to strict enforcement of the option to renew by entering into negotiations with the Tenant after the deadline to exercise the option. In doing so, the court affirmed a recent Ontario decision (*Rinaldo Hair Stylist Ltd. v. bcIMC Realty Corp.*, 2012 ONSC 2831, aff'd 2013 ONCA 38), which held that "the exercise of an option must be done in a manner which is clear, explicit, unambiguous and unequivocal." Negotiations after the expiration of the option to renew do not constitute a waiver of the strict requirements of the option clause.

Finally, the court considered whether relief from forfeiture was available to the Tenant in these circumstances. On this issue, the court found as follows:

> While the failure to renew in accordance with the terms of the lease may have a significant adverse impact on the business of the petitioner, relief from forfeiture is not available when a tenant fails to comply with the conditions precedent to the exercise of an option to renew. This is because there is no compulsion on the tenant to exercise the renewal option, but if it does, it must comply with the conditions precedent. If it fails to do so it does not suffer the forfeiture of an existing tenancy, but loses its right to renew the tenancy. (*Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*, 2007 BCCA 24).

As a result, the Tenant was ordered to vacate the leased premises.

**Key Takeaways**

This case illustrates the importance of strict compliance with the conditions precedent to the exercise of options to renew, which are contained in commercial lease agreements. Commercial tenants should be aware of the timing and notice requirements for options to renew, and they should not expect the court to remedy their failure to strictly comply with the option to renew requirements contained in a lease.

Moreover, this case reinforces the following: Negotiations to renew a lease after the expiration of an option to renew will not waive the landlord's right to enforce the requirements of the option to renew in the lease strictly. A landlord will only waive strict compliance with the conditions precedent to an option to renew where the landlord "clearly and unequivocally" demonstrates an intention to the tenant that strict compliance is waived. Mere negotiations to renew fall short of this standard.

Finally, this case also stands for the proposition that the landlord may waive strict compliance with regard to one of the tenant's obligations under the lease (e.g., payment of rent) and not waive strict compliance to all of the tenant's obligations under the lease (e.g., the conditions precedent to an option to renew).

*Blair A. Rebane is a Partner and National Leader of Borden Ladner Gervais LLP's Franchise and Distribution Group, as well as the Vancouver Regional Leader of the firm's Auto Industry Group and Real Estate Litigation Group. Mr. Rebane practices franchise and distribution law as well as commercial litigation with a focus on commercial leasing disputes. He has appeared as counsel in court on a large number of franchise and commercial leasing matters and acts for a number of Canada's most significant franchisors, manufacturers, retailers and landlords.

**Hunter Parsons is an Associate in Borden Ladner Gervais LLP's Commercial Litigation Group. Mr. Parsons has a general commercial litigation practice, where he regularly acts for landlords and tenants in commercial leasing disputes. Mr. Parsons has appeared as counsel in court in commercial leasing matters.