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Manny's Musing

Learning to Draft Shopping Center Use Clauses

By Emanuel B. Halper

It's not easy to learn how to draft and negotiate leases. Most of the knowledge with which we are spoon fed in college and law school doesn't prepare us for the task. Tackling my first lease convinced me that all I learned in school would be of little help.

All of the world's accumulated statutory and case law isn't enough knowledge for a lease drafter and negotiator. Although a lease drafter needs to know plenty of statutory and case law, he or she needs to know much more than that to do it effectively and professionally.

Studying form leases and previously executed leases helps a little but can hurt a lot. Reading forms and old leases can help you generally understand the kind of ingredients needed to concoct the stew of words and phrases we call a lease. Relying on forms and old leases is dangerous. Many lawyers are curiously addicted to old documents and tend to copy their provisions blindly — no matter how inappropriate. Most likely, any form you copy from was copied from another form that, in turn, was copied from still another form.

Studying judges' opinions is valuable. They help you avoid the drafting errors of an earlier day. They are also valuable tools to understand how judges confront poorly drafted leases and how (sometimes) they ignore or modify the plain meaning of words to do justice (in their eyes). However, court decisions don't deal with the practical business problems lease drafters

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ABA 1994 Convention Report

By Ann Pelo Cargile — Bouit, Cummings, Conners & Berry

The Commercial and Industrial Leasing Group sponsored a number of well received programs at the 1994 ABA Convention in New Orleans, and this article will highlight the program participants and the interesting aspects of their presentations.

Bright and early Monday, August 8th, the Commercial and Industrial Leasing Group held breakfast roundtables, where participants met in small groups to exchange ideas on designated issues. The table run by Michael Glazerman and Jack Zemil discussed liability for compliance with The Americans with Disabilities Act, focusing on lease clauses concerning repair and maintenance, restoration after casualty, change in use, assignment, alterations, and general compliance with laws. Richard Frome headed a discussion on subordination and nondisturbance issues, and raised the interesting question of whether a tenant can get out of its lease following a foreclosure by intentionally defaulting and relying on language in the nondisturbance clause stating that it would not apply if the tenant were in de-

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and negotiators need to solve, and that leaves a wide gap that needs to be filled.

Reading all the decisions that have ever been rendered won't teach you enough to negotiate a construction, alterations, repair, compliance, surrender, destruction or insurance clause. You need to know a lot about construction and insurance to do that. Similarly, lawsuit decisions won't provide an adequate background for a lease drafter to deal with subordination, nondisturbance, and attornment clauses. To draft these clauses properly, you need a reasonable knowledge of the mortgage financing process.

Store leases and other retail-type leases such as restaurant, bank, theater or gasoline station leases present especially difficult problems for drafters. Many clauses in retail-type leases won't be drafted properly unless the drafter has a decent knowledge of the retail business. That should be self-evident. How can you prescribe rules for behavior in a retail environment without knowing anything about how retail businesses function?

Of all the clauses you encounter in retail-type leases, use and exclusive clauses are the most dependent on business knowledge. You can't negotiate them in a vacuum. The use clause tells you what the tenant can't do. The exclusive clause tells you what the landlord is obliged to stop his or her other tenants from doing.

They are vital elements of shopping center leases. The use clause is the shopping center landlord's shield against uniformity. Shopping centers attract customers because of retail diversity. Just think how boring a center would be if every store looked the same and sold approximately the same merchandise or the same kind of merchandise. An exclusive clause is the shopping center tenant's shield against overwhelming and unexpected competition. With limited floor area in which to display merchandise or perform services and a limited market to serve, many tenants need to be assured that they won't have to face potentially ruinous competition. Think about a shopping center consisting solely of two supermarkets. How about a center with one supermarket, seven shoe stores and four Chinese Restaurants (all specializing in spicy Szechuan cuisine)?

Most of a landlord's attorney's big use clause drafting problems stem from other tenants' exclusive clauses. As he or she starts to tackle a new lease, the drafter should be aware that existing leases might enjoin the landlord to prohibit sales of one or more merchandise categories. If that's the case, the drafter should make sure that the new tenant is barred from selling the prohibited items. Allowing a tenant to sell a prohibited item is a sure path to a nervous stomach and high anxiety. Think about it. Both tenants sue the landlord, and he or she has no defense (except insanity which doesn't work in lease litigation). I'd hate to be his or her lawyer.

It doesn't take years of study for a landlord's attorney to read existing leases to make sure that the new tenant won't have the right to sell something prohibited by the old leases. That part of the job is easy. You just have to do it. When you do it, you might get the new tenant to respect the old exclusive (that's good). However, you might also kill the deal. The old exclusive clauses might prohibit the new tenant from selling a merchandise category it considers essential. If so, the lease doesn't get signed, and your client gets angry.

The tough job for a landlord's attorney is to avoid agreeing to a use or exclusive clause that is likely to kill deals later on. You don't negotiate all of the leases at once. They come in waves. When you negotiate the early leases, you have no choice but to anticipate the kinds of use and exclusive clauses to be demanded by later tenants. Give away too much in the early leases, and your hands will be tied later on. Try to give away too little in the early leases, and you take the risk that you won't get them signed in the first place.

How do sophisticated landlord attorneys play this game? They play by learning as much as they can about the retail business. If you know a bit about a tenant's history, the kinds of products it has been selling recently, and the kind of products it used to sell, you're in a better position to anticipate its use and exclusive clause demands.

How can you learn about these things?

- You can learn from tenant lease negotiators. A chain store tenant's lawyer tends to know what his or her client sells or might want to sell in the future. He or she also tends to know what the tenant's competitors sell. Ask them and learn what they know.
- You can learn from books and magazine articles. Take a field trip to the public library. It's full of books and articles on marketing, retailing, and retail history.
- You can learn by visiting stores. Take a field trip to a few local shopping centers. Observe what the stores sell and how they sell. In particular, look for strange product combinations.

Lawyers who learn how to draft shopping center lease use clauses competently won't get masters' degrees or even a plaque in recognition of their efforts. They will get: the satisfaction of knowing they're able to do a better job for their clients; and a closet full of junk they couldn't resist buying on their shopping center field trips. ❐