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Types of default, requirements for notice, and various remedies.

People and Property: When Is a Tenant in Default?

Emanuel B. Halper

ALTHOUGH HARRY PAINE has been judged severely by his contemporaries, he seldom passed judgment on others.

This state of affairs was finally changed by the growing popularity of continuing adult education. A stray brochure from the local university's school of management was placed on Harry's desk. The school was offering a course entitled "Managing Key Personnel." The course was to be taught by none other than the world-renowned Professor Norman Butcher.

Harry was so excited that he called me immediately and asked if I would join him in taking the course (at my own expense, naturally). I replied (may Saint Anthony's fire burn the fiend who brought the brochure to Harry) that I would be delighted.

During the first session, I was pleasantly surprised. Norman Butcher had some intelligent things to say. But one of his ideas was that a

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really big important captain of industry should pass judgment on the productivity of his subordinates and make suggestions that might improve the way they function. Butcher suggested that there had to be a day on which everybody in the organization would be called to account. If anyone were unable to satisfy the questions posed by the leader, perhaps the organization might be better off if the subordinate turned in his restroom key and moved on.

Butcher called the process "Judgment Day."

As I heard him talk, I lapsed into the state that I normally arrive at when I attend somebody else's lecture. I fell into a deep trance-like sleep.

I dreamed that I was in the Sistine Chapel. A voice ordered me to walk toward Michaelangelo's painting, "The Last Judgment." I did and found myself inside the painting.

A wrathful God sat on a celestial throne and passed judgment on humanity.

Humanity wasn't making out so well. So many of us were being led to Hell. I could see the faces of well-known terrorists and dictators. Demons and monsters were leading them to a fiery cavern. I saw them followed by murderers, professional criminals, corrupt politicians, rock stars, and the negotiators who failed to settle the baseball strike.

Three distinctly saintly persons were on their way to paradise. They were Ralph Nader, Jimmy Carter, and Lawrence Welk.

What about the rest of us? I knew you'd ask. Well, from what I remember, there's much to worry about.

Groups of angels interrogated everyone else. People were banded together by their professions. Air traffic controllers were having a hard time of it. Real estate developers were trying to charm their interrogators and were having some success. Lawyers were trying the same thing, but they found that they could not compete with angels when it came to metaphysical discourse and hyper-technical discussions.

I sneaked away from the lawyers' group to testify against magazine editors, Long Island Railroad conductors, and legal secretaries.

The atmosphere darkened; night approached. I saw lightning. I heard thunder. I looked up at the face of the chief prosecutor of the lawyers. It was Harry Paine.

So a week after the dream I overreacted a bit when I opened my mail and found a letter from Harry telling me that I should know about two fascinating events on the horizon.

One was that Harry had proclaimed January 15 as "Judgment Day." All of Harry's employees and independent professionals would be judged in each other's presence on that day.

The other was that we had a new deal with that rapidly expanding supermarket chain, Mother's Cubbard, for still another store in Howe's Bayou. Harry had set up a meeting to discuss Mother's form lease on October 2.

My wife asked what would come of this? I thought only of my dream and the image of Harry Paine with a halo, wings, and spear.

On October 2 we drove to Mother's headquarters. We met with Mother's President, Rock Monis, a steel-eyed and strong-willed Scotsman, and his attorney, J. Jeffrey Flanken, who advised us to call him J.J.

We were soon joined by that most loquacious of real estate brokers, Nick Tromba. Nick was his effervescent self. It was his thirty-fifth birthday, and he advised us that it was our duty to help him celebrate the wonderful event by getting the lease signed in one day.

That preposterous notion struck a responsive chord in Harry, and he seized the floor.

Harry: Nick, you said it much better than I did. I've been doing some thinking lately.

Nick: Harry, you'll wear yourself out.

Harry (grimacing): What the hell is wrong with some original thinking? If I let you weirdos do what you always do when you negotiate leases, I won't have a signed lease until the Fourth of July. I don't have time for that. I want a lease signed soon!

Nick: Harry, I'm all for it. Remember, it's my birthday. It's my lucky day. The lease is gonna get done. Trust me.

Harry: I trust you like I trust a convicted war criminal. I'd like to say something. This lease has to get signed fast if it's to get signed at all. My creative thinking has determined that the negotiations with respect to this lease should take ten hours. There are ninety-six pages in the form lease. I shall expect the lawyers to finish 9.6 pages per hour.

Pages per hour. That's my thinking. Monis, if you want a store in the best spot in Howe's Bayou, you'll cooperate. Halper, if you want to get paid, you'll cooperate.

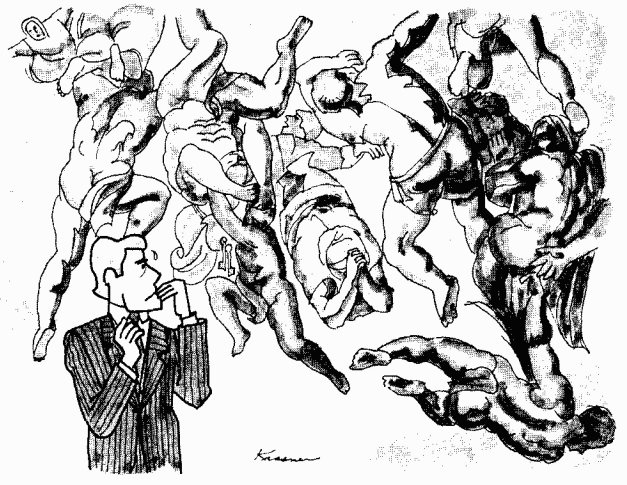
I: But Harry!

Harry: No buts. If you resist my thinking, it's only because you have problems about hard work. Most lawyers are like that.

Rock: Look Harry, you can talk to your lawyer like that. But I'm no shlemiel. Who are you to . . .

Harry: Rock, you're a good fellow despite your bald head. Take me seriously. I mean 9.6 *pages per hour*—that's the word!

Harry was serious. I decided to speak very quickly. Harry acted as the arbiter and the timekeeper. Whenever J.J. Flanken and I would begin to yell at each other, Harry would look at his watch and say something menacing.



The day moved along. But we deadlocked on the default clause at 3 P.M., and everyone refused to budge. I was worried. We spent so much time arguing about the default clause that we were able to go no further than page 45 before 7 P.M. Harry indicated that the p.p.h. was unsatisfactory and that, unless my p.p.h. improved immediately, I might have to answer for it on Judgment Day.

Fear struck my heart when J.J. Flanken said that he would have to leave. This was the very evening of the week that he usually spends with his wife. I begged him to stay to complete our discussion of the default clause. As for Rock Monis, it was his night at the track—his night away from his wife. And you already know that this day was Nick Tromba's birthday.

Everyone left, and I began to be severely depressed. What would Harry do on Judgment Day about my low p.p.h.?

The next day, Harry questioned me extensively about my performance in the negotiation. He felt that I had betrayed him by falling behind the established p.p.h. I had embarrassed him before Rock Monis, the "bald-headed bastard."

I was given the opportunity to redeem myself by explaining to everybody why the discussion of the default clause was important enough to foul up Harry's schedule.

Harry demanded that I prepare a written explanation of the problems that confront me when I negotiate default clauses. I was required to deliver it to him within seven working days.

In case you have an interest in this most morbid subject, I've included the entire memo in this report.

ISSUES PRESENTED BY DEFAULT CLAUSES

Leases aren't the only kinds of contracts that contain default clauses. However, default clauses in leases deserve even more careful scrutiny than default clauses in other kinds of contracts. The consequences of a default under a lease can be catastrophic.

Most landlords' leases contain provisions that permit the landlord to cancel the lease in case the tenant is in default—even if the default is a minor one. A tenant under such a lease, often bound by hundreds of covenants in addition to its agreement to pay rent, faces the loss of its leasehold interest for failure to comply with any one covenant—if a court is willing to interpret the default cancellation clause literally.

By contrast, some tenant-oriented leases provide that the performance of every landlord's obligation is a condition precedent to the tenant's obligation to pay rent. If this clause were construed literally as a landlord's default—no matter how inconse-

quential—the tenant could trigger the claim that the tenant does not have to pay any rent.

There are a number of situations in which, if one party is in default, the other wants the right to cure the default for the account and at the expense of the party in default. If the landlord cures a default on behalf of the tenant, the landlord wants to add the cost of curing the default to the next installment of minimum rent. If the tenant cures a landlord's default, the tenant wants to deduct the cost of curing the default from rent payments as they come due.

This kind of right distresses institutional lenders because they fear that it can result in a significant interruption of the property's income stream.

Before we can discuss the consequences of a default, we must define what default means. Will default mean a failure to comply with any obligation? Will default mean one thing when the remedy is a possible termination of the lease and something else when a less drastic remedy is proposed. Will a party be entitled to notice and an opportunity to cure a failure to comply with a lease provision before the failure ripens into a default?

WHAT CONSTITUTES A DEFAULT?

Most occupancy leases define the tenant's failure to perform any obligation under the lease as a default. This is the case even if the obligation that was not performed is unimportant, even if the landlord is not damaged in the slightest as a result of the failure to perform, even if the failure lasted only for an instant, and even if the tenant was unaware that anything was wrong.

People are conditioned to unfair clauses when they read leases. Consequently, even provisions as foolish as the customary default clauses are accepted without comment by most tenants.

Tenants of all kinds should insist that default clauses be fair. Arranging the default clause so that unintentional minor omissions cannot result in a termination of a tenant's leasehold estate is particularly important to shopping center leases and store lessees. Shopping center and store occupancies are different from other types of occupancy in that the tenant's entire business may depend upon being in a particular location. Such a tenant cannot afford to allow its lease to be terminated at the whim of a landlord because of a minor and unintentional default.

FAILURE TO PAY RENT WHEN DUE

The typical lease form offered by a landlord states that a tenant's failure to pay rent when due constitutes a default. Imagine how easy it is for a rent check intended for a landlord to be misdirected by the combination of clerks and machines that supervise the accounts payable department at chain store organizations. One incompetent employee neglecting to send out a rent check on time can give the landlord the right to cancel a lease (unless the state in which the property is located has a law to the contrary or the court in which the case is tried refuses to enforce the lease in accordance with its literal terms).

In an attempt to avoid the danger of being kicked out for sending in a rent payment a few days late now and then, tenants have insisted that the lease provide for some leeway. This leeway can be provided for in three ways.

Some leases provide for a period of grace. If a payment is made late, but within the grace period, the lateness is forgiven. But a grace period does not protect the tenant who is not aware that the payment was not made on time. It is quite easy to see that the grace period can come and go without the tenant becoming aware that a default has occurred.

Another approach is a lease provision that rent payments be made on the fifteenth day of each month instead of the first day of each month. That gives the tenant fifteen extra days to come up with the money, but it doesn't give the tenant any warning that he hasn't paid or provide much of a safety valve to avoid a default.

The correct way to attack this problem is for

the lease to provide that a default in the obligation to pay rent occurs only if the tenant fails to pay rent on time and if the failure continues for a period of time after the landlord gives the tenant notice that rent wasn't paid. Some leases provide for a period of as many as thirty days, and as few as five days, after notice by the landlord in which a default for failure to pay rent may be avoided by paying a previously unpaid installment.

Negotiators for landlords who want to make an issue of tenants' requests for notice as a prerequisite to the occurrence of a default have some ready-made answers for tenants. Here are some of the arguments I've heard:

- A tenant should know when rent is due and needn't be reminded.
- A landlord could be seriously inconvenienced by a tenant who decided to pay rent late every month.
- If the lease provided that the tenant would not be considered to be in default until a specified time after the landlord gave notice, the tenant could decide never to pay on time and harass the landlord by forcing him to send notices all the time.

A reasonable negotiator for a landlord should not refuse a tenant's request that the tenant not be deemed in default under an obligation to pay rent unless the rent remains unpaid for a given period after the landlord gives notice that the rent was not paid when initially due.

An argument that a tenant should know when to pay rent is not impressive. Any businessman knows that a rent check can be mislaid and that a rent payment can be neglected.

It is true that a landlord could end up being required to send a formal notice every month if notice is a prerequisite to default. But the inconvenience a landlord may suffer if it must send notices is not comparable to the inconvenience a tenant suffers if it loses its entire business. If a landlord is worried about the inconvenience of sending frequent notices, the lease could include a late charge provision and distinguish the definition of default for the purpose of the late charge provision from the definition of default for the purpose of the default cancellation clause. The late charge would be payable by the tenant if the tenant failed to pay rent before the fifth of any month whether or not the landlord gave notice of the failure to pay rent on time. In addition, if the tenant didn't pay rent before the tenth of the month and the landlord sent notice of the failure, the late charge provision could require the tenant to pay the landlord a reasonable amount to compensate the landlord for the inconvenience of sending the notice. It's no fun for the tenant to pay a late charge, but it's easier to bear than losing a leasehold.

There are many other ways to relieve the landlord of the obligation of sending frequent notices. In another solution, the landlord agrees that the landlord must give notice and that the tenant has the right to cure before a default can occur, but the landlord is required to give the tenant notice and an opportunity to cure with respect to only one or two failures to pay rent each year. Under the compromise, a tenant who pays late twice a year would be entitled to notice each time; it would then be in danger of losing its lease if a third late payment is made after any applicable grace period.

This arrangement is better for a tenant than having no right to notice at all. But, under bizarre circumstances, a tenant might lose a valuable leasehold because of a few inadvertent lapses. I think that a stiff late charge is a much more appropriate remedy for repeated failures to pay rent when due as long as the payment *is* made within ten days after notice of default is given.

TENANT'S FAILURE TO PERFORM OBLIGATIONS OTHER THAN PAYMENT OF RENT

Tenants want the notice provisions to extend to every possible default. So they want leases that provide that a tenant's failure to perform any of its obligations, not just the obligation to pay rent, cannot ripen to a default unless the landlord notifies the tenant of the failure and the failure continues for a specific period after the notice.

The problem with this idea is that a tenant's failure to perform certain obligations could result in serious consequences for the landlord. Many of the tenant's obligations under a lease would be the landlord's obligations if there were no lease. Landlords are bound by requirements of governmental authorities, mortgage lenders, and insurance rating bureaus, and when a tenant fails to perform certain obligations under a lease, that failure may also constitute a default on the part of the landlord in its obligations to third parties.

Here are three situations in which a landlord's interests could be prejudiced unless the lease gives the landlord some remedy without the precondition that the landlord give the tenant notice and an opportunity to cure:

- The tenant fails to make repairs when failure to make them could result in deterioration of the demised premises or create a nuisance.
- The tenant fails to comply with legal obligations within the time frame provided by applicable legal requirements.
- The tenant fails to carry insurance required by the lease.

Structural Repairs

If the lease requires the tenant to repair the structural elements of the demised premises, the landlord, who discovers that the building will collapse imminently unless the tenant makes a required repair, would not want to be obliged to give the tenant notice and to wait for a substantial period before it can take action. Here the failure to act immediately would be tantamount to losing a major portion of the landlord's investment. Consequently, the landlord must argue that, in this situation, a default should be deemed to have occurred when the tenant fails to make the repair and not after notice and the expiration of a cure period.

However, it would do the landlord no good to terminate the lease at this point. The building would fall down long before the landlord could get the tenant out. The only useful purpose of a right to terminate would be that the tenant's knowledge of this right might serve as a deterrent against the tenant's willful refusal to take action to preserve the demised premises.

The solution to the landlord's problem is to distinguish between defaults which give the landlord the right to cancel under the default cancellation clause and defaults which allow the landlord to perform an obligation of the tenant under the self-help clause. (The self-help clause gives each party the right to perform the other party's obligations under some circumstances for the account and at the expense of the other party.) A lease could provide that if the tenant failed to perform an obligation and the failure continued for an appropriate time period after the notice, the landlord would have the right to cancel the lease. On the other hand, if the tenant failed to perform an obligation and there was a danger of substantial damage or deterioration to the demised premises, the landlord would have the right to perform that obligation for the account and at the expense of the tenant even if the tenant had no notice of the failure and no opportunity to cure.

Legal Obligations

In many communities, when a condition in the demised premises violates a building code or zoning ordinance, a local governmental body issues a notice of violation. The violator is usually given a period of time in which to correct the violation. That time period usually begins when the notice of violation is issued. If the lease defines an event of default as an event which can happen only after the landlord gives the tenant notice and an opportunity to cure, the tenant may be in a position to delay compliance with the notice of violation until two cure periods pass by. One cure period is the one provided under the applicable code or ordinance, and the other is the one provided for in the lease.

Consequently, landlords may propose that if the failure by the tenant to meet its obligation is a

failure to comply with legal requirements, the lease should not require notice by the landlord and a second opportunity to cure before an event of default is deemed to have occurred. Landlords often attempt to justify this position by claiming that a landlord should be able to avoid being subject to criminal penalties that may result from legal violations. Perhaps landlords' problems would be severe if landlords indeed faced severe criminal penalties. But, usually, the criminal penalties are no more frightening than a requirement to pay a $25 fine. Thus a lease should give the landlord the opportunity to cure the violation of law without notice at the expense of tenant, but it should not give the landlord the right to cancel the lease. That the tenant's leasehold interest should be forfeited because the landlord fears being subject to a $25 fine is patently unfair.

Insurance

A similar problem can arise with respect to the possibility that the tenant will fail to carry a fire or liability insurance policy it is required to carry under the lease. Many fire and liability insurance policies are cancellable on five days' notice. The insurance policies may also be cancelled if the tenant fails to pay its insurance premiums on time. Landlords, who oppose the requirement that they give notice, ask what good the default clause does as a deterrent if the tenant can delay even starting to cure its failure to carry the insurance until the landlord gives notice of the failure. The five-day period would expire before the landlord even heard about the cancellation of the insurance policy. The problem is exacerbated by the possibility that if there is an accident in the demised premises at a time when liability insurance is not carried and one of the tenant's customers sues the landlord successfully, the tenant may be liable to the landlord only for the unpaid insurance premiums and not for the amount of the judgment.

A simple device can protect the landlord with respect to this problem. The lease should provide that each insurance policy bear an endorsement that it may not be cancelled and that it must be renewed unless the insurance company gives at least ten days' notice of cancellation to the landlord. Some insurance companies will agree to give the landlord as much as thirty days' notice of cancellation or failure to renew. Then, within the period provided for in the insurance policy, the lease should permit the landlord to arrange for other insurance for the premises at the expense of the tenant.

Catchall Provisions

Landlords assert that the default clause needs a catchall provision which applies the default provisions to the failure to comply with every obligation not previously mentioned in the default clause. This premise is one that has not been attacked much in the past. I'm hoping negotiators will begin to look at this idea more carefully.

Assume that the lease prohibits the tenant from maintaining vending machines and that the tenant violates this provision. For some reason, the landlord doesn't like vending machines and gives the tenant notice of default. Within the following thirty days, the tenant removes all vending machines but one, and that one is a pay toilet. The tenant doesn't believe that a pay toilet is a vending machine. But in subsequent litigation, a court rules that it is and evicts the tenant. Does this make any sense?

In recent years, many landlords have been reviewing their leases with a magnifying glass to see if they could discover any pretext to oust tenants who aren't paying rent at current inflationary rates. As you know, leases are so complicated and tenants have so many obligations, it may be too easy for a landlord to find one or two defaulted obligations.

Some courts have refused to enforce default cancellation provisions in leases if they determine that the obligation the tenant failed to comply with is not material.[1] Other courts have been willing to enforce default cancellation clauses literally and under circumstances that may seem harsh to you and me.[2] Courts should not be required to do handsprings to arrive at a just conclusion. The negotiators should organize the lease so that it makes sense; and a lease doesn't make sense if the tenant can lose its leasehold interest for failure to comply with a minor lease provision.

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[1] Lundin v. Schoeffel, 465 Mass. 465, 45 N.E. 933 (1897); Madison Stores, Inc. v. Enkay Sales Corp., 207 Misc. 1091, 142 N.Y.S.2d 132 (Mun. Ct. Manhattan 1955). See also Madison 52nd Corp. v. Ogust, 49 Misc. 2d 663, 268 N.Y.S.2d 126, *aff'd* 52 Misc. 2d 935, 277 N.Y.S.2d 42 (1st Dep't 1975); Rubenstein Bros. v. Ole of 34th St., Inc., 101 Misc. 2d 563, 421 N.Y.S.2d 534 (Civ. Ct. 1979); Pollock v. Adams, 548 S.W.2d 239 (Mo. App. 1977); Hignell v. Gebala, 90 Cal. App. 2d 61, 202 P.2d 378 (1st Dist. 1949); Beck v. Giordano, 144 Colo. 372, 356 P.2d 264 (1960); Nissen v. Wang, 105 Misc. 2d 251, 431 N.Y.S.2d 984 (Civ. Ct. 1980); Fli Hi Music Corp. v. 645 Restaurant Corp., 64 Misc. 2d 302, 314 N.Y.S.2d 822 (1st Dep't 1972); Keating v. Preston, 42 Cal. App. 2d 110, 108 P.2d 479 (3d Dist. 1940).

[2] Weissman v. DeNoto, 66 A.D.2d 843, 411 N.Y.S.2d 394 (2d Dep't 1978), *appeal dismissed* 47 N.Y.2d 833 (1979); L.C. Hudson v. Price, 273 S.W.2d 518 (Mo. App. 1954); Pfitzer v. Candeias, 53 Cal. App. 737, 200 P. 839 (3d Dist. 1921).

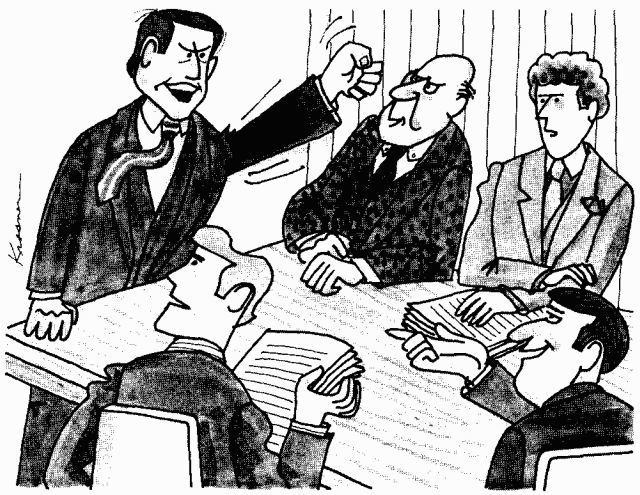
THE CURE PERIOD

Few landlords dispute the proposition that a tenant should not lose its leasehold interest for failure to comply with a lease obligation unless the landlord gives notice of the failure and the failure continues for a period of time. Most often, the period of time is thirty days. However, some landlord-oriented form leases make this period ten or twenty days, and some tenant-oriented form leases make this period forty-five or sixty days.

The cure period should start after the landlord notifies the tenant of its failure to comply. It should be extended when the cure cannot be completed within the time allowed. Except in the case of obligations to pay money, tenants should insist that the cure period be extended when it is not reasonable to expect completion within the normal cure period. The cure period should be extended by any time necessary to permit completion of the cure as long as the tenant commences the cure promptly after notice and diligently prosecutes the cure.

DOUBLE NOTICE PROVISIONS

Although it doesn't happen very often, it does happen that a landlord may try any tactic available to get a tenant out. Such a landlord might try to enforce every provision of the lease. If the tenant's failure to comply with even a minor provision of the lease can result in a cancellation of the lease, it's just possible that an unprincipled landlord could discover that the tenant has, in fact, failed to perform one of its minor obligations and give notice of default in the hope that the notice will be overlooked.



Things being what they are in large organizations, there's a good chance that the notice would indeed be overlooked. Why? The people who run real estate and accounting departments of large organizations get loads of mail. It's not inconceivable that they would neglect to read it all. There's also the possibility that a notice might arrive at a time when the people in charge are traveling or are on vacation.

The prospect of being evicted from a prosperous store for a minor oversight has become so great that some chain store organizations are insisting on extra precautions in the default provisions of their leases. Some chain tenants now insist upon two notices and two opportunities to cure potential defaults before their failure to comply with the terms of a lease can result in a termination of their leasehold interest. The theory is that one notice might be overlooked, but two notices won't be. If personnel practices in chain store organizations deteriorate and the people in charge become more lax than they are now, we may hear of triple notice provisions in days to come.

What does all this mean to a landlord? Multiply the inconvenience a landlord incurs as a result of single notice provisions by two. A tenant could be able to delay paying rent every month until he got two notices and ten or fifteen more days elapsed after each notice. In the meantime, the landlord might have trouble in meeting his mortgage payments and other obligations.

DEFAULT AS A RESULT OF EXTERNAL EVENTS

Some leases prohibit assignment of the tenant's leasehold interest. The principal stockholder of a corporate tenant may nevertheless effect a transfer by selling his stock to another person. Some courts have ruled that under these circumstances, the leasehold interest has not been transferred, and the assignment clause has not been violated. A landlord who is concerned about this problem can protect its interest by insisting upon a lease provision that makes the transfer of the tenant's stock a default under the lease.

A less satisfactory way to attempt to solve this problem is to put an extra provision in the assignment clause. Thus the assignment clause might provide that the tenant is required to prevent its stockholders from transferring their stock. These clauses are troublesome because corporations don't have authority to control the activities of their stockholders.

Landlords encounter a similar problem when they try to enforce a radius clause against a chain store organization. If the tenant is a subsidiary of a chain store organization and agrees not to open another store within a given distance from the shopping center, that restriction may not prevent the parent corporation or other subsidiaries from opening a store in the designated areas. Attempting to solve this problem, some leases provide that the tenant will not permit its parent, or other subsidiaries of its parent, to open stores within the prohibited territory. This solution may not be effective because a corporation can't bind its parents or affiliates unless it is their agent.

An appropriate way to handle this situation is for the landlord to require that the tenant's parent agree not to open any stores, or to permit any subsidiaries to open stores, within the radius. This can be done in a separate agreement or in a guaranty of the lease.

Another effective way to handle this situation is to provide in the default clause that if the tenant's parent or an affiliate opens any store within the radius, that act would constitute a default under the lease.

Thus a default can constitute the occurrence of an event which is not a failure to comply with a provision of the lease and can result from the action of a party who is not technically a party to the lease.

DIVINE FORGIVENESS

As you can see, the subject is neither interesting nor easy to analyze. The seven-day period within which Harry required the memo to be prepared passed slowly and painfully. I delivered the memo to Harry on October 21.

As I handed the memo to Harry, he warned me that it better be good and that, if I knew what was good for me, I would get the lease signed before October 31.

I met day after day with J. Jeffrey Flanken and Rock Monis. Once in a while, Harry would attend our meetings.

Big disagreements were narrowed and small disagreements were eliminated. The process took four more drafts. In successive stages, the open points of disagreement were reduced from 112 to 28, then to 13, and finally there were none.

There was an early snowstorm on the morning of November 19. The snow was so thick that traffic was choked for miles. I, who travel to work by the Long Island Railroad, was on time. (The 6:55 A.M. train is always on time on November 19.) But everyone else was late.

Harry arrived at 10:25 A.M. As he shook snow all over the carpet in the reception area, he was greeted by the secretaries with the kind of warmth that only a lifelong devotion to the prosperity of the office can induce.

As he sat down and began to threaten me for the first time that day, I shoved a prune danish in his mouth and poured a cup of coffee for him. He liked it.

Rock Monis and J.J. Flanken arrived at 11:32 A.M. They were wet, cold, and, as usual, unhappy.

I gave Harry and Rock ball-point pens and summoned a notary public. The ceremony was about to begin.

Harry signed each counterpart of the lease. I passed Harry's pile to Rock.

Rock's right arm dropped slowly toward the signature line. I thought, "This is it."

But this wasn't it. As if repelled by a negative magnetic force, Rock's arm jerked back and his hand ended up at shoulder height.

Harry and I said nothing. We were afraid.

Now Rock was poised to try again. Gently Rock Monis' signing hand was lowered to the lease's signature line. But it wouldn't or couldn't reach the line.

Rock started all over again. I think he sincerely wanted to get his pen to the signature line, but something prevented him from reaching his goal. Was it a conditioned reflex? Was it a disorder of the elbow? Was it a mysterious external force?

Finally, Rock Monis said that he ought to brief his board of directors on the deal before he actually

signed the papers. He assured Harry not to worry and that he wasn't looking for a way to renegotiate. He said, "Just be patient." Rock and J.J. left.

Harry turned all his fury on me. This rotten state of events was caused by my low p.p.h. and absolute incapacity to follow rational leadership.

I: What can I do, Harry? Tell me.

Harry: Trail that bald-headed bastard. Become his shadow. Call him every day until you get him to sign. Didn't they teach you anything in law school?

And so I called Rock Monis every afternoon. I couldn't forget to call Rock daily because Harry called me daily. Each time I called, Rock's secretary politely told me that he was out of the office.

Finally I solved the problem. If Rock was always out of the office when I called in the afternoon, perhaps he would be there early in the morning. And so he was, at 8:30 A.M. on December 12.

I: Rock Monis, please.

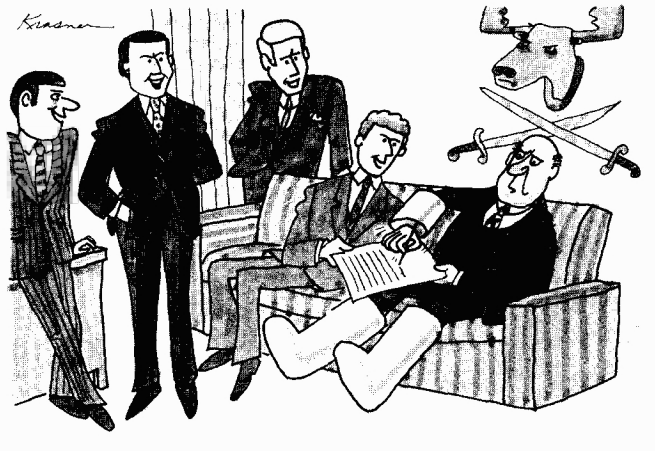
Rock: Speaking.

I: Rock, how are you?

Rock: Very well indeed. And how are you?

I: Oh, my health is fine, but the lease for the new location in Howe's Bayou is getting me down.

Rock: Don't let it do that. Everything gets done—in time.



I: That's the problem. Time. Harry doesn't recognize the concept. He blames me for everything.

Rock: Well, you and I both know that it's not your fault. I'm just too busy to stop everything for just one deal.

I: But Rock, please. If the lease is O.K. and your board of directors has approved it, can't you stop for forty-five seconds to sign it?

Rock: Sure I can, but I've got a problem today. I'm leaving for the airport in half an hour to catch a flight to Edinburgh, Scotland for a Highland Dance festival. I've been dreaming about this trip for months. In fact, I've been taking lessons every afternoon for weeks. How fast can you get here with the signature copies?

I: It takes half an hour.

Rock: Well, give it a try.

So I gave it a try. But the elevator wouldn't come right away, and I couldn't find a cab, and traffic was terrible.

And he left before I got there.

Rock's secretary was sympathetic. She said that he was really sorry to miss me. He should only know how sorry I was to miss him. She assured me that Rock would return from his trip on December 16.

Harry wouldn't believe all of this and insisted that I had lost all sense of responsibility and worse —perhaps I was losing all fear of Harry.

Not so.

I counted each day until December 16. Rock Monis' secretary had arranged his schedule so that he could see me at 11:45 A.M. on that day.

I was there promptly and was ushered into Rock's office at the precise scheduled moment.

At first I saw only J.J. Flanken. He had a worried look. What could be wrong?

And then I saw two male nurses assist Rock Monis to his desk. He had plaster casts on both legs, and (shudder) he had another plaster cast on his right wrist and hand. He had, I was told, wriggled or leaped the wrong way in his nationalistic enthusiasm for Scottish dance, and then he fell in an awkward position causing multiple egregious injuries to his body (unfortunately including his signing hand).

Despite his misfortune, Rock was in good spirits, and he inquired about my health and spirits. (Health was O.K. but spirits were on the downside.)

Everybody present knew that it was now or never. We had to find some way for Rock to sign despite the fact that he couldn't move his hand.

I begged him to try. Rock said he would try. With a superhuman effort he held the pen in his plaster cast and managed to make a few jerky movements over the paper. Later in the day I

showed the signed lease to Harry. He looked at Rock's signature. What he saw was a triangle followed by a jagged line.

Harry ascended to the apex of fury. What was this, a joke, a fraud, or a communist plot? I begged him to believe me. I swore before a notary public that the signature was neither forged nor coerced. Finally, Harry called Rock, who personally verified what had happened. Harry then sent a messenger to J.J. Flanken and got Flanken to deliver a sworn statement that he had seen Rock execute the lease.

At last Harry was satisfied. He reached into his desk and handed me a check for assorted bills that hadn't been paid over the last three years. And then, with a dramatic ecclesiastical motion, he placed his right hand with all fingers extended on my head and said, "We have forgiven you."