COMMERCIAL LEASE LAW insider

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Practical Tools for Owners, Managers, Attorneys, and Other Real Estate Professionals

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FEATURE

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Get Right to Perform Environmental Audit at Lease End

Minimize your risk of liability for any pollution a tenant causes.

Picture this scenario: Soil testing reveals that perchloroethylene (PERC), a highly toxic chemical used in dry cleaning that causes cancer in humans, is present on the property that you've leased to four different dry cleaning tenants over the past 20 years. The PERC has polluted the groundwater, and the government is demanding that you undertake a costly cleanup.

The good news is that you have legal recourse against the tenant or tenants that caused the pollution. The bad news is that you may not be able to determine exactly which of those tenants dumped the PERC. And that may leave you holding the bag for 100 percent of the cleanup costs.

The moral: Landlords must have some way to monitor the environmental condition of the property so they can trace any pollution that occurs to the tenants who caused

RELYING ON USE RESTRICTIONS AND INSPECTION RIGHTS ISN'T ENOUGH TO PROTECT YOU.

it. One effective method for establishing accountability, according to a veteran New Jersey environmental attorney, is to ensure your lease gives you the right to perform an environmental audit just before (or after) a high-risk tenant vacates the space.

Performed systematically, environmental audits give you a snapshot of the property's environmental condition at the moment each tenant moves out, enabling you to identify contamination and attribute it to the tenant that caused it. Result: You'll be able to take immediate and proactive measures against tenants that cause pollution rather than having to chase after them years or decades later after you finally discover the damage. Here's a look at the strategy and how to draft a lease clause to implement it.

Negotiate Right to Conduct Environmental Audits

Commercial leases typically include language banning tenants from using or storing chemicals that are prohibited by state and federal environmental laws in the leased space. They also give landlords the right to sue for damages, as well as the right to perform periodic inspections to ensure tenant compliance with these restrictions.

However, relying on use restrictions and inspection rights isn't enough to protect you. Tenants may conceal the hazardous materials they use or introduce new toxic chemicals into the space at any time. That's why you need to have a qualified consultant, engineer, or other expert perform certain kinds of testing, sampling, or other evaluations to uncover environmental damage.

"Unlike periodic inspections, environmental audits aren't a staple of commercial leases," notes the New Jersey attorney. "Landlords must make a point of negotiating for environmental audit rights."

This may not sit well with all tenants. "While tenants generally appreciate a landlord's long-term need to manage the environmental conditions of the property they own, undergoing an audit can be disruptive," the attorney cautions. Accordingly, she suggests that tenants may push back on the issue. And if there are no clear audit

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THE LIST OF ENVIRONMENTALLY HIGH-RISK TENANTS IS LONGER THAN YOU MIGHT EXPECT.

protocols in place, they may seek to deny the landlord's auditor access to the space. So, it's imperative to reach agreement on environmental auditing before the lease is signed.

The good news is that you don't necessarily need full environmental audit rights with every single tenant. Standard lease restrictions on use and storage of hazardous chemicals and periodic inspections should be adequate protection when dealing with tenants whose businesses don't pose a high risk of environmental damage, such as a clothing store or an accounting firm. You should demand environmental audit rights only when leasing to businesses those that pose a high risk of pollution or environmental harm. Keep in mind that the list of high-risk businesses is longer than you might expect, including not just manufacturing industries but also dry cleaners, warehouses, medical offices, furniture makers, research labs, and marijuana and other agricultural growth operations.

Strategic Pointer: Require all prospective tenants to give you a list of the chemicals and materials they intend to use or store on the leased premises. You can then use that list to determine whether you need environmental audit rights.

Put 8 Protections in Environmental Audit Lease Clause

The other critical phase of the strategy is to ensure that the actual lease language gives you the protection you need to minimize risks of liability for the pollution that tenants cause. While each situation is different, like the Model Lease Clause below, your environmental audits clause should include eight key provisions.

1. Landlord's right to perform environmental audit before lease ends. Timing is crucial. The ideal time to perform an environmental audit is after a tenant vacates the space but before the lease expires [Clause, par. a]. Once a tenant departs, you know it has done all the damage that it's going to do; and if the lease is still in effect, you may still be able to make maximum use of all your remedies under the agreement.

Example: Surrender clauses typically require tenants to leave the premises in at least as good a condition at the end of the lease as it was when they moved in, save for ordinary wear and tear. If the clause is still in effect, the landlord will be in the position to claim that pollution on the premises discovered during the environmental audit constitutes a lease default.

Practical Pointer: If the tenant vacates on the day the lease ends or the post-vacate/pre-lease expiration window isn't otherwise available, arrange for the environmental audit to take place as close as possible to the lease termination date, the New Jersey attorney advises. Then do your own walk-through inspection immediately after the tenant leaves and before the environmental consultant begins the audit to sniff out any obvious pollution or environmental damage that a lay person is capable of detecting.

2. Landlord's sole right to decide whether to do environmental audit. Having an audit right doesn't necessarily mean actually having to use it in every single case. The important thing is having "sole discretion" to decide whether or not to go through with the environmental audit in each particular case [Clause, par. b]. If the tenant balks, compromise by agreeing to use that discretion "reasonably"; and if that's still not enough, set out the specific factors you'll use in exercising your reasonable discretion, such as the nature of the tenant's business and how long it occupied the space.

3. Clarification that choosing not to audit doesn't relieve tenant of liability. If you make the decision not to exercise your audit rights, you run the

CONSIDER STRUCTURING COST-SHARING ON THE BASIS OF THE AUDIT'S FINDINGS.

risk that the tenant will seek to disavow any responsibility for pollution discovered after it's moved out. In addition to claiming it didn't cause the pollution, the ex-tenant may argue that forgoing the environmental audit waived your rights to hold it responsible for subsequently discovered environmental damage.

To guard against this, the clause should say that your decision not to exercise your right to perform an environmental audit doesn't affect your right to sue the ex-tenant for cleanup costs associated with the environmental damage the tenant caused [Clause, par. f].

4. Defined scope of environmental audit. Tenants may be reluctant to agree to an open-ended audit lest it turn into a fishing expedition. They may request that you insert language that defines the scope of the environmental audit and the kinds of tests and evaluations it will include. The exact details of the audit will depend on the nature of the space, the tenant's use, and the environmental laws that apply [Clause, par. c].

5. Landlord's right to select environmental auditor. It's important for the auditor to have proper credentials and experience to do the job right. So, insist on having the right to select the environmental auditor at your sole discretion. If tenants insist on having a say in the selection process, specify the minimum qualifications a consultant or firm must have to be selected [Clause, par. d].

6. Clarification that tenant's environmental liability survives lease termination. Environmental auditors may miss damage that was apparent at the time of the audit; or materials that an auditor concluded were harmless may later get reclassified as toxic substances or pollutants. In either case, you want to be able to sue the tenant notwithstanding the "false negative" results of the environmental audit performed at the end of its tenancy. So, specify that the tenant will remain liable for any environmental damage it may have caused while it leased the space regardless of what the auditor concludes and regardless of whether that damage is discovered after the lease expired [Clause, par. g].

7. Tenant duty to pay costs of environmental audit. The cost of an environmental audit of commercial property typically ranges from $3,000 to $10,000 depending on the property's size and location, audit complexity, and other factors. Our Model Lease Clause requires the tenant to pay the full costs of the audit, but you may have to agree to cost-sharing when negotiating with tenants that have strong bargaining leverage [Clause, par. e].

Another possibility is to structure cost-sharing on the basis of the audit's findings. Thus, for example, tenants would pay a smaller or even no share when no environmental damage is found and a larger share if the auditor does discover pollution, particularly if it recommends further tests to follow up on the initial results.

8. Tenant duty to put environmental audit expense money into escrow. The New Jersey attorney recommends that you require the tenant to put money covering the costs of the environmental audit into an escrow account that you hold. Specify that any funds left in the escrow account after the consultant's fee, testing, and other audit costs are paid will be returned to the tenant; however, the tenant must pay any excess amounts if the money in the escrow account isn't enough to cover the costs of the environmental audit.

Expect tenants to push back on this point, the attorney warns. "This is an important protection on which you should stand your ground," she adds. "If concessions are unavoidable, agree to a smaller escrow amount rather than giving up the escrow idea entirely."

MODEL LEASE CLAUSE

Require Tenant to Submit to Environmental Audit Before Lease Ends

Standard commercial leases require tenants to comply with applicable environmental laws and refrain from using or storing hazardous chemicals or substances on the premises. They also give the landlord remedies for environmental offenses and damage that tenants commit. However, there's one key protection they often don't include, namely, the right to have an environmental consultant audit the leased premises at the end of the term to detect the presence of such pollution. This can be a crucial right to the extent it enables landlords to not only discover environmental damage proactively but also determine which tenant is responsible for causing it.

Here's a Model Lease Clause prepared by an environmental attorney in New Jersey, where commercial litigation over contamination to leased property happens all the time. Ask your attorney to tailor it to your own situation and on the basis of the actual circumstances, including the tenant's business and the location and size of the property.

ENVIRONMENTAL AUDIT OF LEASED PREMISES

a. **Landlord Right to Audit Before Lease Ends.** Landlord shall have the right to conduct an environmental audit at the premises prior to the termination of the Lease and to enter upon Tenant's premises to conduct such environmental audit.

b. **Landlord Right to Decide Whether to Audit.** The decision whether or not to conduct the environmental audit provided for above shall be within the sole discretion of Landlord to make.

c. **Scope of Audit.** The environmental audit provided for herein shall consist of such examinations, tests, inspections, sampling and sample testing, reviews, and other evaluations as Landlord shall in its sole discretion determines to be advisable.

d. **Landlord Right to Select Auditor.** The environmental audit provided for herein shall be performed by a consultant of Landlord's choice to be selected in accordance with Landlord's sole discretion.

e. **Tenant Duty to Pay for Audit.** Tenant shall be solely responsible for the payment of the conduct of the environmental audit provided for herein.

f. **Failure of Audit Does Not Release Tenant from Liability.** Failure to conduct the environmental audit provided for herein or, if such audit is conducted, failure to detect conditions attributable to Tenant or Tenant's operations shall in no fashion be intended as a release of any liability for environmental conditions subsequently determined to be associated with Tenant or Tenant's operations.

g. **Tenant to Remain Liable After Lease Ends.** Tenant shall remain liable for any environmental condition(s) related to its operation regardless of when such condition(s) is/are discovered and regardless of whether or not Landlord conducts an environmental audit at the termination of the Lease, such that the obligations set forth in this clause shall survive the termination of the Lease.

h. **Escrow.** Tenant shall deposit at the commencement of the Lease term $_____ into an escrow account held by Landlord to defray the costs and expenses of the environmental audit provided for herein. Monies will be paid out of the escrow account for these purposes upon receipt of bills by Landlord. Any escrowed funds remaining in the escrow account after the payment of all costs and expenses associated with the environmental audit shall be returned to Tenant. In the event that audit costs and expenses exceed the amount being held in escrow, Tenant shall pay any such excess costs and expenses immediately upon receipt of bills.

PLUGGING LOOPHOLES

Get Right to Collect Rent Directly from Subtenant If Tenant Defaults

Put a clause in the consent agreement that all three parties sign.

Common scenario: One of your tenants subleases its space to a subtenant. The subtenant upholds its end of the deal by paying rent to the tenant on time. But the tenant doesn't pay the rent it owes to you.

Under a standard Consent to Sublease agreement, you'll have only one possible course of action: Sue the tenant for the unpaid rent. You'll also be stuck with that option month after month, forcing you to waste your money, time, and energy filing lawsuits to collect rent that should be paid to you directly. And there's no guarantee that the deadbeat tenant will even have the money to pay the judgment even if you win in court.

Get Right to Bypass Defaulting Tenant

The good news is that there's a way to avoid being locked into this situation of having to litigate for your rent each month. Simply bypass the defaulting tenant and get the rent directly from the subtenant. You can establish your right to do this by including a clause in the Consent to Sublease that you, the tenant, and subtenant all must sign to execute the sublease arrangement.

How to Draft Clause

Like the Model Clause on p. 7, your Consent to Sublease clause should contain three key provisions:

Landlord right to get rent from subtenant. First, specify that if the tenant commits a lease violation, you have the right to elect to receive the rent directly from the subtenant from then on [Clause, par. a].

Tenant to get credit. Next, state that the tenant will get a corresponding credit for the amount of rent that the subtenant pays on its behalf [Clause, par. b].

Landlord doesn't assume tenant's duties to subtenant. Collecting rent directly from a subtenant carries a potential legal risk—namely, that a court will find you responsible for providing the subtenant services you normally provide only to tenants and for which the tenant would be responsible under the sublease, such as heat, electricity, and parking. The clause protects you from this risk by expressly stating that accepting rent from the subtenant doesn't mean that you're assuming any of the tenant's sublease duties, obligations, or liabilities to the subtenant [Clause, par. c].

Negotiating the Clause

The Sublease Consent clause is legally sound, but will it fly? Yes, says the New York City commercial landlord attorney who drafted and has used the provision on numerous occasions. "Asking a tenant to comply with these provisions is perfectly reasonable," he believes, especially given that the landlord is acting in the tenant's interests by accepting the sublease. However, don't be surprised if a tenant seeks to negotiate the clause. Potential tenant demands/proposals to be ready for:

- Limiting the clause to apply only to violations involving failure to pay rent, operating expenses, or other money owed;
- Allowing the landlord to demand the rent from the subtenant only after

the end of a specific notice period or cure period; and/or

- Requiring the landlord to stop dealing with the subtenant if the tenant cures the default (a reasonable demand that you can counter by specifying that the tenant must remain in good standing for six months after curing the default before you suspend direct dealings with the subtenant).

Subtenants may also weigh in. One common subtenant demand is language requiring the tenant to credit rent paid by the subtenant to the landlord against the sublease rent due. This should be acceptable to the landlord since the issue mainly affects the relationship between the tenant and subtenant.

MODEL CLAUSE

Here's a Model Clause you can insert into a Consent to Sublease Agreement giving you the right to collect rent directly from a subtenant when a tenant who has subleased its lease doesn't pay rent or defaults on another lease obligation. Speak to your attorney about adapting the provision to your own circumstances.

LANDLORD OPTION TO COLLECT RENT FROM SUBTENANT

a. **Landlord to Receive Rent from Subtenant.** In the event Tenant breaches any of the terms and provisions of this Lease, Landlord shall have the right to elect to receive directly from Subtenant all sums due or payable to Tenant by Subtenant under the Sublease, and upon receipt of written notice from Landlord referencing this Section, Subtenant shall thereafter pay to Landlord any and all sums becoming due or payable under the Sublease.

b. **Tenant to Receive Corresponding Credit.** Tenant shall receive from Landlord a corresponding credit for such sums against any payments then due or thereafter becoming due from Tenant.

c. **No Implied Relationship Between Landlord and Subtenant.** Neither the giving of such written notice to Subtenant nor the receipt of such direct payment from Subtenant shall cause Landlord to assume any of Tenant's duties, obligations, and/or liabilities under the Sublease, nor shall such event impose upon Landlord any duty or obligation to honor the Sublease nor subsequently to accept Subtenant's attornment.

RECENT COURT RULINGS

Email Exchange May Constitute Enforceable Lease Modification

What Happened: Construction delays forced a shopping center landlord and restaurant tenant to push back the commencement date of the lease they signed in 2017 to Dec. 1, 2021. The tenants finally opened for operation in September 2022 and made all subsequent rent payments. However, the landlord claimed that the tenant was also liable for over half a million dollars in rent accruing from Dec. 1, 2021. Citing a July 2022 email exchange, the tenant argued that it wasn't on the hook for that rent because the parties had agreed to change the commencement date. Even if there was such an agreement, it wouldn't be enforceable, the landlord countered, based on the following language from the lease:

> All negotiations, considerations, representations, and understandings between Landlord and Tenant are incorporated herein and may be modified or altered only by agreement in writing between Landlord and Tenant, and no act or omission of any employee or agent of Landlord shall alter, change, or modify any of the provisions hereof.

Ruling: The Florida court denied the landlord's motion for summary judgment—that is, judgment without trial on the basis of the pleadings.

Reasoning: The lease clause barring oral modification didn't make this an open-and-shut case, the court reasoned. "It is well- established that despite prohibitive language, a written contract may be modified by parol where the oral modification has been accepted and acted upon by the parties in such manner as to work a fraud on either party to refuse to enforce it." The email exchanges in this case created a genuine question about whether the sides had, in fact, reached a "meeting of the minds" on pushing back the lease commencement date. As a result, the case had to go to trial.

- **Dania Live 1748 II LLC v. Saito Dania, LLC, 2024 U.S. Dist. LEXIS 175527**

Landlord's Decision to Demolish Building at Lease End Doesn't Relieve Tenant of Duty to Repair

What Happened: A landlord claimed that an office building tenant violated its lease obligation to perform repairs on the roof, HVAC system, foundation, and other parts of the property and sued for $32.5 million in damages. The tenant argued that the landlord didn't have a legal case for damages since it was planning to demolish the property anyway after the lease ended in 2025.

Ruling: The Virginia court ruled in the landlord's favor.

Reasoning: Even if the tenant's allegations were true, a landlord's decision to demolish a building at the conclusion of a tenancy doesn't relieve the tenant from its lease obligation to repair the building during the term of the lease. To the extent that repairing a building slated for demolition would result in economic waste, the tenant's damages would be based not on the costs of the repairs necessary to undo the damage but on how much the tenant's failure to make

the required repairs reduced the value of the property. But the case would have to go to trial to determine the truth of both propositions: that the tenant didn't actually make the necessary repairs and that the landlord actually did intend to sell the building.

- **Oakton Nla LLC v. AT&T Servs., Inc., 2024 Va. Cir. LEXIS 156**

Tenant Must Pony Up Unpaid COVID-19 Rent

What Happened: A landlord cut a break to a fitness center tenant that had to shut down during the COVID pandemic by allowing it to defer 2020 rent until Jan. 1, 2021. The tenant remained in its lease but never made any of the installment repayments. So, the landlord sued and won over $800,000 in damages and interest. The tenant appealed.

Ruling: The California appeals court upheld the lower court's ruling.

Reasoning: The tenant asserted a number of defenses, but the court shot them all down:

- The force majeure clause in the lease didn't excuse the COVID nonpayments because it carved out "financial inability" and "lack of funds";
- There was no frustration of purpose because the tenant was capable of performing its rent payment obligations under the lease but chose not to do so because performance was financially unfavorable; and
- The landlord didn't violate the various lease warranties ensuring the tenant's "right to be free of interference from operation *by landlord*" (emphasis added) because the government COVID closure orders didn't constitute interference by the landlord.

- **Los Portales Associates, LP v. Fitness International, LLC, 2024 Cal. App. Unpub.**

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