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# Tips And Traps For Lease Amendment Negotiations



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*I write about commercial real estate negotiations, deals and legal issues.*



In negotiating lease amendments, owners and tenants must look out for issues not apparent to the naked eye. [-] **RANJAN SAMARAKONE**

Owners, tenants, and their attorneys and other advisers have lately spent a lot of time renegotiating leases to give tenants some breathing room in today's virus-driven shutdowns. Those negotiations tend to deal with a handful of economic issues again and again. Sometimes the parties should look beyond those issues and think about some other elements of

lease amendment negotiations that could produce unpleasant surprises later.

It starts with the negotiation process. Any owner will often not want to deal with the problem, while the unpaid rent piles up. In the meantime, owner and tenant send some emails back and forth about possible rent waivers or forgiveness. If the owner isn't careful, a court might decide after the fact that the owner agreed to something when they didn't really think they were doing that.

So a careful owner will state in every communication that it isn't legally binding and just constitutes discussions about a possible future lease amendment. An even more careful owner might insist on formal written communications (letters back and forth) with appropriate caveats every time.

If the owner waits and does nothing, a court might also decide, at a certain point, that the owner has waived some rights. So the owner really shouldn't just ignore the problem and hope it goes away. It won't. And the owner shouldn't expect the tenant to push these discussions along. It's often up to the owner.

Most leases do contain protective language to prevent unintended lease amendments or waivers, but courts sometimes ignore that sort of boilerplate language, so an owner should not rely on it.

If the owner and tenant do agree on some rent relief, how does that interact with other provisions of the lease? For example, perhaps the owner agrees to a 50% rent abatement for four months. But maybe the tenant was already entitled to a free month of rent during that abatement period. Does the tenant still get the free month of rent? Can the tenant apply that free rent to some other month?

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Similar issues arise if the lease expresses future rent adjustments as a percentage of the previous rent. What happens if that “previous rent” got chopped in half? How do you calculate the future adjustments?

These are great questions. The parties should answer them in their lease amendment, not leave them for future debate.

Sometimes the parties will agree to release funds from the tenant’s security deposit to pay some or all of the current unpaid rent. In that case, the lease will ordinarily require the tenant to immediately replenish the security deposit to bring it back to its original level. Instead, the owner and tenant need to either waive that requirement completely or allow the tenant to replenish the security deposit on a very slow schedule. Without that, the tenant hasn’t accomplished much.

If the lease already allows the tenant to reduce the security deposit over time, how does that interact with today’s lease amendment and possible release of funds from the security deposit? Will the tenant still have a right to the future reduction?

Whenever the owner agrees to any lease amendment, the owner also needs to think about third parties. First, the owner may still owe installments of brokerage commission to the broker who arranged the lease. The owner may want to try to renegotiate those payments, given that the lease wasn’t exactly as valuable as it was supposed to be. Owner’s leverage will depend on what the brokerage agreement says about conditions to payment of any future installment.

Second, the owner will probably have a mortgage lender. The mortgage may limit the owner's ability to agree to lease amendments. In that case, the owner may need the lender's approval. Failure to obtain that approval could have dire consequences.

Third, the lease will often be backed by a guaranty. The owner should insist that the guarantor consent to the amendment and acknowledge the guaranty will still apply to the lease as amended. Without that, the guarantor might claim the guaranty went away.

A later article will look at a few other mistakes that both owners and tenants can make in lease amendment negotiations, and how to prevent them.



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I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don't. It's important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals. **Read Less**

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