

COMMERCIAL LEASE LAW

insider



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

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Get 16 Lease Protections When Letting Tenants Use Conference Center

Meeting space is chief among the amenities sought by office tenants.

While soft markets come and go, the current struggles of office building owners go beyond normal economic cycles. Fundamental changes are taking place, including the proliferation of hybrid work arrangements where employees spend only a couple of days per week working at the office. With fewer employees in the office at the same time, businesses are cutting back on

the amount of office space they lease. Of course, this takes a bite out of landlords' leasing revenues.

The good news is that it also creates new strategic opportunities for landlords, provided that they offer the right amenities. High on the short list of game-changing amenities is common workspace and conference facilities. One leading model is to set aside an aesthetically

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TENANTS ARE WILLING TO PAY EXTRA RENT, FROM \$2 TO \$6 MORE PER SQUARE FOOT, FOR THIS AMENITY.

pleasing, well-equipped floor, space, area, or facility within the building as a conference center that's available to all tenants to reserve for meetings and other business functions as needed.

We'll take a look at the concept, explain how to create a leasing strategy to implement it, and give you a Model Lease Clause incorporating 16 legal protections landlords that offer conference center amenities need.

Conference Centers Help Attract & Retain Tenants

Studies show that a vibrant conference center is a major attraction for tenants, especially in key industry sectors like technology, information, media, and arts and entertainment. For one thing, it fills a distinct need created by hybrid work. "The conference room is often the first thing office tenants cut when they downsize their space," notes a Los Angeles leasing attorney. These spaces prove critical later when the downsizing company needs to gather employees together in a physical space.

The other thing modern tenants like about a really nice conference center is how it helps them attract and retain quality personnel. The millennials these companies are targeting want to spend their work time in an aesthetically pleasing, vibrant, open, and collaborative space rather than a drab and traditional office building. A sizzling conference center may be the perfect solution. That's why so many landlords say that tenants are willing to pay extra rent, from \$2 to \$6 more per square foot, according to an NAIOP Research Foundation study, to lease in buildings that offer them.

How to Create a Legally Sound Arrangement

The conference center is part of the common areas that the landlord establishes and maintains for the enjoyment of all tenants. While most prevalent in office buildings, the amenity may also work in other commercial real estate settings leased to multiple tenants, including shopping centers. There are two basic business models landlords can use to operate a conference center at their property:

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THERE ARE TWO BUSINESS MODELS LANDLORDS CAN USE TO OPERATE A CONFERENCE CENTER.

- Lease or license the space to a third-party services vendor that pays all of the operating expenses and retains the revenue from the business, other than the additional rent you collect from tenants; or
- Operate it yourself using your own personnel the way you do other building common areas.

Landlords also need to establish clear rules for tenant use of the conference center. These provisions may be either incorporated into the main lease or as a separate attachment. In either case, they should include 16 protections.

1. Tenant Duty to Obey Conference Center Rules

Make it clear that failure to comply with all terms set out in the clause is grounds for revoking the tenant's rights to use the center. "The prospect of losing conference center use privileges is a powerful incentive," advises a Florida leasing attorney [Clause, Preamble].

2. No Center Use for Tenant in Default

Specify that the tenant must fully comply with all of its rent and other obligations under the lease and can be barred from using the center if it defaults. The tenant may insist on narrowing the scope of this clause by insert the word "material" before "default" [Clause, Sec. 1].

3. Tenant Duty to Use Conference Center Legally

Require the tenant to ensure that its use of the center complies with:

- Federal, state, county, and municipal laws, regulations, and ordinances;
- Directives, orders, or citations by any public officer in connection with its use of the center, including to abate a nuisance; and
- All insurance requirements related to its use of the center.

In addition, say the tenant must immediately notify you in writing of any notice of any directive, order, citation, or any legal or insurance violation it receives [Clause, Sec. 2].

4. Tenant Duty to Not Commit Violations

The Yin to the duty-to-comply Yang is language barring the tenant from using or permitting the use of the center for any purpose or activity that violates any law, the certificate of occupancy, an insurance policy covering, or an encumbrance upon the center or the building. It should also provide for immediate discontinuance of such use while also banning any use of the center by the tenant that interferes with the use and enjoyment of the building by the landlord or other tenants [Clause, Sec. 3].

5. Rules for Reservation of Conference Center Space

Next, get into the mechanics of the tenant's actual use of the center starting with the protocols and procedures the tenant must follow to reserve space at the center for an event. Specifically, the clause should address:

- How many days in advance the tenant must make the reservation;
- The information the tenant must list on the reservation request, including a description of the proposed event, its date, time, and expected head count, and any special equipment or space needs; and
- The maximum amount of time for which the center may be reserved for an event [Clause, Sec. 5].

6. Rules for Confirming & Cancelling Reservations

Rules and deadlines for confirmations and cancellations of reservations are also important, especially at buildings where there's a high tenant demand for center space. Treat a tenant's failure to

**REQUIRE
TENANTS'
CATERING
VENDORS TO
HAVE MINIMUM
LIABILITY
INSURANCE
COVERAGE.**

provide timely confirmation and follow confirmation instructions as cancellation of the reservation. To the extent it hurts other tenants who'd like to use the space, there should also be appropriate penalties, including cancellation charges, for tenants who cancel events at the last minute [Clause, Sec. 6].

7. Rules for Accommodating Tenant Requests for Reconfiguring Conference Center

While the conference center's design should be as flexible as possible, tenants may ask you to reconfigure the space for their particular event. The lease clause should specifically address whether you're willing to make changes to the "default" configuration and, if so, under what conditions and timelines [Clause, Sec. 7].

8. Rules for Accommodating Tenant Requests for Special Equipment

Tenants may also have special equipment needs for their events. The lease clause should say that tenants are expected to take the space on an "as-is" basis with "plug-and-play" equipment but also provide for any additional equipment furnishing or servicing arrangements that you're willing to make. In all cases, require tenants to inspect the equipment immediately before the event to verify that the equipment is in working order. State that you're not responsible if the equipment doesn't work right during the event. Also require tenants to leave the equipment in good working order and in a neat condition after the event ends [Clause, Sec. 8].

9. Rules for Conference Center Decorations

Like many landlords, you may want to ban tenants from hanging decorations from the center's ceiling or light fixtures. Another potential problem area is nailing or using sticky tape that can scar or

damage walls and doors to display decorations, signs or posters. Glitter, confetti, and rice can also leave a major mess [Clause, Sec. 9].

10. Rules for Catering of Conference Center Events

Food and drink are an essential part of what give conference center events their vibrance. So, be prepared to allow tenants to cater their events while establishing appropriate limitations, including requiring tenants to provide you certification before the event that their catering vendors have minimum liability insurance coverage. How much? Attorneys suggest at least \$1 million per occurrence for each of the following:

- Bodily injury;
- Property damage; and
- Fire.

Also establish rules for cleanup and disposal of food items left in the center overnight after the event is over [Clause, Sec. 10].

11. Rules for Serving Alcohol at Conference Center Events

You're also going to need clear rules for serving of alcoholic beverages during conference center events to guard against liability risks. The lease should require tenants to use only properly licensed alcohol serving vendors with Liquor Liability insurance coverage of at least \$1 million. Our Model Lease Clause also addresses the risk of liability that a tenant/host may incur if a guest leaves drunk and gets into a car accident causing injuries to third parties, including the requirement that tenants that serve alcohol at center events have at least \$3 million in "dram shop liability" coverage [Clause, Sec. 11].

12. Rules of Conduct for Guests of Conference Center Events

Hold the tenant responsible for ensuring that its guests don't engage in any behavior that's illegal, unsafe, disorderly, or

that unreasonably interferes with the management of the building and its use and enjoyment by other tenants. Such rules of conduct may include bans on smoking, illegal drug use, profanity, lewdness, harassment, violence, and noisiness.

Guests should also be required to comply with all security, parking, fire, sanitation, and other building protocols while on the premises [Clause, Sec. 12].

13. Rules for Cleaning Conference Center After Events

Require the tenant to restore the center to its original configuration and condition after the event. While landlords are generally responsible for cleaning the space after an event, the tenant should be required to remove all outside equipment, trash, materials, etc. Reserve the right to charge a tenant that fails to meet these requirements [Clause, Sec. 13].

14. Limitation of Landlord's Liability to Tenant for Use of Conference Center

The tenant should acknowledge that its

use of the center is at the tenant's sole risk and that neither the landlord nor its agents will be liable for any injuries, liabilities, damages, expenses, etc., that may arise out of that use [Clause, Sec. 14].

15. Tenant Duty to Indemnify Landlord

As an extra layer of legal protection, the clause requires the tenant to indemnify the landlord and its affiliates "from and against all claims, losses, damages, liabilities, or expenses incurred (including attorney's fees)" as a result of tenant's use of the center [Clause, Sec. 15].

16. Landlord Right to Modify Conference Center Terms

Last but not least, the clause provides for future contingencies and changes by reserving the landlord's right to add, remove, or modify any of the requirements set forth in the provision governing tenant's use of the center and to change its methods of operating the center to provide for the maximum enjoyment of all tenants in the building [Clause, Sec. 16].

**MODEL LEASE
CLAUSE**

Set Rules for Tenant Use of Office Building Conference Center

An aesthetically pleasing and well-equipped conference center that's available to all tenants for business events can be a powerful amenity enabling landlords to not only attract and retain quality tenants but also charge higher rents. While primarily used at office buildings, the vibrant conference center can also be a game changer for owners of shopping centers and other properties shared by multiple business tenants. But like any other common facility, the conference center must be operated in a fair, orderly, and legally compliant fashion. The starting point is to create lease provisions establishing appropriate rules, limitations, and procedures governing the tenant's use of the center. Here's a Model Lease Clause that, with the help of an attorney, you can adapt to your own needs and situation.

TENANT USE OF BUILDING CONFERENCE CENTER

WHEREAS, Landlord has established a Conference Center ("Center") that it generally makes available to all tenants, Tenant agrees that in consideration for the right to access and use the Center, Tenant (when used herein, "Tenant" shall refer to Tenant's officers, directors, employees, independent contractors, customers, clients, business associates, and agents) shall comply with all of the following terms and conditions set forth below and that Tenant's failure to do so shall be reasonable grounds for Landlord to terminate said right of Tenant to access and use the Center:

- 1. No Tenant Defaults.** Tenant shall have the right to access and use the Center only if it is fully compliant with all of its rental and other obligations under the Lease. Tenant agrees that being in material default of its Lease obligations shall be grounds for Landlord to deny Tenant its Center use and access rights and privileges.
- 2. Tenant's Compliance.** In using the Center, Tenant shall, at Tenant's sole expense, comply with:
 - (a)** All laws, orders, ordinances, and regulations of federal, state, county, and municipal authorities having jurisdiction over the Center;
 - (b)** Any directive, order, or citation made pursuant to law by any public officer requiring abatement of any nuisance or which imposes upon Landlord or Tenant any duty or obligation due to conditions that may have been created by or at the request or insistence of Tenant, or required by reason of a breach of any of Tenant's obligations under the Lease or by or through other fault of Tenant; and
 - (c)** All insurance requirements applicable to the Center, including as set forth in Sections 10 and 11 below.In the event Tenant receives notice of any such directive, order, citation, or of any violation of any law, order, ordinance, regulation, or any insurance requirement, Tenant shall promptly notify Landlord in writing of such alleged violation and furnish Landlord with a copy of such notice.
- 3. Tenant's Use.** Tenant shall not use or permit the Center, or any part thereof, to be used in violation of any applicable law, regulation, or ordinance, or of the certificate of occupancy issued for the Building or the Center, or any document of record that encumbers the Building, and shall immediately discontinue any use of the Center that is declared by any governmental authority having jurisdiction to be in violation of law or of said certificate of occupancy. Tenant shall not use or permit the Center to be used for any purposes that interfere with the use and enjoyment of the Building by Landlord or the other tenants, or which violate the requirements of any insurance company insuring the Building or its contents, or which, Landlord in its sole discretion determines, impairs the reputation of the Building. Tenant shall refrain from and discontinue such use immediately upon notice from Landlord.
- 4. Availability of Center Space.** Landlord shall make the Center available for use BY BUILDING TENANTS ONLY in accordance with the following rules, procedures, and protocols.
- 5. Reservation of Center Space.** Tenant must make reservations to use Center space at least [insert # of days, weeks, or months] in advance for events to take place during business hours of 7 a.m. and 7 p.m., Monday to

Friday, and at least [*insert # of days, weeks or months*] in advance for events to take place at all other times. Requests for reservations must describe the proposed event to be held in the Center and part of the Center requested for the event and list the date, hours (including time to set up the Center for the event and clean up after it ends), estimated head count, and any special Center space and/or equipment needs for the event. Reservation requests that do not list all of the required information shall not be approved. The maximum amount of time that Tenant may reserve the Center for a single event is [*insert # of hours*] for events to take place during business hours of 7 a.m. and 7 p.m., Monday to Friday, and [*insert # of hours*] for events to take place at all other times.

- 6. Confirmation & Cancellation.** Tenant shall reply to and carry out the instructions contained in all emails requesting confirmation of its reservation within 48 hours of receiving them. Any failure by Tenant to provide timely confirmation as requested shall be deemed a cancellation of the reservation. In the event Tenant decides not to hold the scheduled event as planned, Tenant shall promptly notify Landlord that it is cancelling the reservation. Tenant shall provide notice of cancellation to Landlord no later than forty-eight (48) hours of the date of the scheduled Center event. Failure to provide timely notification of cancellation or to show up for a reserved event shall result in the imposition of a cancellation fee of [*list amount or means of calculating cancellation fee*].
- 7. Center Space Configuration.** Upon receiving timely confirmation from Tenant, Landlord shall ensure that the Center space is configured to the specifications listed in the Tenant's reservation at least 24 hours in advance. In the event Tenant does not specify any special space configuration needs in its reservation requests and confirmations, the Center shall be set to its default configuration. Landlord shall not be required to change Center space configurations during the event.
- 8. Equipment.** Landlord shall deliver Center space for events "as-is" with existing audio-visual (AV) and other equipment deemed "plug-and-play." Prior to the event, Tenant shall be responsible for inspecting the space, confirming that the equipment is working properly or, if not, notifying Landlord of any equipment that is not working properly so that Landlord may replace it or effect repairs. Landlord shall not be responsible or liable if the equipment does not function properly during the event. Nor shall Landlord's staff be responsible for providing equipment support services during events. Accordingly, Tenant shall make prior arrangements if it requires equipment assistance during an event. Tenant shall turn off and leave all of the microphones, adapters, A/V cords, and other equipment it borrows in a neat and orderly fashion after the event and shall be liable for a charge of [*list amount*] for any Center equipment that is missing or damaged.
- 9. Decorations.** Tenant shall not hang anything from the ceiling or light fixtures, or attach anything to the walls, including, without limitation, sticky tape. Altering the appearance of rooms by taping, pinning, nailing, or fastening any items in any manner to the walls, doors, and/or ceilings is prohibited. Tenant is permitted to place decorations on top of tables, provided that it removes all such decorations immediately after the event.
- 10. Catering of Center Events.** Tenant shall be permitted to use outside catering vendors for its Center events, provided that no later than forty-eight (48) hours prior to the event Tenant submits to Landlord a current Certificate of Insurance (COI) for each vendor documenting coverage of no less than:

 - (a) Bodily Injury Liability of \$1,000,000 per occurrence;
 - (b) Property Damage Liability of \$1,000,000 per occurrence; and
 - (c) Fire Legal Liability \$1,000,000 per occurrence.

Tenant and its caterers shall be responsible for cleanup and removal of all food and supplies provided for the Center event. Landlord shall have the right to dispose of any such items left overnight.
- 11. Serving of Alcohol During Center Events.** Tenant shall be permitted to serve alcoholic beverages during reserved Center events, provided that no later than forty-eight (48) hours prior to the event Tenant submits to Landlord a current COI for each alcohol serving vendor documenting that they are properly licensed to serve alcohol and have Liquor Liability coverage of at least \$1,000,000. Tenant and its caterers shall be solely responsible for controlling the serving of alcoholic beverages in accordance with all applicable laws and ensur-

ing that guests consume alcohol only in the Center and that no alcohol is removed from the Center. All alcoholic beverages shall be dispensed by a non-drinking server [*and shall be limited to beer and wine*]. Alcoholic beverages shall not be served to minors under age 18 or to any person who is or behaves in a way that creates reasonable suspicion of being impaired as a result of alcohol. Tenant shall provide Landlord with evidence that it has secured dram shop insurance with total limits of liability for bodily injury, loss of means of support, and property damage because of each occurrence of not less than Three Million Dollars (\$3,000,000).

- 12. Rules of Conduct During Center Events.** Conduct that is illegal or unreasonably interferes with the normal, safe, orderly, and efficient operation of or any other persons' use or enjoyment of the Center or any other part the Building is strictly prohibited and Tenant shall be responsible for ensuring that all of its employees, guests, vendors, visitors, and others who use the Center during its reserved events adhere to the following rules of conduct:
 - (i)** Smoking, vaping, or any other consumption of tobacco or illegal substance in the Center is strictly prohibited;
 - (ii)** Guests and children under the age of 18 must be accompanied by a Tenant employee at all times while using the space;
 - (iii)** All individuals must follow the required sign-in and sign-out protocols when entering the Building to access the Center;
 - (iv)** Profane language, lewd behavior, violence, and harassment of any person in the Center are strictly prohibited;
 - (v)** All Center occupants must wear shirts, shoes, and appropriate clothing;
 - (vi)** All guests coming to a Center event must comply with Building parking, security, sanitation, and fire protocols;
 - (vii)** Loud music is not permitted in the Center;
 - (viii)** Pets are not permitted in the Center except for assistance animals.
- 13. Cleaning.** Tenant shall restore the Center to its original configuration and condition after the event, including via ensuring the removal of all outside equipment, trash, materials, etc. Landlord may impose a [*list \$ amount*] charge on Tenant for failing to meet these requirements.
- 14. No Landlord Liability.** Tenant agrees that its use of the Center shall be at Tenant's sole risk and that neither Landlord nor its agents shall be liable for any injuries, liabilities, damages, expenses, causes of action, suits, claims, judgments, and/or costs whatsoever arising out of or connected with Tenant's use of the Center.
- 15. Hold Harmless.** In addition to any provisions in its lease with Landlord, Tenant agrees to indemnify and hold harmless Landlord, and its respective affiliates, from and against all claims, losses, damages, liabilities, or expenses incurred (including attorney's fees) as a result of Tenant's use of the Center.
- 16. Additional Landlord Rights.** Landlord reserves the right to add, modify, or delete any Rule or Regulation herein contained and to change the method of operation to ensure maximum enjoyment and optimal operation of the Center by all Building tenants.

**WINNERS &
LOSERS**

Is Tenant's Cotenancy Rent Abatement an Unenforceable Penalty to Landlord?

Two recent cases shed light on how courts decide the issue.

Loss or failure to attract anchor tenants can have devastating financial effects on a shopping center and its tenants. So, don't be surprised if retail tenants with bargaining clout demand a cotenancy clause protecting them against this contingency. Such provisions typically give the tenant the right to pay reduced rent or terminate the lease when the number of anchor tenants or overall occupancy level of retailers in a shopping center falls below a specific threshold. Of course, relief to the tenant magnifies the blow the landlord suffers in not being able to draw and retain the anchor tenants it needs to operate the property at optimal capacity.

The best way to avoid the adverse effects of a cotenancy clause is not to include one in the lease. The problem is that accepting the clause may be the price a landlord has to pay to do business with a national retail chain or other powerful tenant. If you're currently saddled with a tenant that's taking advantage of a cotenancy clause to pay substantially reduced rent, there's a potential remedy that you might want to consider: Get a court to declare that the cotenancy rent abatement is invalid and unenforceable.

What the Law Says

There are two possible avenues of attack open to a landlord seeking to challenge a cotenancy clause in court:

Unreasonable penalty. Contract law, 101: Landlords, tenants, and other parties to a contract are allowed to specify the penalties one side must pay to the other if

they violate the terms of the agreement. In most states, these so-called "liquidated damages" provisions are perfectly enforceable, as long as they don't impose an unreasonable penalty or forfeiture on the defaulting party. A cotenancy clause may be considered an unenforceable liquidated damages penalty if it reduces the tenant's rent to an extent that's disproportionate to the financial loss the tenant suffers as a result of the anchor tenant's loss.

Unconscionability. Terms of a lease may be unenforceable if they're unconscionable—that is, so overwhelmingly one-sided in the favor of the party with superior bargaining power that nobody in good conscience would enforce them. To prevail on unconscionability, a landlord might have to show that both the substantive terms of the cotenancy clause and the process by which they were drafted were unconscionable.

Here are two recent cases illustrating how courts apply these principles to actual disputes in which a landlord contests the enforceability of a cotenancy clause. While both rulings come from California, the principles involved apply equally in most other states.

Cotenancy Rent Abatement Is Unreasonable Penalty

In this case, a court found a cotenancy clause in the tenant's favor to be unenforceable.

Situation: A shopping center lease included a cotenancy clause allowing national retail chain, Ross Dress for

PROVING THAT A COTENANCY CLAUSE IS AN UNREASONABLE PENALTY IS AN UPHILL CLIMB.

Less, to delay opening its new store and pay zero rent if no acceptable anchor tenant was open in the center at the time the lease began. There was an acceptable anchor in place, Mervyn's, when the lease was signed, but it had closed up and gone out of business by the time the Ross lease commenced. No new anchor replaced Mervyn's for over a year.

As permitted by the cotenancy clause, Ross accepted delivery of the premises but didn't open a store or pay rent for 12 months before moving out. The landlord sued Ross for rent over the full 10-year term of the lease, claiming that the cotenancy clause was unenforceable. The jury sided with the landlord and ordered Ross to pay \$672,100 for unpaid rent. Ross appealed.

Ruling: The California appeals court upheld the award of unpaid rent to the landlord.

Reasoning: The court held that the cotenancy clause was an unreasonable and unenforceable penalty. A provision is considered a penalty when it "bears no reasonable relationship to the range of actual damages the parties could have anticipated would flow from a breach of a covenant or a failure of a condition." Here, the trial court found that Ross didn't anticipate that it would suffer any damages as a result of Mervyn's not being open on the lease commencement date; and the \$0 it "paid" in rent bore no reasonable relationship to the \$39,500 per month it would have paid but for the cotenancy clause rent abatement.

However, the court stopped short of finding the cotenancy clause unconscionable, reasoning that unconscionability requires proof of both procedural and substantive unconscionability. There was no evidence of procedural unconscionability because the parties were sophisticated and experienced in commercial lease negotiation. Ross's insistency on cotenancy provisions didn't make the lease a contract of adhesion or otherwise deprive the landlord of a meaningful choice, the court

concluded [Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 182 Cal. Rptr. 3d 235 (Cal. Ct. App. 2015)].

Cotenancy Rent Abatement Is Not an Unreasonable Penalty

Here's another case involving the same principles and a similar situation but with a completely different outcome.

Situation: Jo-Ann's, a national fabric retail chain, signed a lease that required fixed minimum rent of \$42,292 per month, but which included a cotenancy clause allowing the tenant to pay substitute rent of the greater of 3.5 percent of gross sales or \$12,000 per month if the number of anchor tenants at the shopping center fell below three or the amount of space in the center occupied by anchor tenants fell below 60 percent.

Jo-Ann's invoked the clause twice during the term without the landlord's objection. But when it sought to pay substitute rent under the clause for a third time, the landlord went to court seeking a judgment declaring the cotenancy provision to be an unreasonable penalty in accordance with the *Grand Prospect* decision, along with \$638,293, the difference between the fixed minimum rent and substitute rent.

The trial court rejected the landlord's claim. One unsuccessful appeal later, the case landed in the California Supreme Court.

Ruling: The high court ruled that the cotenancy clause was valid and enforceable.

Reasoning: The Court cited key differences between this case and *Grand Prospect*: The cotenancy clause in *Grand Prospect* allowed the tenant to pay no rent at all whereas the substitute rent provided for in this case bore a more realistic resemblance to the actual damages Jo-Ann's suffered as a result of reduced anchor occupancy in the center.

The other key difference was the landlord's control and ability to keep

the tenant from invoking the cotenancy clause. In *Grand Prospect*, everything turned on the actions of Mervyn's, a business over which the landlord had no control since it wasn't a tenant. By contrast, the Court found that the cotenancy clause in this case gave the landlord "a realistic and rational choice" between alternative methods of performance. "If [the landlord] wishes to avoid receiving a lower level of rent, it can choose to make inducements to attract additional anchor tenants or raise the overall occupancy rate. . . . [such as by] offering favorable lease terms, providing additional amenities to tenants, or renegotiating important leases."

Based on these factors, the Court concluded that the substitute rent provided for under the cotenancy clause wasn't a penalty but an acceptable form of "alternative performance" that fairly allocated the risks between the landlord and Jo-Ann's. "[T]he parties' contractual intent when reduced to writing should be controlling and enforced, particularly as applied to the commercial leasing market in arms-length negotiations and transactions," the Court reasoned [*JJD-HOV Elk Grove LLC v. Jo-Ann Stores, LLC*, 17 Cal. 5th 256, 2024 Cal. LEXIS 7043].

Takeaway

Enforceability of cotenancy clauses is the prevailing view. While the landlord in *JJD* didn't argue unconscionability, the Court suggested that such a claim would be difficult to prove in a cotenancy case. Such clauses aren't negotiated in a vacuum. Landlords and tenants "who are often sophisticated and well represented, consider such provisions alongside other lease terms during an arms-length negotiation process." Landlords who understand the real estate market and how the clause works are perfectly free to walk away from the bargaining table and often

make the "realistic and rational choice" of accepting a cotenancy clause "to entice retailers into rental agreements."

Significantly, while *Grand Prospect* shows that it's possible, proving that a cotenancy clause is an unreasonable penalty is an uphill climb. As the *JJD* Court notes, the "vast majority of cases" from other states have upheld these clauses.

Examples:

- Connecticut federal court upholds cotenancy clause allowing tenant to pay reduced rent of 5 percent of gross sales if either a specific anchor tenant (Borders) or 50 percent of other retail space in the mall weren't open, refusing to "unmake a deal agreed to by two sophisticated parties" [*Kleban Holding Co., LLC v. Ann Taylor Retail, Inc.*, 2013 U.S. Dist. Lexis 168231];
- Nevada court cites the extensive negotiations between sophisticated parties who "understood that they were negotiating and agreed to a contract with different benefits and risks for each party" in upholding cotenancy clause allowing tenant to pay substitute rent of 2 percent of gross sales [*Boca Park Marketplace Syndications Group, LLC v. Ross Dress for Less, Inc.*, 2019 WL 2563814];
- Oregon federal court finds that cotenancy clause reducing tenant's rent to the lesser of 2 percent of gross sales or the "Minimum Rent then applicable" if cotenancy requirements aren't met is not an unenforceable liquidated damages penalty [*Old Navy, LLC v. Center Developments Oreg., LLC*, 2012 U.S. Dist. Lexis 82579]; and
- Tennessee federal court upholds cotenancy provision allowing tenant to pay reduced rent of 4 percent of gross sales [*Hickory Grove, LLC v. Rack Room Shoes, Inc.*, 2012 U.S. Dist. Lexis 70353].

**RECENT
COURT
RULINGS**

Landlord Not Responsible for Damaging Tenant's Anti-Theft System

What Happened: A grocery store operator signed a lease allowing it to “install” its own electronic gatekeeper system to prevent people from stealing grocery carts. But it turned out that a previous tenant had already installed a gatekeeper system wire. Satisfied that the system worked well enough, the tenant decided to keep using it.

Ten years later, the landlord’s contractor inadvertently severed the wire while paving the parking lot, rendering the system totally inoperable. The tenant expected the landlord to offer to replace the system the way it would after damaging any other property owned by a tenant. But the landlord disputed the tenant’s claim of ownership over the system. To support its own claim of ownership over the system, the tenant produced a bill of sale that it had received from the landlord transferring ownership of certain equipment to the tenant.

Ruling: The Ohio court concluded that the tenant owned the system, but the appeals court reversed.

Reasoning: The tenant’s claims to owning the system derived from the lease provision giving it the right “to install” its own system. Because the lease didn’t define the term, the court relied on the dictionary definition of “to install” as “to set up for use or service.” But it was the previous tenant that set up the cart theft deterrent system in this case. All the tenant did was use it. And mere use isn’t enough to prove ownership. Nor did the bill of sale support the tenant’s claim of ownership since the cart theft deterrent system wasn’t on the attached exhibit listing the equipment that the landlord was transferring to the tenant. And since the tenant didn’t own it, the landlord didn’t have to pay it damages for damaging the system.

• *Texlo, LLC v. Gator Hillcrest Partners*, 2024-Ohio-5686, 2024 Ohio App. LEXIS 4384

Landlord May Accelerate Abandoning Tenant's Rent Without Mitigating Damages

What Happened: During the COVID-19 pandemic, a restaurant tenant abandoned its lease with six years remaining on the term. The lease contained an acceleration clause giving the landlord the option, in the event of the tenant’s default, to declare “the total amount of rent payable during the Term of the Lease, discounted to present value . . . at the rate of four percent (4%) per annum,” immediately due and payable.” The clause also stipulated that any rent the landlord received upon reletting the property “would be applied first to paying any debts other than [Tenant’s] unpaid rent, then to costs and expenses of reletting, and last to

paying any unpaid portion of [Tenant’s] accelerated rent.” While acknowledging the default, the tenant claimed that the landlord didn’t mitigate its damages and that the acceleration clause was an unenforceable penalty.

Ruling: The Supreme Court of Virginia upheld the trial court’s ruling ordering the tenant to pay the landlord \$410,391 in damages and \$18,000 in attorney’s fees.

Reasoning: The high court rejected the tenant’s mitigation of damages claim because under Virginia law, a commercial landlord has no duty to mitigate

damages by reletting abandoned property. When a tenant abandons leased property during the lease term, the landlord has two options:

- Refuse to accept the tenant's surrender, do nothing, and sue for accrued rents; or
- Re-enter the premises and accept the surrender, thereby terminating and releasing the tenant from further liability under the lease.

Nor was the acceleration clause an unenforceable penalty. The tenant

contended that the clause enabled the landlord to relet the premises and thus effect a "double recovery" by collecting rent from both the old and new tenant. But the court rejected the argument, citing the lease language specifically requiring the landlord to use the rent money it received in reletting the premises to any unpaid portion of the unpaid accelerated rent.

- **Bistro Manila, LLC v. Alvah I LLC, 2025 Va. App. LEXIS 6, 2025 WL 37060**