

Friday, November 5, 2021  
9:00 AM – 10:15 AM

**Workshop 18**

**Rights and Remedies in Changing Times: Whose Default Is It Anyway?**

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1. Times of Change, Times for Change
  - a. Client development, retention and maintenance opportunity
  - b. Knowing and understanding your client
    - i. Type of business and special needs
    - ii. Exposure and susceptibility to adverse conditions
    - iii. Evolution of retail/omni channel retail
    - iv. Quantifying sales attributed to a particular location
  - c. Client's vision for Center or business over lease term
    - i. Position Center for sale
    - ii. Tenant exit strategy in place
    - iii. Site plan revisions
    - iv. Parking
    - v. Patios and outdoor seating
    - vi. Licenses uses
    - vii. Electric changing stations
    - viii. Drive throughs
    - ix. Order fulfillment
  - d. Most recent lease review and updating
2. Landlord default provisions, exclusive tenant remedies, liquidated damages, waiver of Consequential Damages
  - a. Landlord Default Provisions
    - i. Standard Landlord default provision
      1. Notice and right to cure
      2. Types of damages
      3. Landlord exculpation

#### 4. Express remedies

- (a) Self-help (particularly for failure to make repairs and replacements and perform maintenance)
  - ii. Way to compromise between Landlord's desire to just provide for all rights and remedies at law and in equity and expressly preclude right to terminate and abate rent and Tenant desire for cumulative remedies and right to express money damages and to terminate.
  - b. Examples of Typical Landlord Defaults:
    - i. Delivery timing and Landlord Work obligations; Co-Tenancy Violation; Exclusive violation.
  - c. How will a court interpret the provision if it provides Tenant with remedies for a Landlord default, but does not specifically say they are Tenant's sole remedies?
    - i. Not specifying a specific remedy for a violation and stating it is the sole remedy leaves the Tenant entitled to any remedy at law or in equity.
  - d. What is the magic language to ensure treatment as agreed upon liquidated damages instead of an unenforceable penalty? Is it state specific?
    - i. Similar to the above, if you don't specify that liquidated damages are the sole damages, opens door to litigation about what those other damages are.
    - ii. Typical clauses with liquidated damages are ones where damages are difficult to quantify: failure to comply with operating covenants, return an estoppel or SNDA, or comply with common area limitations.
  - e. Examine typical waiver of consequential damages
    - i. Definition of consequential damages vs. direct damages. Look at what is excluded from damages and what is left is consequential.
    - ii. Also waive special, speculative or punitive damages, and lost profits?
    - iii. Should it be made mutual?
    - iv. What are standard carve-outs?
    - v. Any relevant case law worth providing here?
- #### 3. Internal Dispute Resolution (IDR) and Alternative Dispute Resolution (ADR) Mechanisms in Leases
- a. Advantages of IDR and ADR
    - i. Time
    - ii. Money
  - b. Common Issues for IDR—Generally Non-Monetary
    - i. Commencement Date
    - ii. Construction Issues
      - 1. Quality of Materials
      - 2. Plan compliance
      - 3. Substantial completion
    - iii. Fair Market Rent
    - iv. Assignment standards
    - v. Operating Expenses and Maintenance Standards

- vi. Trade Fixture vs. Fixture
- vii. Condition of Premises at Expiration/Termination
- c. Identifying Standards of Discretion
  - i. Sole and absolute
  - ii. Sole, but reasonable
  - iii. Commercial reasonableness
  - iv. Good faith
  - v. Designated Benchmarks
    - 1. MSA
    - 2. Identified Properties
    - 3. Relevant time periods
    - 4. COLA
    - 5. Interest Rates
- d. Designated Party or Parties Exercising Judgment
  - i. Landlord
  - ii. Tenant
  - iii. Lender
  - iv. Franchisor
  - v. Architect(s)
  - vi. Broker(s)
  - vii. Contractor(s)
  - viii. Accountant(s)
- e. Alternative Dispute Resolution (ADR)
  - i. Arbitration
  - ii. Non-binding facilitation
- f. ADR Format Issues
  - i. Applicable rules
    - 1. AAA
    - 2. JAMS
  - ii. Identify time parameters
    - 1. Discovery
    - 2. Subpoena power
  - iii. Number of Deciders

- iv. Initial cost responsibility
  - v. Potential fee shifting
  - vi. Enforceability of decision
- g. Stated obligation to timely pay all rent and charges pending determinations by IDR, ADR or Court irrespective of dispute

#### 4. The Mysterious World of Mitigation of Damages

- a. The concept of avoiding and minimizing damages occasioned by breach when and where possible.
- b. The “traditional rule” at common law of “No Duty to Mitigate Damages” is now seen as a minority rule --but not so fast. Consult state by state statutes and case law.
  - i. A lease at common law is a conveyance, such that the tenant is the owner of the leased premises for the term and is fully responsible in all situations until the end of the term or the Landlord terminates the tenancy.
  - ii. Requiring the Landlord to mitigate damages is seen as placing an unreasonable burden on the Landlord who may have no real knowledge, experience or connection with the land other than legal ownership, whereas the Tenant is actually in the best position to minimize the damages it is causing.
- c. The Contract-Based Approach Requires Mitigation of Damages
  - i. Limits damages where reasonable efforts could avoid them
  - ii. Societal value to returning property to productive use
  - iii. So long as commercial contract itself does not provide otherwise
- d. “No duty to mitigate damages” clauses have been generally held enforceable in commercial settings in the absence of statutory prohibitions
- e. When (if ever) Does the Landlord’s Obligation to Mitigate Arise
  - i. Upon request or notice of potential for breach, actual breach, vacating space, Landlord’s reentry
- f. Landlord must make “reasonable efforts” under the circumstances
  - i. Depends on number of spaces available—no obligation to prefer space
  - ii. May demand financial suitability and stability, suitable experience
  - iii. May consider tenant uses and tenant mix
  - iv. Substantially similar lease provisions
  - v. Security deposits, guarantees and other security enhancements
  - vi. Rent under lease vs. market rent vs. any rent
- g. Burden of Proof –Whose Burden Is It?
  - i. State law versus contractual allocation of burdens
- h. Impact of Mitigation question on acceleration
  - i. Length of lease term, expert testimony, speculative damages, periodic judgments, acceleration clauses

- i. Impact of Mitigation/Replacement Lease on Tenant's responsibility
  - i. Consider: Length of term, size of space, reasonableness of retenanting costs, tenant's entitlement to surplus; impact of sale of Property, negotiated survival clauses
- j. Clauses describing Mitigation responsibilities and obligations
  - i. Rent concessions, costs of reletting, rental rates, amortization of costs, acceleration of rent
  - ii. Landlord's discretion regarding tenant credit, security, tenant mix
  - iii. No preference to specific tenant space when there are other vacancies
- k. Impact of failure to mitigate
  - i. Complete bar
  - ii. Implied recoveries
- l. Challenges of Sale, Repurposing and Redeveloping
  - i. When Landlord chooses to redevelop space or center in lieu of reletting
  - ii. When Landlord sells center