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S-p-e-l-l out clear lease terms

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Throughout most any lease, there are at least half a dozen provisions that require the occurrence of an event before the other party is required to act.

A good example is a rent commencement clause, which may condition the tenant's obligation to pay rent upon a fixed number of days after possession or upon opening for business. Another is a co-tenancy, which might relieve a tenant from its obligation to pay minimum rent if shopping center tenancy falls below a minimum level. Most lease drafters think these provisions are easy to draft. They're frequently wrong.

These provisions are described by lawyers as "conditions precedent" and "conditions subsequent." In the former case, some event must occur before the other party is obligated; in the latter, a party may be relieved of an obligation if the condition fails to occur. In addition, conditions may be express or implied.

An express condition, as the name suggests, must be explicitly drafted in the lease. There can be no doubt about what the parties intended — the obligation must be "unmistakable." Words typically used to express such unmistakable obligations include "if," "unless" and "until." Another useful phrase is "so long as."

Thus, a provision of a lease that states, "Tenant shall pay so long as 85% of the other tenants in the center pay," means just what it says. Once less than 85% of the other tenants pay, the tenant is no longer obligated to pay. Similarly, a typical co-tenancy clause that begins with "In the event that" and then states the co-tenancy requirement, will probably be enforced as a condition subsequent.

But what about a provision in which the landlord "warrants and represents" that 85% of the other tenants will pay or the mall will remain occupied? That may be nothing more than a promise. In that case, the tenant can still claim breach of contract, but it may not be able to claim that it has been relieved of any obligations.

It is essential that parties use these "unmistakable" terms to express a condition.

For example, take the two ways of stating the landlord's obligation to provide an end-of-year CAM statement. One way might be to write: "Within 90 days of the end of the Lease Year, Landlord shall provide the statement and Tenant shall be obligated to pay any increase in costs." That may sound like a condition precedent, but it's doubtful a court would agree.

Of course, there would be far less doubt if the provision read something along the lines of: "So long as Landlord provides the statement within 90 days... Tenant shall be obligated to pay any increase in costs."

The lease must also make clear what is being conditioned. For example, take the clause that says, "Landlord must audit Tenant's statement of Gross Sales within 90 days of receipt," or one that provides, "Tenant must re-measure its Premises within 90 days of Possession." If either party fails to audit or re-measure within 90 days, what do they lose? The right to audit or to re-measure? Or the right to sue?

It's a tough question, and the answer may hinge upon whether the parties have made clear the consequences of the failure to act. If the lease says nothing, then it is likely that the right to sue may be intact (though the right to re-measure or audit may be lost).

On the other hand, the question would be a lot easier to answer if each of those provisions then added, "in the event" landlord does not audit, or tenant does not re-measure, the statement of gross sales or the square footage of the premises will be final and conclusive.

An implied condition is even more difficult to judge. Certainly from a legal point of view, an implied condition is one that is imposed in order to give meaning to the parties' intention, or as a court might put it, to "do justice."

For example, a provision that requires the tenant to take possession of its premises when work is "substantially complete," contains the implied condition that all of the essentials needed by the tenant — water, access, electricity, etc. — will, in fact, be complete.

However, implied conditions are not easily found or enforced. This is especially true where one party may forfeit a right, for example the right to sue or commence arbitration, or to exercise an option.

When in doubt, use the unmistakable words, and make the consequences known.

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