

## What's Lurking In Your Lease?



**By Christopher R. Agostino, Esq.**

Commercial tenants regularly enter into lease agreements without the advice of counsel. As optimistic as most entrepreneurs are, it is rare that the language in a commercial lease is not scrutinized at one time or another as issues arise over the course of a 15-20 year lease term. The terms that become relevant are usually not the simple default-for-non-payment-of-rent variety. Rather, there are many more mundane, but no less critical issues that arise from time to time and cause tenants and landlords to scramble through the pages of their signed lease.

The assignments section in any lease is one area that regularly breeds discussion outside of the context of default. Standard form commercial leases largely prohibit assignments, absent landlord consent. Landlords want to exercise control over their space and choose tenants that they approve in their discretion. However, landlord's interests must be balanced with a tenant's need to run its business and maximize the value of its leased space. For instance, can a tenant take on a partner, sell its shares or assets, conduct estate planning, borrow money or even enter into a franchise agreement? Each of these seemingly innocuous events in the life-cycle of a business requires a careful review of the assignments section in a lease before taking any action. Negotiating the assignments section with an eye towards these issues before the lease is signed can avoid a disappointing phone call from the landlord down the road.

One often overlooked, but critical term in the assignment context is the landlord's recapture right. Consider the case of a restaurant that is four years into a ten-year lease term when it is asked to sell its business. Obviously the remaining term of its lease is the most important asset the restaurant owns. Many standard form commercial leases grant the landlord the right to terminate the lease agreement and re-capture the leased space immediately upon receipt of any request from the tenant to assign the lease. This so-called "re-capture" right is often overlooked in lease negotiations, but it can be particularly harsh in its application and effectively strips the tenant of any ability to sell its business without landlord approval. Any value attributable to the tenant's business and its identity at the leased location is immediately captured by the landlord.

This includes the value of any leasehold improvements to the space, whether paid for by the tenant or the landlord. As noted, in many commercial lease forms the mere request to assign the

lease triggers the landlord's right to re-capture; therefore, a tenant may be giving up its ability to assign the lease before a discussion with the landlord even begins.

Competent counsel is not only necessary to identify issues such as re-capture, but knowledge of the rental market and landlord tendencies can also help to negotiate the terms of any re-capture right or eliminate such terms altogether.

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