COMMERCIAL LEASE LAW 2010:
Cases and Commentary on Avoiding Ambiguous Lease Language

Commercial owners have much to learn from the case law issued by U.S. federal and state courts over the past year. The biggest challenge for owners seems to be drafting clear lease language, which can protect them from lawsuits filed by tenants arguing that they have rights the owner didn’t intend to give them. If your lease provisions are ambiguous—failing to clearly define your and your tenant’s rights and obligations—a court could interpret the lease favorably for your tenant.

In this issue, you will find the most significant commercial lease law cases from the past 12 months that illustrate the importance of negotiating narrow lease terms to protect yourself from litigation. This issue’s commentary from Insider experts shows you how to draft your lease so that you can avoid—or win—lawsuits such as these.

➤ Property Manager’s Testimony Contradicted by Evidence

Facts: A tenant rented commercial space for its beauty salon under a 10-year lease that required rent plus a percentage of the building’s operating costs (overhead charge). The estimated monthly overhead charge was $800, and the owner was obligated to calculate the actual overhead charge at the end of the calendar year and charge for underpayments or apply credits as needed.

The tenant refused to compensate the owner for its underpayments for 2006, claiming that the calculations were not accurate because they included expenses related to separate addresses. The owner sued the tenant for the unpaid overhead charge.

The trial court ruled in favor of the tenant because it found ambiguities in the lease that raised questions about whether some items had been properly included in the overhead charge—namely, the charges for the owner’s other addresses. The trial court reformed the lease and ordered that an accounting be done for the overhead charge for each calendar year. The owner appealed.

Decision: The appeals court upheld the trial court’s decision in part and reversed in part.

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The property manager testified to the trial court that the building in which the tenant leased space actually consisted of several distinct addresses and that all charges for the building were assessed together and then split evenly among the tenants at those addresses. He said that, therefore, the owner was correct in including expenses from the other addresses in the overhead charge, because the expenses were all for one location with one bill for electric, gas, and water.

But the appeals court agreed with the trial court that the tenant’s building did not encompass the other addresses and that their expenses should not have been part of its overhead charge. A land survey showed that those addresses actually belonged to multiple other buildings and a photograph showed that the tenant’s building was a single, three-story building unattached to them.


LESSON LEARNED: Negotiate Express Permission to Share Operating Costs

“Let this case be a warning to all owners who utilize lease forms that rely on brief, or intentionally vague, provisions addressing the ‘operating costs’ that will be passed through to tenants,” warns Justin W. Leach, an attorney in Nashville, Tenn. This case indicates that “short and sweet” may not be the best approach from the owner’s perspective—especially when describing the costs that are reimbursable by tenants,” he adds.

To sufficiently define the operating costs associated with a property, owners should take note of this ruling and be sure to err on the side of clarity and detail when describing the types of costs that they plan to charge back to tenants. Here, where there was a lack of clarity in the applicable lease provision, the court was unwilling to simply give the owner the benefit of the doubt about the overhead charges that the tenant was required to pay. In fact, this case suggests that in the absence of clear language as to the costs that can be included in the operating costs or overhead charges passed through to tenants, courts may be willing to take it upon themselves to determine what constitutes fair and appropriate expenses.

“Specifically, this ruling should be a wake-up call for owners who routinely spread costs among the tenants of multiple properties,” says Leach. Owners who operate multiple buildings that are a part of the same development or otherwise share costs will want to make sure their lease forms expressly permit this type of sharing, or “spreading,” of operating costs—regardless of whether particular costs are billed to a specific address that is different from the individual building where a tenant is leasing space, Leach points out.

Leach, an attorney with Walle Lansden Dortch & Davis, LLP, says that owners should consider including this Model Language after checking with their attorneys.

MODEL LANGUAGE

For purposes of determining Operating Expenses, if the Building is part of a complex, development, or group of individual buildings or structures collectively owned or managed by Landlord or its affiliates, or collectively managed by Landlord’s managing agent, the Property shall, at Landlord’s option, also be deemed

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to include such other of those buildings or structures (and related facilities and parcels on which the same are located) as Landlord shall from time to time designate in its discretion, and Operating Expenses for the Property may include costs related to, or billed directly to, those other buildings, structures, and facilities, in which case, Landlord may allocate Operating Expenses within such complex or development and between such buildings, structures, and parcels in Landlord’s reasonable discretion in accordance with sound accounting and management principles.

**Tenant’s Exclusive Use Provision Applied to Other Buildings**

**Facts:** A fast-food restaurant had an exclusive right to sell “sandwiches and subs” in a shopping center that consisted of three buildings (Building A, Building B, and Building C). The fast-food restaurant tenant was located in Building A. Its exclusive use provision stated: “Throughout the Term … Tenant shall have the exclusive right in the Shopping Center to engage in the sale of delicatessen and submarine type sandwiches.” Knowing this, the shopping center’s owners allowed a computer services company in Building B to become an Internet café that sold Internet access, drinks, and food, including sandwiches.

The fast-food restaurant tenant sold its business and assigned its lease—including the exclusive use provision—to a new tenant. It did not discuss the fact that the Internet café was serving sandwiches—the sales of which had escalated to a high of 30 percent to 50 percent of its total sales over several months.

When the new tenant discovered that the Internet café was selling sandwiches, it sued the owners, claiming that the exclusive use provision in its assigned lease had been breached by the sandwich sales in Building B. The owners argued that the exclusive use provision did not apply to the Internet café, only competing businesses in Building A.

The court ruled that the new tenant’s exclusive use provision extended beyond Building A to include the Internet café in Building B, prohibiting it from selling sandwiches. The owners appealed.

**Decision:** The appeals court upheld the trial court’s decision in favor of the new tenant.

**Reasoning:** The appeals court stated that the new tenant’s lease, the layout of the shopping center, and the purpose of the exclusive use provision were evidence that the provision applied to Building B.

Under the lease, the exclusive use provision applied “in the Shopping Center.” The appeals court pointed out that several lease provisions defined “Shopping Center” to include all three buildings. For example, the “Shopping Center” had only one name and address listed for the all three buildings in the lease. And the site plan for the “Shopping Center” included all three.

The appeals court decided that the term “Shopping Center” must be interpreted to apply to all three buildings, because to rule otherwise would undermine the “full force and effect” language of the exclusive use provision—that is, to limit the new tenant’s competition in the shopping center—by permitting the owners to lease space in Building B to a competitor that could devastate the new tenant’s business.

The purpose of an exclusive use provision is to protect a tenant by reducing the prospect of future competition within the same shopping center, the appeals court noted.

**Garcha et al. v. Central Plaza-Union City, L.P., December 2009**

**LESSON LEARNED:**

**Restrict Portion of Retail Complex Covered by Tenant’s Exclusive**

Exclusive use provisions were once considered essential for a tenant in a retail complex, points out Louisiana real estate attorney Marie A. Moore. Now that retail chains are filing for bankruptcy protection and closing stores, tenants are more concerned about being the only tenant left standing, and are focusing more on cotenancy provisions than on exclusive use rights, she notes. However, exclusive use provisions remain important to many tenants, particularly food court tenants that specialize in particular products. These tenants would lose sales if the owner permitted another tenant to sell the same product in a nearby space.

“Owners can grant these rights if they craft the tenant’s exclusive use provision carefully,” warns Moore. First, the owner should identify the products for which the tenant really needs protection. Although an exclusive with respect to a fairly discrete product such as “pizza” may not cause trouble in the future, the owner should avoid granting an exclusive with respect to a broad category of products, such as sandwiches, soft drinks, or cookies. Today, an owner may not even wish to grant an exclusive with respect to wraps and smoothies since many other tenants may sell these items as a minor part of their broader product mix.
“To give a tenant comfort with respect to its specialty while maintaining the right to lease to a tenant with a broad range of offerings, the owner should specify that the exclusive use provision will not be violated by another tenant’s incidental sale of the same type of product,” suggests Moore. For example, a provision granting a tenant the exclusive right to sell cookies should state that the owner will not be in violation of the exclusive if another tenant also sells cookies as a minor part of its business. The tenant may be satisfied if it is assured that cookies cannot account for more than 5 percent of any other tenant’s sales.

Second, the owner can restrict the portion of the retail complex covered by the tenant’s exclusive, notes Moore. If a retail complex is large and contains several food courts, then the owner should restrict the exclusive to the particular food court in which the tenant is located. The owner may also be able to stipulate that the exclusive covers only a particular building or wing of the retail complex.

“When an owner grants a tenant an exclusive, however, it needs to remain aware of the exclusive when it enters into other leases,” stresses Moore. “Even if the owner has limited the product for which the exclusive was granted and the portion of the retail complex affected by the exclusive, it must remember the tenant’s rights and incorporate the exclusive as a use prohibition in any other lease of the same type in the affected portion of the retail complex,” she notes.

Owner Entitled to Full Rent for Abandoned Buildings

Facts: An owner sued a tenant for breaching its two leases after the tenant abandoned both of the owner’s buildings that it rented and refused to pay the remaining rent due under the leases. Because the tenant failed to appear at two summary dispossess proceedings for nonpayment of rent, the court ruled in favor of the owner. This established that the tenant had breached the leases. However, the court denied the owner’s request for a judgment in her favor without a trial as to the tenant’s liability for breaching the leases. The owner appealed.

Decision: The appeals court reversed the lower court’s ruling.

Reasoning: The appeals court stated that the tenant was liable for breach of its leases, entitling the owner to a judgment in her favor without a trial. It said that, as a consequence of the tenant’s failure to appear at the summary dispossess proceedings, the owner’s allegation—that the tenant had breached the provisions of both leases requiring payment of rent—should have been deemed “admitted” for the purpose of the owner’s request for a judgment in her favor without a trial. In other words, because the court ruled at the summary dispossess proceedings that the tenant was liable for breaching its leases, it had to grant the owner’s request for a judgment without a trial in her favor based on the same issue.

Moreover, on appeal, the tenant didn’t contest the validity of the judgments made against it at the summary dispossess proceedings. Rather, it claimed that in furnishing the names of prospective tenants to occupy one of the buildings for the balance of its lease term, and that the owner had “unreasonably withheld consent to an assignment of the lease.”

The appeals court pointed out that the lease contained an express restriction against assignment without the owner’s written consent, but had no clause prohibiting the owner from unreasonably withholding consent. Therefore, the owner was within its rights to withhold its consent to an assignment. “Once the tenant abandoned the premises prior to the expiration of the lease, the owner was within its rights under New York law to do nothing and collect the full rent due under the lease,” the appeals court said.

The tenant also argued that the owner’s failure to mitigate damages by reletting the premises or accepting the assignees proposed by the tenant breached an implied covenant of good faith. The appeals court noted that, in the case of every contract there is an “implied undertaking on the part of each party that he or she will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his or her part.” Here, however, the owner acted within its rights in refusing to accept an assignment of the lease and did nothing to prevent the tenant from performing its obligations under it—most notably, its obligation to pay the rent.

REP A8 LLC v. Aventura Technologies, Inc., et al., December 2009

LESSON LEARNED:
Use Express Restrictions, Permissions in Lease

In this case, the owner prevailed not only because the lease contained an express restriction against assignment without written consent, but also because the lease language didn’t prohibit “unreasonably withholding consent.” Thus, the owner could legally withhold its consent, whether for a good reason or not—enti-
tleing it to collect rent from the tenant here. However, the owner could have avoided the lawsuit altogether if it had been more careful when negotiating the lease and included a clause expressly allowing it to withhold its consent for any reason at all.

- Tenant with Stairwell Access Could Not Terminate Over Broken Elevator

Facts: A garment manufacturer tenant signed a lease for the seventh-floor of a building. The tenant and owner acknowledged that because the building’s elevator was undergoing renovations, it might not be available for service at the start of the lease term. To account for the possible delay, the tenant and owner included in the lease a secondary commencement date that the tenant could wait until to move into the space.

The elevator work was not completed until several weeks after the second commencement date. Meanwhile, the tenant had already moved into the building and had begun installing new hardwood flooring. The tenant already had paid the first month’s rent and a security deposit, but stopped paying rent after the elevator was not completed by the secondary commencement date. The tenant argued that the lease had been terminated because of the delay, prompting the owner to send its own notice of termination for nonpayment of rent to the tenant.

The owner sued the tenant, demanding that it vacate the space and pay the rent that it owed. The tenant asked the court for a judgment in its favor without a trial. The court ruled in favor of the tenant, and the owner appealed.

Decision: The appeals court reversed the lower court’s ruling.

Reasoning: The appeals court noted that the tenant couldn’t show that it had lost any expected sales, revenue, or customers due to the lack of elevator service. Thus, the tenant had not been deprived of the “expected and intended use of the premises” it was owed under the lease, despite the seven-week delay in service.

Furthermore, the court noted that the tenant’s installation of the hardwood flooring reflected its active cooperation in getting the space ready for future business, which rendered its argument that it had not been given the possession contemplated by the lease inaccurate, the appeals court said.

The lease language also stated that the elevator renovations might not be complete at the time of the secondary commencement date and made adjustments accordingly, which the court explained was an acceptable provision for such a possibility. Finally, the court found that the tenant’s principal, employees, and contractors could—and did—gain access to the premises from the stairway.

- Pacific Coast Silks v. 247 Realty, LLC, July 2010

LESSON LEARNED: Use Precise Definitions

While the outcome of this case was favorable for the owner, it could have been different if the tenant had been able to show that the lack of elevator service had caused any harm. As New York real estate attorney Craig Ingber noted in the Insider’s 2009 Special Issue, “Imprecise definitions—or perhaps too many definitions within a lease—can result in unintended consequences.” In many cases, those consequences are harmful to the owner, not the tenant.

Insider Sources

✓ Use Surveillance Video to Show Reasonable Maintenance

Install security cameras not only to help you deter and catch criminals, but also to help you prove to a court whether or when a dangerous condition existed on your property. That’s important because the length of time a dangerous condition has existed on your property where an accident occurred is a consideration in determining whether an owner acted reasonably. If the dangerous condition existed long enough so that you should have known about it, and you did nothing to make the area safe, the court is more likely to find you at fault for an injury.

Consider what happened in this New York case. A customer was injured in a mini-mart parking lot when he became entangled in a plastic band that had been
used to bundle newspapers. The customer sued the mini-mart’s owner.

To establish that the owner had actual or constructive notice of the “dangerous condition,” which would make it liable for the injury, the customer had to show that the condition was “visible, apparent, and in existence for a sufficient period of time so as to allow the owner an opportunity to take corrective action,” the court said.

Surveillance video footage of the parking lot showed that the band had appeared in the parking lot at 8:50 a.m. and that the customer had fallen on it at 9:18 a.m. The court concluded that the owner was not liable for the customer’s injuries because the video established that the owner had maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the condition.

- Perry v. Cumberland Farms, Inc., December 2009

✗ Don’t Delegate Duty to Provide Safety Devices

Don’t assume that the tenant—and not you or your property manager—is responsible for providing safety devices, such as ladders, to contractors that tenants have hired to do work at your building. If your state law allows you to designate in the lease that the tenant has this responsibility, then the tenant—not you—will be liable for negligence regarding safety equipment. Otherwise, you may end up in a case where it’s difficult to tell who is liable when a contractor is injured when using safety devices—like ladders—that are not his property.

For example, a sporting goods store tenant at a shopping mall hired a contractor to hang its sign and provided a ladder for him to use while working. The contractor claimed that he had warned the tenant and mall manager that the feet on the ladder were worn out, but was told to “just continue working with it.” The contractor fell off the ladder while hanging the sign, suffering severe injuries. The contractor sued the mall owner, tenant, and manager, claiming that he fell because the tenant and manager failed to provide him with a secure ladder that he could use while working at an elevated height.

The state’s labor law required owners and their agents, such as the mall owner and manager, to provide workers—including contractors—with appropriate safety devices to protect against accidents including “falling from a height.” Despite the fact that the owner, tenant, and manager knew that the ladder was faulty, each claimed that the other two were responsible for replacing it.

But the duty to provide safety devices such as ladders was nondelegable—that is, the duty could not be assigned to another person—the court pointed out, because the purpose of the law is to protect workers by placing the ultimate responsibility to provide adequate safety equipment on the owners and owners’ agents (here, the owner and manager) of the properties where the work is being done.

- Shim v. Vornado Realty Trust, et al., June 2010

✓ Fulfill Duty of Extraordinary Care for Elevator Passengers

Be especially diligent about maintaining and repairing elevators in your building. Accidents caused by malfunctioning elevators may expose you to greater liability than typical accidents on your property. That’s because the “reasonableness” standard doesn’t apply; rather, a heightened standard applies. This means that you must frequently check elevators on your property for problems and repair them immediately. You can be held liable for elevator defects that you knew or should have known about.

Consider the following Georgia case: Two employees were trapped and repeatedly bounced up and down uncontrollably for almost an hour and a half in a malfunctioning elevator in an office building that was owned and managed by a commercial property management company. Both employees needed surgery for injuries they had suffered from the bouncing. They sued the property management company, claiming that it had negligently maintained the elevator.

The property management company contended that the employees had failed to present any evidence that it knew about any defect that may have caused the elevator to malfunction. It argued that it could not be held liable for the injuries because it “had inspection and repair procedures in place and used all reasonable precautions to protect its passengers from harm.”

However, elevator-equipped building owners and managers must exercise extraordinary diligence to protect their passengers or guests. Moreover, an owner and manager could be held liable for even slight negligence in maintaining an elevator in a case like this one.

Here, several witnesses’ testimony that they had reported problems with the elevator, evidence showing
repeated incidents with the elevators, and the property management company’s records presented questions as to whether the property management company knew or should have known that the elevator was dangerous and failed or neglected to take the proper precautions to prevent or mitigate the employees’ injuries.

Beach v. B. F. Saul Property Co., March 2010

✓ Maintain “Special Use” of Pedestrian Sidewalk in Reasonably Safe Condition

Even if you believe your municipality is responsible for maintaining the sidewalk outside your building, it’s a good idea to keep the sidewalk in a reasonably safe condition for pedestrians and exercise “reasonable care” to guard them from injury. An injury on the sidewalk may give rise to a case that reveals you have more responsibility for maintaining what you considered to be a public space than you thought.

For example, in Aberdeen, S.D., a pedestrian was injured when he fell through a concrete-filled metal grate in a public sidewalk. The grate covered a defunct stairwell to the basement of a building on the property abutting the sidewalk. The stairwell had been reconstructed with the grate by the abutting property’s owner in 1968 in accordance with city specifications. Before the reconstruction, it had been installed solely for the abutting owner’s convenience. The pedestrian sued the abutting owner for negligence.

The pedestrian appealed the lower court’s decision that, because the sidewalk had been rebuilt by the abutting owner pursuant to the city’s demands, the city, rather than the abutting owner, owed a duty of care to pedestrians using the sidewalk. The appeals court agreed with the pedestrian because the “special use doctrine”—under which an abutting owner could be held liable if an injured pedestrian showed that the sidewalk was constructed in a special manner for the abutting owner’s benefit—applied. Here, the abutting owner’s stairwell specifically had been constructed for his benefit to allow him to use the sidewalk in a manner different from that of the general public, making it a special use of the sidewalk.

An abutting owner who makes special use of a sidewalk owes a duty to maintain it in a “reasonably safe condition for pedestrians lawfully using it, and must exercise reasonable care to guard the public from inju-

ry.” The abutting owner in this case would be liable to anyone injured as a direct result of his negligence.

Locke v. Gellihaus, February 2010

✗ Don’t Rely on Out-of-Possession Status to Avoid Liability

If you don’t maintain any control over your property, don’t assume that fact will shield you from liability for an accident. It is uncommon for out-of-possession owners to win liability cases with this argument. For example, if you are aware of a dangerous condition or there is an incident of gross negligence at your property, it won’t matter that you don’t have much to do with day-to-day operations.

In the following case, an out-of-possession owner got lucky. But the court warned that owners can’t rely on their status as out-of-possession landowners to relieve them from liability in every situation. Here, a handicapped shopper was injured when a malfunctioning door of a mall elevator closed on his leg. The customer sued the city, which owned the mall; the realty company that leased and operated the mall; and the elevator company, which had been retained by the realty company to maintain the elevator.

The shopper produced evidence of prior complaints that the door of the elevator closed too quickly. As the lessee and operator of the mall, the realty company had a duty to maintain and repair the mall’s elevators. In this case, it was liable for the shopper’s injury because it had actual or constructive notice—from the prior complaints—of a defect in the elevator that closed on him.

The elevator company also was liable for the accident because it failed to show that it had used reasonable care to discover and correct the problem with the door—a condition that it should have been able to find. And the maintenance records for the elevator were insufficient to establish that the door of the elevator was functioning properly at the time of the accident.

However, because the city had demonstrated that it was an “out-of-possession landowner” that retained no control over the premises and was not contractually obligated to repair unsafe conditions, it could not be held responsible for the malfunctioning elevator. In situations of gross negligence, however, an out-of-possession owner wouldn’t be so lucky, the court noted.

Green v. City of New York, et al., August 2010
Whether you are a property owner or manager, you need an all-in-one resource to help you formulate commercial leases that are to your advantage. This Second Edition of BEST COMMERCIAL LEASE CLAUSES provides guidance on how to structure your leases and maintain your tenants’ satisfaction. The topics covered include:

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