

**COMMERCIAL  
LEASING  
THIRD EDITION**

**VOLUME ONE**

**EDITOR-IN-CHIEF  
JOSHUA STEIN, ESQ.**

# TABLE OF CONTENTS

## VOLUME I

### PART I—OVERVIEW OF COMMERCIAL LEASING

- CHAPTER 1 INTRODUCTION: THE LEASING STATE OF MIND  
*Joshua Stein, Esq.*
- CHAPTER 2 MODEL TERM SHEET FOR LEASE  
*Joshua Stein, Esq.*
- CHAPTER 3 OFFICE LEASING TERM SHEET: TENANT'S AGENDA  
*Joshua Stein, Esq.*
- CHAPTER 4 MODEL COMMERCIAL LEASE  
*Joshua Stein, Esq.*
- CHAPTER 5 MODEL COMMERCIAL LEASE RIDER (TO SUPPLEMENT STANDARD REBNY OFFICE LEASE)  
*Abraham Krieger, Esq.*
- CHAPTER 6 TENANT'S CHECKLIST OF SILENT LEASE ISSUES (THIRD EDITION)  
*Joshua Stein, Esq.*  
*S.H. Spencer Compton, Esq.*
- CHAPTER 7 LANDLORD'S CHECKLIST OF SILENT LEASE ISSUES (THIRD EDITION)  
*Joshua Stein, Esq.*  
*S.H. Spencer Compton, Esq.*
- CHAPTER 8 MODEL NEW YORK LANGUAGE FOR SPACE LEASES  
*Joshua Stein, Esq.*

CHAPTER 9 HIDDEN COSTS IN LANDLORD'S LEASE  
FORMS

*Marisa J. Manley, Esq.*

CHAPTER 10 MODEL MEMORANDUM OF LEASE

*Joshua Stein, Esq.*

CHAPTER 11 COMMERCIAL LEASING BROKERAGE  
AGREEMENTS

*Lawrence P. Lenzner, Esq.*

CHAPTER 12 PREMATURE COMPENSATION AND HOW  
TO PREVENT UNPLEASANT BROKERAGE  
SURPRISES (WITH SAMPLE LANGUAGE  
AND MODEL BROKER REGISTRATION  
AGREEMENT)

*Joshua Stein, Esq.*

**PART II—SELECTED ISSUES**

CHAPTER 13 CONSTRUCTION AND THE COMMERCIAL  
LEASE

*Kevin J. Connolly*

CHAPTER 14 DRAFTING CONSIDERATIONS FOR  
ENVIRONMENTAL ISSUES IN COMMERCIAL  
LEASING TRANSACTIONS

*Lawrence Schnapf, Esq.*

CHAPTER 15 IMPACT OF TECHNOLOGY ON COMMERCIAL  
LEASING

*Kevin P. Groarke, Esq.*  
*Gary A. Goodman, Esq.*

CHAPTER 16 INSURANCE ISSUES IN COMMERCIAL  
LEASES

*Curtis Lee*  
*Herbert H. Feldman*

CHAPTER 17 REAL PROPERTY TAX CONSIDERATIONS  
FOR LANDLORDS AND TENANTS IN  
NEGOTIATING LEASES OF COMMERCIAL  
PROPERTY  
*James S. Grossman, Esq.*  
*Christopher J. Centore, Esq.*

**PART III—PARTICULAR TYPES OF LEASES**

CHAPTER 18 COMMERCIAL CONDOMINIUM LEASES  
*Matthew J. Leeds, Esq.*

CHAPTER 19 LEASES WITH FOREIGN SOVEREIGNS  
AND INTERNATIONAL ORGANIZATIONS  
*Andrew L. Odell, Esq.*

CHAPTER 20 GOVERNMENT LEASING  
*Robert C. MacKichan, Jr., Esq.*

CHAPTER 21 LEASES WITH NEW YORK STATE  
*Lloyd S. Lowy, Esq.*

CHAPTER 22 LEASE TRANSACTIONS WITH THE CITY  
OF NEW YORK  
*Leonard M. Wasserman, Esq.*

CHAPTER 23 THE RESTAURANT LEASE: SELECTED  
CONSIDERATIONS  
*Richard D. Eisenberg, Esq.*

CHAPTER 24 RETAIL LEASES  
*Bradley A. Kaufman, Esq.*

CHAPTER 25 ANCHOR TENANT RETAIL LEASING  
*Deborah Goldman, Esq.*

CHAPTER 26 TELECOMMUNICATIONS LEASES AND  
LICENSE AGREEMENTS  
*Jeffrey A. Moerdler, Esq.*

## VOLUME II

### PART IV—TRANSACTIONS AFFECTING EXISTING LEASES

- CHAPTER 27    ASSIGNMENT AND SUBLETTING  
RESTRICTIONS IN LEASES AND WHAT  
THEY MEAN IN THE REAL WORLD  
*Joshua Stein, Esq.*
- CHAPTER 28    ASSIGNMENT AND ASSUMPTION OF LEASES  
*Andrew A. Lance, Esq.*
- CHAPTER 29    SUBLEASES: THE SAME THINGS AS LEASES,  
ONLY DIFFERENT  
*Andrew L. Herz, Esq.*  
*Hope K. Plasha, Esq.*  
*Russell G. Wohl, Esq.*
- CHAPTER 30    MODEL OFFICE SUBLEASE  
*Joshua Stein, Esq.*
- CHAPTER 31    LEASE RENEWALS: HOW TO GAIN THE  
UPPER HAND  
*Marisa L. Manley, Esq.*
- CHAPTER 32    LEASE SURRENDER AGREEMENTS  
*Scott Shostak, Esq.*
- CHAPTER 33    MODEL SURRENDER AGREEMENT  
*Joshua Stein, Esq.*
- CHAPTER 34    HOW TO STAY AWAY FROM THE  
MINEFIELDS IN LEASE EXPANSIONS,  
EXTENSIONS, AND RENEWALS  
*Joshua Stein, Esq.*

### PART V—CREDIT SUPPORT AND ENFORCEMENT

- CHAPTER 35    LEASE GUARANTIES  
*Michelle Maratto Itkowitz, Esq.*  
*Jay Itkowitz, Esq.*

- CHAPTER 36 MODEL LEASE GUARANTY  
*Joshua Stein, Esq.*
- CHAPTER 37 LEGAL ISSUES, PRACTICES, AND  
PRACTICALITIES FOR LETTERS OF  
CREDIT IN COMMERCIAL LEASES,  
WITH A SAMPLE LETTER OF CREDIT  
AND COMMENTARY  
*Joshua Stein, Esq.*
- CHAPTER 38 AN UPDATE ON THE BANKRUPTCY LAW OF  
LARGE LETTERS OF CREDIT FOR LEASES  
*Joshua Stein, Esq.*
- CHAPTER 39 THE ESSENTIAL GUIDE TO THE MOST  
IMPORTANT CLAUSE IN A COMMERCIAL  
LEASE: THE DEFAULT CLAUSE  
*Adam Leitman Bailey, Esq.*  
*John M. Desiderio, Esq.*
- CHAPTER 40 OVERVIEW OF LEASE ENFORCEMENT  
*Michelle A. Maratto Itkowitz, Esq.*  
*Jay B. Itkowitz, Esq.*

## **PART VI—LENDER’S ISSUES**

- CHAPTER 41 HOW LENDER’S COUNSEL REVIEWS  
A LEASE  
*Joshua Stein, Esq.*
- CHAPTER 42 MODEL LEASE REVIEW CHECKLIST  
*Joshua Stein, Esq.*
- CHAPTER 43 THE USE AND MISUSE OF ESTOPPEL  
CERTIFICATES  
*Andrew L. Herz, Esq.*  
*Hope K. Plasha, Esq.*
- CHAPTER 44 MODEL TENANT ESTOPPEL CERTIFICATE  
*Joshua Stein, Esq.*

CHAPTER 45 MODEL NONDISTURBANCE AGREEMENT  
AND REPORT

*Joshua Stein, Esq.*

CHAPTER 46 JOURNEY THROUGH THE NINE CIRCLES  
OF HELL: A TENANT'S ODYSSEY IN  
NEGOTIATING NONDISTURBANCE  
AGREEMENTS

*Joel R. Hall, Esq.*

CHAPTER 47 NEW YORK STATUTES ON COMMERCIAL  
LEASING

*Joshua Stein, Esq.*

# DETAILED TABLE OF CONTENTS

## VOLUME I

Dedication—Melvyn Mitzner, Esq.....	iii
Acknowledgments .....	v
Preface .....	viii
About the Editor / About the Authors.....	ix

### PART I—LEASING NEGOTIATIONS

#### CHAPTER 1 INTRODUCTION: THE LEASING STATE OF MIND

*Joshua Stein, Esq.*

#### CHAPTER 2 MODEL TERM SHEET FOR LEASE

*Joshua Stein, Esq.*

#### CHAPTER 3 OFFICE LEASING TERM SHEET: TENANT'S AGENDA

*Joshua Stein, Esq.*

#### CHAPTER 4 MODEL COMMERCIAL LEASE

*Joshua Stein, Esq.*

[4.0]	I.	Description .....	4-3
[4.1]	II.	Other Documents.....	4-5
[4.2]	III.	Administration.....	4-7
		Exhibit A: Basic Terms .....	4-9
		Exhibit B-1: Supplemental Terms.....	4-19
		Exhibit B-2: State-Specific Terms .....	4-99
		Exhibit B-3: Supplemental Terms (Retail).....	4-100



**CHAPTER 5 MODEL COMMERCIAL LEASE RIDER  
(TO SUPPLEMENT STANDARD REBNY  
OFFICE LEASE)**

*Abraham Krieger, Esq.*

[5.0]	I.	Rent .....	5-3
[5.1]	II.	Term .....	5-9
[5.2]		A. Real Estate Tax Escalations .....	5-10
[5.3]		B. CPI Escalations .....	5-12
[5.4]		C. Operating Expense Escalations .....	5-14
[5.5]		D. Electricity & Utilities .....	5-19
[5.6]		E. Work to Be Performed .....	5-22
[5.7]		F. Alterations and Additions.....	5-24
[5.8]		G. Liens .....	5-26
[5.9]		H. Use of Demised Premises.....	5-28
[5.10]		I. Right to Relocate.....	5-30
[5.11]		J. Signs and Exterior Appearance.....	5-30
[5.12]		K. HVAC Services.....	5-30
[5.13]		L. Limited Liability .....	5-31
[5.14]		M. Indemnification By Tenant.....	5-32
[5.15]		N. Insurance .....	5-32
[5.16]		O. Estoppel Certificates .....	5-34
[5.17]		P. Security Deposit.....	5-34
[5.18]		Q. Assignment and Sublet.....	5-35
[5.19]		R. Subordination and Attornment .....	5-40
[5.20]		S. Option to Extend Term.....	5-40
[5.21]		T. Brokerage .....	5-41
[5.22]		U. Modifications and Corrections .....	5-41
[5.23]		V. Notices.....	5-42
[5.24]		W. Condemnation .....	5-42
[5.25]		X. Miscellaneous.....	5-45
		Exhibit A: Description of Premises.....	5-49

**CHAPTER 6 TENANT’S CHECKLIST OF SILENT LEASE  
ISSUES (THIRD EDITION)**

*Joshua Stein, Esq.*

*S.H. Spencer Compton, Esq.*

[6.0]	I.	Introduction .....	6-3
[6.1]		A Genesis of the Checklist.....	6-4
[6.2]		B. What the Checklist Is and Does .....	6-5
[6.3]		1. Which Issues to Raise .....	6-6
[6.4]		2. What Types of Leases? .....	6-8

**CHAPTER 7 LANDLORD’S CHECKLIST OF SILENT LEASE ISSUES (THIRD EDITION)**

*Joshua Stein, Esq.*  
*S.H. Spencer Compton, Esq.*

[7.0] I. Introduction ..... 7-3  
[7.1] II. Getting Around To It..... 7-3  
[7.2] III. How This Checklist Was Born..... 7-4  
[7.3] A. What The Checklist Does..... 7-5  
[7.4] B. Does The Checklist Give Landlords An Unfair Advantage?..... 7-6  
[7.5] C. Intended For Major Commercial Space Leases .... 7-6  
[7.6] D. Caveats, Warnings, Disclosures..... 7-8  
[7.7] E. Notes On Style ..... 7-8  
[7.8] F. The Case Law..... 7-9  
[7.9] G. Beyond The Four Corners of The Lease..... 7-9  
[7.10] H. Have At It..... 7-10

**CHAPTER 8 MODEL NEW YORK LANGUAGE FOR SPACE LEASES**

*Joshua Stein, Esq.*

[8.0] I. Introduction ..... 8-3  
[8.1] II. Leases (Base Case)..... 8-4  
[8.2] III. Leases (Special Case)..... 8-7  
[8.3] IV. General Provisions ..... 8-10

**CHAPTER 9 HIDDEN COSTS IN LANDLORD’S LEASE FORMS**

*Marisa J. Manley, Esq.*

[9.0] I. Introduction ..... 9-3  
[9.1] II. The Space ..... 9-3  
[9.2] III. Operating Expenses—The Trickiest Clause ..... 9-5  
[9.3] A. Umbrella or Enabling Clause ..... 9-6  
[9.4] B. Exclusions ..... 9-6  
[9.5] C. Capital Improvements ..... 9-7  
[9.6] D. Double-Dipping..... 9-9  
[9.7] E. Electricity ..... 9-9  
[9.8] IV. Rent Increases ..... 9-12  
[9.9] A. Base Year ..... 9-12  
[9.10] B. Fair Share ..... 9-13  
[9.11] C. Indexing the Rent ..... 9-13

[9.12]	D. Overlapping Escalation Formulas .....	9-15
[9.13]	E. Disappearing Indices .....	9-16
[9.14]	V. Real Estate Taxes .....	9-16
[9.15]	VI. Alterations, Maintenance, and Repair .....	9-18
[9.16]	A. Alterations .....	9-18
[9.17]	B. Maintenance .....	9-19
[9.18]	C. Wear and Tear .....	9-19
[9.19]	VII. Casualties and Catastrophes .....	9-20
[9.20]	A. Casualties .....	9-20
[9.21]	B. Other Catastrophes—Off-Site Events .....	9-21
[9.22]	VIII. Escapes and Extensions .....	9-21
[9.23]	A. Subleasing .....	9-22
[9.24]	B. Assignment .....	9-23
[9.25]	C. Renewals .....	9-24
[9.26]	IX. Dispute Resolution .....	9-25
[9.27]	X. Negotiating the Workletter .....	9-27
[9.28]	A. The Build-Out Workletter .....	9-27
[9.29]	B. Interior Allowance and Fit-up .....	9-28
[9.30]	X. Conclusion .....	9-30

**CHAPTER 10 MODEL MEMORANDUM OF LEASE**

*Joshua Stein, Esq.*

[10.0]	I. Comments for the User .....	10-3
[10.1]	A. Must We? .....	10-3
[10.2]	B. Term of Lease .....	10-3
[10.3]	C. Execution Requirements .....	10-3
[10.4]	D. Addresses .....	10-4
[10.5]	E. Lease or Sublease .....	10-4
[10.6]	F. Purchase Options .....	10-5
[10.7]	G. Brackets .....	10-5
[10.8]	H. Nonstandard Provisions .....	10-5
[10.9]	II. Other Documentation .....	10-5
[10.10]	A. Defined Terms .....	10-5
[10.11]	B. Exhibit A: Landlord’s Premises .....	10-6
[10.12]	C. Exhibit B: Tenant’s Premises .....	10-6
[10.13]	D. Cover Page .....	10-6
[10.14]	E. Nondisturbance .....	10-6
[10.15]	F. Title Insurance .....	10-6
[10.16]	G. Release of Memorandum .....	10-6
[10.17]	H. Recording Requirements .....	10-7
[10.18]	III. Followthrough Requirements .....	10-7

[10.19]	A. Lease Modifications .....	10-7
[10.20]	B. Lease Dates .....	10-8
[10.21]	C. Termination or Cancellation .....	10-8
[10.22]	D. Title Policy .....	10-8
[10.23]	E. Recorded Original .....	10-8

**CHAPTER 11 COMMERCIAL LEASING BROKERAGE AGREEMENTS**

*Lawrence P. Lenzner, Esq.*

[11.0]	I. Preliminary Considerations .....	11-3
[11.1]	A. Overview .....	11-3
[11.2]	B. Oral Listing Agreement.....	11-3
[11.3]	C. Types of Listing Agreements .....	11-4
[11.4]	1. Non-Exclusive Agreement .....	11-4
[11.5]	2. Exclusive Agency Agreement.....	11-5
[11.6]	3. Exclusive Right to Lease Agreement.....	11-6
[11.7]	II. Drafting Commercial Leasing Brokerage Agreements.....	11-6
[11.8]	A. Generally .....	11-6
[11.9]	B. Principle Areas to be Covered by the Brokerage Agreement .....	11-7
[11.10]	1. Nature of the Agency Created .....	11-7
[11.11]	2. Term .....	11-7
[11.12]	3. Standards of the Broker's Performance....	11-7
[11.13]	4. Conditioning Payment of the Broker's Commission.....	11-7
[11.14]	5. Amount and Payment of Leasing Commission.....	11-8
[11.15]	6. Options for Additional Space and Renewal Options .....	11-9
[11.16]	7. Landlord's Default.....	11-10
[11.17]	8. Representations, Warranties and Indemnification.....	11-10
[11.18]	9. Arbitration .....	11-11
[11.19]	10. Parties/Authorities .....	11-12
[11.20]	11. Expenses .....	11-12
[11.21]	12. Leasing Transactions Following the Expiration of a Brokerage Agreement.....	11-12
[11.22]	13. Miscellaneous Concerns of Brokers.....	11-13
[11.23]	III. Conclusion.....	11-13

Appendix A: Exclusive Agency Agreement for Commercial Building .....	11-15
Appendix B: Exclusive Broker Agreement for Lease Drafted by Owner’s Attorney .....	11-21
Appendix C: Non- Exclusive Broker Agreement for Lease Drafted by Owner’s Attorney .....	11-27

**CHAPTER 12    PREMATURE COMPENSATION AND HOW TO  
PREVENT UNPLEASANT BROKERAGE  
SURPRISES (WITH SAMPLE LANGUAGE AND  
MODEL BROKER REGISTRATION  
AGREEMENT)**

*Joshua Stein, Esq.*

Premature Compensation and How to Prevent Unpleasant Brokerage Surprises.....	12-3
Appendix: Model Broker Registration Agreement and Commitment Waiver .....	12-11

**PART II—SELECTED ISSUES**

**CHAPTER 13    CONSTRUCTION AND THE COMMERCIAL  
LEASE**

*Kevin J. Connolly*

[13.0] I. Introduction .....	13-3
[13.1] II. The Letter of Intent.....	13-4
[13.2] III. Whose Project Is It, Anyway?.....	13-5
[13.3] IV. The Citadel of Privity Still Stands.....	13-7
[13.4] V. Delivery Methods and Payments of Costs .....	13-9
[13.5] VI. Insurance .....	13-10

**CHAPTER 14    DRAFTING CONSIDERATIONS FOR  
ENVIRONMENTAL ISSUES IN COMMERCIAL  
LEASING TRANSACTIONS**

*Lawrence Schnapf, Esq.*

[14.0] I. Introduction .....	14-3
[14.1] II. Environmental Issues Under Common Law .....	14-3
[14.2] III. Summary of Principal Federal Environmental Laws Affecting Commercial Leasing Transactions.....	14-5
[14.3] A. CERCLA .....	14-8

[14.4]	1. CERCLA Liability for Property Owners and Tenants .....	14-8
[14.5]	2. CERCLA Third Party Defense.....	14-17
[14.6]	3. CERCLA Innocent Landowner Defense.....	14-21
[14.7]	4. CERCLA Bona Fide Prospective Purchaser (BFPP) Defense.....	14-22
[14.8]	5. CERCLA Contiguous Property Owner (CPO) Defense.....	14-24
[14.9]	6. Innocent Seller’s Defense .....	14-25
[14.10]	7. CERCLA Secured Creditor Exemption .....	14-25
[14.11]	8. Contractual and Equitable Defenses .....	14-26
[14.12]	9. CERCLA Liens .....	14-26
[14.13]	B. RCRA.....	14-26
[14.14]	IV. Summary of Principal New York Environmental Laws Affecting Commercial Leasing Transactions.....	14-28
[14.15]	A. New York Inactive Hazardous Waste Disposal Site Law (State Superfund or SSF) .....	14-28
[14.16]	B. New York Oil Spill Law .....	14-29
[14.17]	C. Petroleum Bulk Storage Act (PBSA).....	14-32
[14.18]	D. Brownfield Cleanup Program (BCP) .....	14-35
[14.19]	E. Vapor Intrusive Disclosure Law .....	14-38
[14.20]	F. New York City Voluntary Cleanup Program (VCP) and “E” Designation Program.....	14-40
[14.21]	V. Environmental Due Diligence.....	14-43
[14.22]	A. An Overview of the E1527-13 Phase 1 Standard.....	14-45
[14.23]	1. Recognized Environmental Conditions (REC) .....	14-45
[14.24]	2. Historic Recognized Environmental Conditions (HREC).....	14-46
[14.25]	3. Controlled Recognized Environmental Conditions (CREC) .....	14-47
[14.26]	4. Agency File Reviews .....	14-48
[14.27]	5. Searches for Cleanup Liens and Institutional Control.....	14-48
[14.28]	6. Using Prior Reports.....	14-49
[14.29]	7. Findings and Opinions .....	14-50
[14.30]	8. Recommendations Are Not Required .....	14-50
[14.31]	9. When Is Additional Investigation or Sampling Required? .....	14-51
[14.32]	B. Hiring the Environmental Consultant .....	14-52
[14.33]	1. Scope of Work.....	14-52

[14.34]	2. Insurance .....	14-55
[14.35]	3. Limitation of Liability (LOL) .....	14-55
[14.36]	4. Indemnity .....	14-56
[14.37]	5. Reliance .....	14-56
[14.38]	6. Miscellaneous Documentation and Reporting Issues .....	14-57
[14.39]	7. Information To Be Provided by Client.....	14-57
[14.40]	8. Warranties .....	14-58
[14.41]	9. Payment.....	14-59
[14.42]	10. Termination .....	14-59
[14.43]	C. Common Sources of Cleanup Liability for Commercial Property .....	14-59
[14.44]	1. Historical Uses .....	14-59
[14.45]	2. Underground Storage Tanks (USTs).....	14-60
[14.46]	3. Dry Cleaners.....	14-61
[14.47]	4. Sewer System Discharges .....	14-63
[14.48]	5. Septic Systems and Sanitary Cesspools .....	14-63
[14.49]	6. Dry Wells .....	14-63
[14.50]	7. Hydraulic or Electrical Equipment.....	14-64
[14.51]	8. Vehicle Maintenance Areas .....	14-64
[14.52]	9. Chemical and Waste Storage Areas .....	14-65
[14.53]	10. Loading Docks, Shipping Areas and Railroad Sidings.....	14-65
[14.54]	11. Asbestos-Containing Materials (ACM) .....	14-65
[14.55]	12. Lead-Based Paint (LBP).....	14-67
[14.56]	VI. Environmental Provisions .....	14-67
[14.57]	A. "As Is" Provisions .....	14-67
[14.58]	B. Contractual Allocation of Environmental Liability .....	14-68
[14.59]	C. Problems With Older or Traditional Commercial Leases.....	14-68
[14.60]	D. Environmental Lease Definitions.....	14-71
[14.61]	E. Pre-Occupancy Environmental Due Diligence Contingency .....	14-75
[14.62]	F. Tenant Affirmative Environmental Covenants .....	14-77
[14.63]	G. Lessor Environmental Reps and Warranties .....	14-80
[14.64]	H. Lessor Affirmative Covenant Relating to USTs ...	14-81
[14.65]	I. Tenant UST Covenants Upon Surrender of Premises .....	14-82
[14.66]	J. Occupancy and Pre-Termination Diligence Covenants .....	14-83
[14.67]	K. Tenant Environmental Indemnity.....	14-84

[14.68]	L. Tenant Release of All Claims .....	14-85
[14.69]	M. Landlord Environmental Indemnity .....	14-86

**CHAPTER 15 IMPACT OF TECHNOLOGY ON COMMERCIAL LEASING**

*Kevin P. Groarke, Esq.*  
*Gary A. Goodman, Esq.*

[15.0]	I. Introduction .....	15-3
[15.1]	A. The National Tech Boom .....	15-3
[15.2]	B. New York: New Tech City .....	15-3
[15.3]	C. Upstate New York Tech.....	15-6
[15.4]	D. So Why Is It Different This Time? .....	15-6
[15.5]	II. Office Leases for Technology Companies .....	15-7
[15.6]	A. Pricing .....	15-7
[15.7]	B. Location.....	15-8
[15.8]	C. Electrical Power .....	15-8
[15.9]	D. Physical Infrastructure .....	15-8
[15.10]	E. The Changing Need of Tech Companies .....	15-9
[15.11]	F. Tech Industry Subsectors .....	15-10
[15.12]	III. Impact of Technology on Retail Leasing .....	15-12
[15.13]	A. The History of Retail.....	15-12
[15.14]	B. Online Retailing .....	15-13
[15.15]	C. The Retail Industry Today .....	15-14
[15.16]	IV. Conclusion.....	15-18

**CHAPTER 16 INSURANCE ISSUES IN COMMERCIAL LEASES**

*Curtis Lee*  
*Herbert H. Feldman*

[16.0]	I. Introduction .....	16-3
[16.1]	II. Risk Management—Understanding Why .....	16-3
[16.2]	III. Basic Types of Insurance .....	16-4
[16.3]	IV. Landlord’s View .....	16-6
[16.4]	V. Other Considerations.....	16-8
[16.5]	A. Indemnity Agreement.....	16-8
[16.6]	B. Self-Insurance by Tenant .....	16-8
[16.7]	C. Tenant’s Share of Insurance Costs.....	16-9
[16.8]	D. Net Leases .....	16-10
[16.9]	E. Waiver of Subrogation .....	16-10
[16.10]	F. Rents Insurance .....	16-11
[16.11]	G. Improvements and Betterments (I&Bs) .....	16-11



[16.12]	H. Leasehold Interest .....	16-12
[16.13]	I. Demolition and Increased Cost of Construction ...	16-12
[16.14]	VI. Summary .....	16-13

**CHAPTER 17 REAL PROPERTY TAX CONSIDERATIONS  
FOR LANDLORDS AND TENANTS IN  
NEGOTIATING LEASES OF COMMERCIAL  
PROPERTY**

*James S. Grossman, Esq.  
Christopher J. Centore, Esq.*

[17.0]	I. Tenant Analysis of Property Tax Considerations Prior to Entering Into Lease .....	17-3
[17.1]	A. Basic Property Tax Terminology .....	17-3
[17.2]	B. Base Tax Year Considerations .....	17-4
[17.3]	C. Scope and Type of Improvements Resulting in Tax Escalation Liability for Tenant.....	17-5
[17.4]	D. Tax Parcel History and Tax Computation Considerations.....	17-5
[17.5]	E. Tenant Rights to Contest Tax Assessments Through Grievance and Litigation Processes.....	17-8
[17.6]	1. Primer on Administrative Review and Tax Certiorari Proceedings.....	17-8
[17.7]	2. Lease Provisions Relating to the Right to Contest Real Property Taxes .....	17-11
[17.8]	II. Landlord's Analysis of Real Property Tax Considerations Prior to Entering Into Lease .....	17-15
[17.9]	A. Real Property Tax Escalation Clauses .....	17-15
[17.10]	B. When Landlord Contests Property Tax Assessments .....	17-16
[17.11]	C. Interaction Between Rents And Real Estate Taxes .....	17-17
[17.12]	III. Property Tax Exemptions and Abatements and Their Impact on Lease Negotiations .....	17-17
[17.13]	A. Municipal Industrial Development Agency Exemption .....	17-17
[17.14]	B. Business Investment Property and Commercial Property Exemptions .....	17-18
[17.15]	1. Business Investment Property Exemptions (Outside New York City).....	17-18
[17.16]	2. Commercial Properties in Designated Areas of Manhattan .....	17-20
[17.17]	3. Commercial Properties In New York City Outside Designated Areas of Manhattan.....	17-20

[17.18]	C. Empire Zone Property Tax Benefits .....	17-22
[17.19]	D. Tax Benefits Under the Excelsior Program .....	17-23

**PART III—PARTICULAR TYPES OF LEASES**

**CHAPTER 18 COMMERCIAL CONDOMINIUM LEASES**

*Matthew J. Leeds, Esq.*

[18.0]	I. Introduction .....	18-3
[18.1]	II. Identifying Issues .....	18-4
[18.2]	III. The Condominium Form Of Ownership .....	18-5
[18.3]	IV. Due Diligence.....	18-8
[18.4]	V. Sample Concerns.....	18-11
[18.5]	VI. Sample Drafting Mechanisms .....	18-15
[18.6]	VII. Conclusion.....	18-19

**CHAPTER 19 LEASES WITH FOREIGN SOVEREIGNS AND INTERNATIONAL ORGANIZATIONS**

*Andrew L. Odell, Esq.*

[19.0]	I. Overview .....	19-3
[19.1]	A. With Whom Are You Dealing?.....	19-3
[19.2]	B. Role of U.S. State Department.....	19-5
[19.3]	C. Absolute Immunity.....	19-6
[19.4]	D. Transactional Pace/Political Events .....	19-7
[19.5]	E. Some Illustrations.....	19-7
[19.6]	II. Applicable Laws.....	19-10
[19.7]	A. The Foreign Missions Act.....	19-11
[19.8]	B. Foreign Sovereign Immunities Act .....	19-14
[19.9]	1. Immunity Exceptions Under the FSIA.....	19-15
[19.10]	2. Enforcement Measures Under the FSIA .....	19-19
[19.11]	C. The Vienna Conventions.....	19-21
[19.12]	1. Diplomatic Immunity .....	19-21
[19.13]	2. Consular Immunity.....	19-23
[19.14]	3. Diplomatic/Consular Waivers .....	19-24
[19.15]	D. Related Laws .....	19-24
[19.16]	III. Conclusion.....	19-26
	Appendix A: Form of Commercial Lease Wavier for Foreign Sovereign Tenants .....	19-27
	Appendix B: Organizations Under the IOIA.....	19-29
	Appendix C: Special Rules for Service of Process on Foreign Sovereigns in U.S. District Court for the Southern District of New York .....	19-33

## CHAPTER 20 GOVERNMENT LEASING

*Robert C. MacKichan, Jr., Esq.*

[20.0]	I.	Background—Extent of U.S. Government Leasing ....	20-3
[20.1]	II.	Federal Leasehold Acquisition Policy .....	20-3
[20.2]	III.	Statutory and Regulatory Authority for the Government’s Acquisition of Leasehold Interests in Real Property .....	20-5
[20.3]	IV.	Categories of Lease Procurements .....	20-7
[20.4]	A.	Replacement Leases .....	20-7
[20.5]	B.	Succeeding Leases.....	20-7
[20.6]	C.	New Leases (Including Replacement Leases).....	20-8
[20.7]	V.	Competitive Negotiated Procurement Process for Acquiring Leasehold Interests .....	20-8
[20.8]	A.	Defining the Requirements of an Agency .....	20-8
[20.9]	B.	Preparing and Implementing an Acquisition Plan.....	20-9
[20.10]	C.	Evaluation of Offers, Discussions and Award .....	20-10
[20.11]	D.	Completion of Tenant Improvements .....	20-11
[20.12]	VI.	Standard U.S. Government Lease Terms— Unique Provisions and Comparison with Private Sector Leases.....	20-11
[20.13]	A.	Base Rent (Form 1364, “Proposal to Lease Space”) .....	20-12
[20.14]	B.	Operating Costs (Form 1217, “Lessor’s Annual Cost Statement”) .....	20-12
[20.15]	1.	Subletting and Assignment Clause.....	20-13
[20.16]	2.	Subordination, Nondisturbance and Attornment Clause.....	20-13
[20.17]	3.	Tax Adjustment Clause .....	20-13
[20.18]	C.	Tenant Improvements.....	20-14
[20.19]	D.	Tenant Improvement Process .....	20-14
[20.20]	1.	Maintenance of Building and Premises & Right of Entry Clause .....	20-15
[20.21]	2.	Fire and Casualty Damage Clause .....	20-15
[20.22]	3.	Default By Lessor Clause (Right of Rent Setoff).....	20-15
[20.23]	4.	Alterations Clause .....	20-16
[20.24]	5.	Delivery and Condition Clause .....	20-16
[20.25]	6.	Acceptance of Space and Certificate of Occupancy Clause .....	20-17
[20.26]	7.	Changes Clause .....	20-17

[20.27]	8. Substitution of Tenant Agency Clause.....	20-17
[20.28]	9. Examination of Records by GSA Clause .....	20-17
[20.29]	10. Audit and Records—Negotiations Clause .....	20-18
[20.30]	E. Socio-Economic Clauses Establishing Affirmative Duties and Reporting Requirements .	20-18
[20.31]	1. Equal Opportunity Clause .....	20-18
[20.32]	2. Prohibition of Segregated Facilities Clause ...	20-19
[20.33]	3. Pre-Award On-Site Equal Opportunity Compliance Evaluation Clause .....	20-19
[20.34]	4. Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era Clause .....	20-19
[20.35]	5. Affirmative Action for Workers with Disabilities Clause.....	20-19
[20.36]	6. Small Business Subcontracting Plan Clause.....	20-20
[20.37]	7. Reporting Executive Compensation and First-Tier Subcontract Awards Clause .....	20-20
[20.38]	VII. Handling Lease Administration Issues.....	20-20
[20.39]	VIII. Government Holdover in Leased Space.....	20-22
[20.40]	IX. Greening of GSA Leases.....	20-22

## **CHAPTER 21 LEASES WITH NEW YORK STATE**

*Lloyd S. Lowy, Esq.*

[21.0]	I. Introduction .....	21-3
[21.1]	II. General Matters .....	21-4
[21.2]	A. Necessary Approvals.....	21-4
[21.3]	B. Standard Clauses .....	21-5
[21.4]	C. Remedies; Court of Claims .....	21-6
[21.5]	III. Specific Issues .....	21-7
[21.6]	A. Tenant Versus Occupying Agency.....	21-7
[21.7]	B. Lease Term.....	21-8
[21.8]	C. Audit Rights .....	21-8
[21.9]	D. Subject to Appropriation .....	21-9
[21.10]	E. Janitorial Services .....	21-12
[21.11]	F. Build Out and Alterations .....	21-12
[21.12]	G. Repairs.....	21-13
[21.13]	H. Right to Set-Off.....	21-13
[21.14]	I. Subordination and Non-Disturbance.....	21-13
[21.15]	J. Non-Assignment .....	21-14
[21.16]	K. Late Payment of Rent.....	21-15
[21.17]	L. Indemnity .....	21-15

[21.18]	M. Insurance .....	21-16
[21.19]	N. Holdover and Other Damages .....	21-16
[21.20]	O. Security Deposit .....	21-16
[21.21]	VII. Conclusion .....	21-16

**CHAPTER 22 LEASE TRANSACTIONS WITH THE CITY OF NEW YORK**

*Leonard M. Wasserman, Esq.*

[22.0]	I. The “Waiting Period”: Patience and Accommodation .....	22-3
[22.1]	A. ULURP and 195 .....	22-3
[22.2]	B. SEQRA and CEQR .....	22-6
[22.3]	II. Budgetary Constraints and the Rent Obligation .....	22-7
[22.4]	III. The Public Auction Requirement and Its Alternatives .....	22-9
[22.5]	IV. The “Pilot” .....	22-15
[22.6]	V. Other Special Lease Features .....	22-22
[22.7]	A. Rent Discounts and Recoveries Through Participations .....	22-22
[22.8]	B. “Standard” Provisions .....	22-23
[22.9]	1. Transfer, Assignment, and Sublease Clauses .....	22-23
[22.10]	2. Use .....	22-24
[22.11]	3. Construction Obligations .....	22-25
[22.12]	4. Leasehold Mortgage Protective Provisions .....	22-26
[22.13]	VI. Conclusion .....	22-27

**CHAPTER 23 THE RESTAURANT LEASE: SELECTED CONSIDERATIONS**

*Richard D. Eisenberg, Esq.*

[23.0]	I. Introduction .....	23-3
[23.1]	II. Use Provision and Limitations .....	23-4
[23.2]	A. The Use Clause .....	23-4
[23.3]	B. Auxiliary Office Space .....	23-5
[23.4]	C. General Restrictions and Limitations .....	23-5
[23.5]	III. Operational Covenants And Infrastructure Requirements .....	23-6
[23.6]	A. Extermination .....	23-7
[23.7]	B. Disposal of Trash .....	23-8
[23.8]	C. Grease Traps or Interceptors .....	23-9

[23.9]	D. Ventilation.....	23-10
[23.10]	E. Kitchen Facilities—Health and Maintenance Standards .....	23-11
[23.11]	F. Waterproof Membrane .....	23-12
[23.12]	G. Fire and Smoke Detection and Suppression Systems .....	23-12
[23.13]	H. Landlord’s Disclaimer.....	23-13
[23.14]	I. Additional Infrastructure and Operational Considerations.....	23-13
[23.15]	IV. Covenants Relating to Conduct and Activities .....	23-14
[23.16]	A. Noise/Sound Levels .....	23-14
[23.17]	B. Residential Building Covenants.....	23-15
[23.18]	C. Customer Control .....	23-16
[23.19]	V. Sidewalk and Garden Space Use.....	23-16
[23.20]	A. Conditional Use of Outdoor Space .....	23-16
[23.21]	B. Restrictions on Use of Outdoor Space .....	23-19
[23.22]	VI. Rights to Transfer Lease and Restaurant Assets .....	23-19
[23.23]	A. Transferability Provision.....	23-19
[23.24]	B. Control and Management Restrictions.....	23-21
[23.25]	C. Rights to Furniture, Fixtures and Equipment.....	23-21
[23.26]	D. Creation of Security Interests.....	23-22
[23.27]	VII. Liquor License.....	23-23
[23.28]	A. Liquor License Contingency .....	23-23
[23.29]	B. Indemnities and Insurance Regarding Service of Alcoholic Beverages .....	23-25
[23.30]	VIII. Retail Lease Provisions Which Significantly Affect Restaurant Tenants .....	23-25
[23.31]	A. Sidewalk Sheds .....	23-25
[23.32]	B. Percentage Rent: Exclusions From Gross Sales .....	23-27
[23.33]	C. Radius Restrictions; Competing Business Area Restrictions.....	23-28
[23.34]	D. Existing Exclusives .....	23-29
[23.35]	E. Landlord’s Contribution to Tenant’s Installation.....	23-29
[23.36]	IX. Conclusion.....	23-30

## **CHAPTER 24 RETAIL LEASES**

*Bradley A. Kaufman, Esq.*

[24.0]	I. Basic Lease Information.....	24-3
[24.1]	II. Specific Lease Provisions.....	24-5
[24.2]	A. Security .....	24-5

[24.3]	B. Construction, Landlord’s and Tenant’s Work.....	24-5
[24.4]	C. Percentage Rent.....	24-6
[24.5]	D. Taxes .....	24-7
[24.6]	E. Common Area Maintenance (CAM).....	24-8
[24.7]	F. Utilities and Services.....	24-9
[24.8]	G. Rules and Regulations .....	24-9
[24.9]	H. Maintenance of the Leased Premises, Mall or Building.....	24-10
[24.10]	I. Alterations Within Leased Premises .....	24-10
[24.11]	J. Subordination, Nondisturbance, and Attornment..	24-11
[24.12]	K. Assignment and Subletting.....	24-12
[24.13]	L. Promotional Fund and Advertising Programs .....	24-13
[24.14]	III. Generally .....	24-13
[24.15]	A. Access by Landlord.....	24-14
[24.16]	B. Holding Over.....	24-14
[24.17]	IV. Retail Tenant Special Concerns .....	24-15

**CHAPTER 25 ANCHOR TENANT RETAIL LEASING**

*Deborah Goldman, Esq.*

**CHAPTER 26 TELECOMMUNICATIONS LEASES AND LICENSE AGREEMENTS**

*Jeffrey A. Moerdler, Esq.*

[26.0]	I. Found Money: New Opportunities In Telecommunications Agreements .....	26-3
[26.1]	A. Background .....	26-3
[26.2]	B. Types of Telecommunications Facilities.....	26-5
[26.3]	C. Making the Most of This Opportunity .....	26-7
[26.4]	II. The Legal Ins And Outs Of Telecommunication Leases .....	26-8
[26.5]	III. How To Manage The Business of Telecommunications Agreements .....	26-12
[26.6]	IV. Telecommunications: The Fcc Acts on Building Access.....	26-16
[26.7]	V. Data Centers, Switch Hotels, and Technology Buildings: Development, Financing and Business Issues .....	26-17
[26.8]	A. Types of Facilities .....	26-18
[26.9]	1. Switch Facilities .....	26-18
[26.10]	2. Data Centers .....	26-18
[26.11]	3. Co-location Companies .....	26-19

[26.12]	4. New Media or Wired Buildings .....	26-19
[26.13]	B. Property Criteria.....	26-20
[26.14]	C. Data Center and Switch-Hotel Leasing Issues .....	26-22
[26.15]	1. Installation.....	26-23
[26.16]	2. Co-Location.....	26-23
[26.17]	3. Nondisturbance Agreements .....	26-23
[26.18]	4. Security Deposit .....	26-24
[26.19]	5. Financial Credibility of Landlord.....	26-24
[26.20]	D. Data Center and Switch-Hotel Financing Issues...	26-24
[26.21]	E. Conclusion.....	26-25
[26.22]	VI. Distributed Antenna or in Building Wireless Systems.....	26-26

## VOLUME II

### PART IV—TRANSACTIONS AFFECTING EXISTING LEASES

#### CHAPTER 27 ASSIGNMENT AND SUBLETTING RESTRICTIONS IN LEASES AND WHAT THEY MEAN IN THE REAL WORLD

*Joshua Stein, Esq.*

[27.0]	I. Introduction .....	27-3
[27.1]	II. Overview and Some Definitions .....	27-6
[27.2]	A. General Common Law Definitions .....	27-6
[27.3]	B. Terms Used in This Chapter .....	27-6
[27.4]	C. Overview of Issues Addressed in This Chapter ...	27-7
[27.5]	III. Stock Transfers.....	27-9
[27.6]	IV. Assignments by Operation of Law .....	27-12
[27.7]	V. Mergers.....	27-14
[27.8]	VI. Requirement for Consent if Lease Is Silent .....	27-16
[27.9]	VII. Reasonableness in Denying Consent.....	27-17
[27.10]	A. Whether Required .....	27-17
[27.11]	B. What Constitutes Reasonableness.....	27-21
[27.12]	C. Withholding Consent Versus Refusing Consent...	27-27
[27.13]	VIII. Lessons for a Landlord.....	27-28
[27.14]	IX. Lessons for a Tenant .....	27-29
[27.15]	X. Conclusion.....	27-30



## CHAPTER 28 ASSIGNMENT AND ASSUMPTION OF LEASES

*Andrew A. Lance, Esq.*

[28.0]	I.	Introduction .....	28-3
[28.1]	II.	What Is an Assignment of Lease? .....	28-4
[28.2]	A.	Transfer of Entire Interest .....	28-4
[28.3]	B.	Privity of Contract and Privity of Estate .....	28-5
[28.4]	III.	What Is an Assumption of the Lease? .....	28-6
[28.5]	IV.	Assignment of Lease by a Tenant .....	28-9
[28.6]	A.	Form of an Assignment of Lease .....	28-9
[28.7]	B.	Recourse after an Assignment of Lease .....	28-9
[28.8]	C.	Distinguishing an Assignment of Lease from a Sublease.....	28-10
[28.9]	D.	Continuing Liability of an Assignor.....	28-12
[28.10]	V.	Assignment of Lease by a Landlord.....	28-14
[28.11]	A.	Recourse Limited to the Property.....	28-14
[28.12]	B.	Recourse to the Security Deposit .....	28-16
[28.13]	C.	Attornment by the Tenant .....	28-17
[28.14]	VI.	Restrictions Applicable to Assignment of Lease .....	28-18
[28.15]	A.	Why a Landlord Restricts Assignment of the Lease.....	28-19
[28.16]	B.	Providing for an Estoppel Certificate.....	28-22
[28.17]	C.	Assignment by Tenant.....	28-23
[28.18]	1.	Prohibition of Assignment Without Landlord's Consent.....	28-24
[28.19]	2.	Reasonableness of Landlord's Consent .....	28-26
[28.20]	3.	Applying a Reasonableness Standard to the Landlord's Consent.....	28-30
[28.21]	4.	Ambiguities in the Definition of an Assignment.....	28-34
[28.22]	a.	General Assignment Restrictions .....	28-34
[28.23]	b.	Restrictions on Assignments “By Operation of Law” .....	28-37
[28.24]	c.	Totality of the Circumstances.....	28-39
[28.25]	5.	Narrowing the Definition of an Assignment..	28-39
[28.26]	a.	Affiliate Transactions .....	28-39
[28.27]	b.	Transfers of Interests in the Tenant .....	28-42
[28.28]	c.	Other Transfers of Rights in the Lease.....	28-47
[28.29]	d.	Obtaining Consent .....	28-49
[28.30]	e.	Form of Consent .....	28-51
[28.31]	D.	Assignment by Landlord .....	28-51
[28.32]	VII.	Allocation of Profits From Assignment .....	28-53

[28.33]	A. Sharing Profits from an Assignment of Lease .....	28-53
[28.34]	B. Recovery of the Premises and Mitigation of Damages.....	28-58
[28.35]	C. The Landlord's Right to Recapture the Leased Premises .....	28-59
[28.36]	VIII. Bankruptcy .....	28-61
[28.37]	A. Tenant Bankruptcy .....	28-62
[28.38]	D. Landlord Bankruptcy .....	28-68
[28.39]	IX. Effect of Violation of Transfer Restriction by Tenant.....	28-69
[28.40]	X. Status of Assignor After Assignment.....	28-72
[28.41]	XI. Good Guy Guarantee.....	28-74
[28.42]	XII. Conclusion.....	28-76
	Appendix A: Basic Form of Assignment and Assumption of Lease .....	28-79
	Appendix B: Lease Assignment and Assumption .....	28-81
	Appendix C: Sample Attornment Provision .....	28-93
	Appendix D: Sample Conditions to Reasonableness of Consent.....	28-97
	Appendix E: Sample Form of Landlord's Consent to Assignment.....	28-99

**CHAPTER 29 SUBLEASES: THE SAME THING AS LEASES, ONLY DIFFERENT**

*Andrew L. Herz, Esq.*  
*Hope K. Plasha, Esq.*  
*Russell G. Wohl, Esq.*

[29.0]	I. Introduction .....	29-3
[29.1]	II. Does the Direct Lease “Work”? .....	29-6
[29.2]	A. Can the Tenant Sublease? .....	29-6
[29.3]	B. Is the Existing Package of Rights Under the Direct Lease Acceptable to the Subtenant?.....	29-10
[29.4]	C. Interplay Between the Direct Lease and the Sublease.....	29-12
[29.5]	III. Does the Sublease “Work”? .....	29-12
[29.6]	A. Preliminary Inquiries.....	29-13
[29.7]	B. Compliance With the Direct Lease .....	29-14
[29.8]	C. Allocation of Risks and Costs .....	29-15
[29.9]	D. Interplay of Direct Lease and Sublease Provisions and Independent .....	29-19
[29.10]	1. Generally .....	29-19

[29.11]	2. Status of Direct Lease and Condition of Sublet Premises .....	29-20
[29.12]	3. Exercise of Rights .....	29-20
[29.13]	4. Recomputation of Time Periods.....	29-21
[29.14]	5. Generally Independent Provisions .....	29-21
[29.15]	a. Assignment and Subletting: Alterations and Consents.....	29-22
[29.16]	b. Insurance.....	29-23
[29.17]	c. Boilerplate Provisions.....	29-24
[29.18]	6. Incorporation by Reference .....	29-24
[29.19]	7. Conditions to Effectiveness of Sublease .....	29-28
[29.20]	IV. Conclusion.....	29-29
	Exhibit A: Due Diligence for the Sublease Transaction .....	29-31
	Exhibit B: Enforcement of Rights Against Landlord .....	29-36
	Exhibit C: Cooperation Clause—General .....	29-37

## **CHAPTER 30 MODEL OFFICE SUBLEASE**

*Joshua Stein, Esq.*

## **CHAPTER 31 LEASE RENEWALS: HOW TO GAIN THE UPPER HAND**

*Marisa L. Manley, Esq.*

[31.0]	I. Introduction .....	31-3
[31.1]	A. Tenant Renewal Strategy .....	31-3
[31.2]	B. Why Landlords Make Inferior Renewal Offers ....	31-3
[31.3]	C. How Tenants Can Strengthen Their Bargaining Position.....	31-4
[31.4]	II. Overview of the Renewal Negotiation Process.....	31-5
[31.5]	A. Site Surveys.....	31-6
[31.6]	B. Preliminary Financial Analysis .....	31-6
[31.7]	C. Select Architectural/Engineering Team .....	31-6
[31.8]	D. Secondary Financial Analysis .....	31-7
[31.9]	E. Submit Preliminary Offers for Preferred Locations (or Request Landlord Proposals).....	31-7
[31.10]	F. Negotiate Financial Terms for Preferred Alternative Locations .....	31-7
[31.11]	G. Preliminary Lease Negotiations .....	31-7
[31.12]	H. Final Lease Negotiations.....	31-9
[31.13]	I. Preparation for a Move.....	31-9

[31.14]	III. The Advantage of Early Renewals.....	31-9
[31.15]	IV. Eight Key Issues to Address in Negotiating a Lease Renewal.....	11
[31.16]	V. Negotiating a Renewal Option.....	18
[31.17]	VI. Protecting a Renewal Option.....	25
[31.18]	VII. Holding Over No Substitute for Lease Renewal.....	26
[31.19]	VIII. A Stronger Lease Means Cost Advantages Over Competitors.....	27

## CHAPTER 32 LEASE SURRENDER AGREEMENTS

*Scott Shostak, Esq.*

[32.0]	I. Introduction.....	32-3
[32.1]	II. Overview Of Lease Surrender Agreements.....	32-4
[32.2]	A. Overview.....	32-4
[32.3]	B. Reasons for Early Lease Terminations.....	32-4
[32.4]	C. Definition of Lease Surrender Agreement.....	32-5
[32.5]	D. Methods of Surrendering a Lease.....	32-6
[32.6]	E. Terminology for Early Lease Terminations.....	32-7
[32.7]	F. Impact of Business Cycles.....	32-8
[32.8]	G. New York State and Other Jurisdictions.....	32-9
[32.9]	H. No Duty to Mitigate in New York: Tenant’s Abandonment May Not Terminate Tenant’s Liability.....	32-9
[32.10]	I. The Difference Between Termination of Lease and Early Termination of Lease.....	32-11
[32.11]	J. Conclusion.....	32-12
[32.12]	III. Drafting Lease Surrender Agreements.....	32-13
[32.13]	A. Introduction.....	32-13
[32.14]	B. Written or Oral Lease Surrender Agreements: Determining Whether the Lease Surrender Agreement Must Be in Writing.....	32-14
[32.15]	C. Setting Forth the Appropriate and Necessary Parties.....	32-16
[32.16]	1. Identifying Occupants Who Should Be Parties to the Lease Surrender Agreement.....	32-17
[32.17]	2. Financing Arrangements with Third Parties— Lenders.....	32-21
[32.18]	3. Due Diligence: Conduct a Review of the Documents and Representations.....	32-22
[32.19]	D. Clarifying and Defining What Constitutes the “Surrender” of the Lease.....	32-24

[32.20]	E. Confidentiality Clauses .....	32-25
[32.21]	F. Recording the Lease Surrender Agreement .....	32-26
[32.22]	IV. Lease Surrender Agreements: General Issues .....	32-26
[32.23]	A. Who Is Entitled to the Termination Fee for the Early Termination of a Lease? .....	32-26
[32.24]	1. Factors in Negotiating the Termination Fee...	32-27
[32.25]	2. From the Tenant’s Perspective .....	32-28
[32.26]	3. From the Landlord’s Perspective .....	32-28
[32.27]	4. External Matters Affecting the Determination of a Termination Fee .....	32-29
[32.28]	5. Tax Implications of Lease Surrender Agreements and Termination Fees.....	32-30
[32.29]	B. Negotiating Tenant’s Obligations to Restore the Premises and Comply With Lease Terms Regarding Its Condition .....	32-31
[32.30]	1. Costs Associated With the Condition of the Premises .....	32-31
[32.31]	2. Inspection of the Condition of the Premises ..	32-32
[32.32]	3. Factors to Consider in Negotiating the Condition of the Premises .....	32-33
[32.33]	4. Pitfalls and Difficult Issues Regarding Repairs and Remediation.....	32-35
[32.34]	C. Determining Continuing Liability After Lease Surrender.....	32-36
[32.35]	1. Continuing Liability in General .....	32-36
[32.36]	2. Factors in Negotiating Continuing Liability ..	32-39
[32.37]	3. Managing Uncertainty and Risk in Assessing Continuing Liability .....	32-40
[32.38]	4. Pitfalls to Avoid .....	32-43
[32.39]	D. Resolving Contingent Rights and Pending Proceedings .....	32-44
[32.40]	V. Potential Problems.....	32-45
[32.41]	A. Subtenants Remaining in the Premises .....	32-46
[32.42]	B. Unintentional Acceptance of Tenant’s Abandonment .....	32-47
[32.43]	C. Tenant’s Property Remaining in the Premises .....	32-47
[32.44]	D. Failure to Secure Approval of Termination in the Context of Financial Agreements.....	32-49
[32.45]	E. Bankruptcy .....	32-49
[32.46]	VI. Enforcement of Lease Surrender Agreements.....	32-51
[32.47]	VII. Conclusion.....	32-54

**CHAPTER 33 MODEL SURRENDER AGREEMENT**

*Joshua Stein, Esq.*

**CHAPTER 34 HOW TO STAY AWAY FROM THE  
MINEFIELDS IN LEASE EXPANSIONS,  
EXTENSIONS, AND RENEWALS**

*Joshua Stein, Esq.*

**PART V—CREDIT SUPPORT AND ENFORCEMENT**

**CHAPTER 35 LEASE GUARANTIES**

*Michelle Maratto Itkowitz, Esq.*

*Jay Itkowitz, Esq.*

[35.0]	I.	Introduction To The Lease Guaranty .....	35-3
[35.1]	A.	Vocabulary .....	35-3
[35.2]	B.	Why a Guaranty?.....	35- 4
[35.3]	II.	The Anatomy Of A Guaranty .....	35-4
[35.4]	A.	Who Is the Guarantor? .....	35-4
[35.5]	1.	Individual Lessees Are Already Personally Liable.....	35- 4
[35.6]	2.	A Guaranty Is Only as Good as the Guarantor.....	35-5
[35.7]	a.	Individual Guarantor .....	35-5
[35.8]	b.	Due Diligence .....	35-5
[35.9]	B.	Guarantor’s Identifying Information.....	35-6
[35.10]	1.	Social Security Number .....	35-6
[35.11]	2.	Home Address .....	35-6
[35.12]	C.	Personal Jurisdiction .....	35-6
[35.13]	D.	Counsel Fees .....	35-7
[35.14]	E.	Survival Clause .....	35-7
[35.15]	F.	Signatures .....	35-8
[35.16]	III.	The Basic Good Guy Guaranty .....	35-8
[35.17]	IV.	GG Guaranties That Refer Back to the Lease .....	35-10
[35.18]	V.	End of Term .....	35-12
[35.19]	VI.	Alterations and Fixtures .....	35-13
[35.20]	VII.	Notice Requirements .....	35-14
[35.21]	VIII.	Advance Notice Requirements.....	35-16
[35.22]	IX.	Landlord’s Acceptance Of Surrender.....	35-18
[35.23]	X.	Liens And Encumbrances.....	35-20
[35.24]	XI.	Mechanics’ Liens .....	35-22
[35.25]	XII.	UCC Liens.....	35-22
[35.26]	XIII.	Rent Abatement and Clawback Provisions .....	35-24

[35.27]	A. Rent Abatements .....	35-25
[35.28]	B. Clawbacks .....	35-27
[35.29]	XIV. Lease Renewals, Extensions and Modifications.....	35-28
[35.30]	XV. Survival Clauses .....	35-28
[35.31]	A. New Agreement.....	35-29
[35.32]	B. Material Terms of the Original Lease Have Changed.....	35-30
[35.33]	XVI. Waiver of Notice or Ratification .....	35-30
[35.34]	A. Guarantor Waives Notice .....	35-30
[35.35]	B. Ratification of Guaranty.....	35-31
[35.36]	C. Continuing the Guarantor Relationship.....	35-31
[35.37]	XVII. Withdrawing From a GG Guaranty.....	35-32
[35.38]	XVIII. Bankruptcy & GG Guaranties.....	35-34
[35.39]	A. The Automatic Stay .....	35-35
[35.40]	B. Landlord’s Motion in Bankruptcy Court.....	35-36
[35.41]	1. The Standard for Proceeding Against Guarantor.....	35-36
[35.42]	2. The Standard for Getting Relief From the Stay.....	35-38
[35.43]	XIX. Examples .....	35-40
[35.44]	A. Tenant Friendly GG Guaranty.....	35-40
[35.45]	B. Landlord Friendly GG Guaranty .....	35-41
[35.46]	C. Additional Security for Landlord .....	35-43
[35.47]	D. Additional Uncertainty for Tenant .....	35-43

## **CHAPTER 36 MODEL LEASE GUARANTY**

*Joshua Stein, Esq.*

[36.0]	I. Introduction .....	36-3
[36.1]	II. General Comments and Issues to Consider.....	36-5
[36.2]	A. Bankruptcy Risks .....	36-5
[36.3]	B. Bankruptcy Risks—Large Security Deposits.....	36-5
[36.4]	C. Completion Guaranties.....	36-6
[36.5]	D. Conflicts of Interest.....	36-6
[36.6]	E. Different Deals .....	36-6
[36.7]	F. Distributions .....	36-7
[36.8]	G. Due Diligence.....	36-7
[36.9]	H. Enforcement .....	36-7
[36.10]	I. Full Recourse?.....	36-8
[36.11]	J. Joinder by Spouse.....	36-8
[36.12]	K. Not So Good?.....	36-8
[36.13]	L. Plain English .....	36-8

[36.14]	M. Principal .....	36-9
[36.15]	N. Security .....	36-9
[36.16]	III. Caveats .....	36-9
[36.17]	A. Bad Dates .....	36-9
[36.18]	B. Defined Terms.....	36-9
[36.19]	C. State-Specific Provisions .....	36-10
[36.20]	IV. Shorter-than-Short.....	36-10
[36.21]	V. Lease Language Based on Guaranty .....	36-12
[36.22]	A. Concessions to Guarantor .....	36-12
[36.23]	B. Events of Default.....	36-13
[36.24]	C. Guaranty.....	36-14
[36.25]	D. Interaction With “Good Guy” Guaranty .....	36-14
[36.26]	E. Notices.....	36-14
[36.27]	F. Special Tenant Rights .....	36-15
[36.28]	VI. Tenant or Guarantor? .....	36-15
[36.29]	VII. Closing Documents .....	36-16
[36.30]	VIII. Post-Signing Administration .....	36-18
[36.31]	A. Amendments, Etc. ....	36-18
[36.32]	B. Change of Address; Other Notices.....	36-18
[36.33]	C. Lines of Communication.....	36-18
[36.34]	D. Loan Closings.....	36-18
[36.35]	E. Renewal and Extension .....	36-19
[36.36]	F. Reporting.....	36-19
[36.37]	G. Termination of Guarantor .....	36-19
[36.38]	H. Workout Negotiations .....	36-19
[36.39]	IX. Base Case: Full Guaranty of Lease .....	36-20
[36.40]	A. Definitions.....	36-21
[36.41]	B. Guaranty of Guaranteed Obligations .....	36-23
[36.42]	C. Landlord’s Exercise of Landlord Remedies.....	36-24
[36.43]	D. No Offset.....	36-25
[36.44]	E. Changes in Lease.....	36-25
[36.45]	F. Waivers of Rights and Defenses .....	36-25
[36.46]	G. Nature of Guaranty.....	36-26
[36.47]	H. Miscellaneous.....	36-26
[36.48]	I. Additional Documents .....	36-26
[36.49]	X. Partial Guaranty.....	36-28
[36.50]	XI. Good-Guy Guaranty.....	36-31
[36.51]	XII. Representations and Warranties .....	36-33
[36.52]	A. Representations and Warranties.....	36-33
[36.53]	XIII. Multiple Guarantors.....	36-35
[36.54]	A. Joint and Several Liability .....	36-36
[36.55]	B. Notices and Service.....	36-36



[36.56]	C. Counterparts .....	36-36
[36.57]	XIV. Guarantor Financial Matters .....	36-36
[36.58]	A. Financial Information .....	36-37
[36.59]	B. Guarantor Financial Standard.....	36-38
[36.60]	XV. Recovered Payments .....	36-38
[36.61]	XVI. Special Mortgagee Protections .....	36-39
[36.62]	XVII. Enforcement .....	36-41
[36.63]	XVIII. Miscellaneous—Nonbusiness .....	36-41
[36.64]	A. Consent to Jurisdiction .....	36-42
[36.65]	B. Death or Disability .....	36-42
[36.66]	C. Tenant Insolvency Proceeding .....	36-42
[36.67]	D. Debt Collection .....	36-43
[36.68]	E. Demand on Guarantor .....	36-43
[36.69]	F. Further Assurances .....	36-43
[36.70]	G. Maximum Guaranteed Amount.....	36-43
[36.71]	H. Notices.....	36-43
[36.72]	I. Other Guaranties .....	36-44
[36.73]	J. Reimbursement and Subrogation Rights.....	36-44
[36.74]	K. Scope of Lease Obligations.....	36-44
[36.75]	L. Security.....	36-45
[36.76]	M. Miscellaneous.....	36-45
[36.77]	XIX. Designation of Agent for Service .....	36-46
[36.78]	A. Initial Designation .....	36-46
[36.79]	B. Preservation of Agent’s Status; Replacement of Agent .....	36-46
[36.80]	C. Means of Service.....	36-47
[36.81]	D. No Limit on Landlord .....	36-47
[36.82]	XX. Concessions to Guarantor.....	36-47
[36.83]	A. Assignment to Guarantor .....	36-48
[36.84]	B. Confidentiality.....	36-48
[36.85]	C. Mutual Attorney Fees.....	36-48
[36.86]	D. New Lease .....	36-48
[36.87]	E. Notice and Opportunity to Cure .....	36-49
[36.88]	F. Preserved Defenses .....	36-49
[36.89]	G. Release on Assignment .....	36-50
[36.90]	H. Termination of Guaranty .....	36-51

**CHAPTER 37 LEGAL ISSUES, PRACTICES, AND PRACTICALITIES FOR LETTERS OF CREDIT IN COMMERCIAL LEASES, WITH A SAMPLE LETTER OF CREDIT AND COMMENTARY**

*Joshua Stein, Esq.*

[37.0]	I.	Introduction .....	37-3
[37.1]	II.	Substantive Comments .....	37-5
[37.2]	III.	Industry Standard Practices for L/Cs .....	37-7
[37.3]	IV.	Points Not Covered .....	37-9
[37.4]	V.	Some Issues to Consider .....	37-15
[37.5]	VI.	Other Documentation .....	37-17
		Exhibit A: Sight Draft .....	37-25
		Exhibit B: Transfer Notice .....	37-27

**CHAPTER 38 AN UPDATE ON THE BANKRUPTCY LAW OF LARGE LETTERS OF CREDIT FOR LEASES**

*Joshua Stein, Esq.*

**CHAPTER 39 THE ESSENTIAL GUIDE TO THE MOST IMPORTANT CLAUSE IN A COMMERCIAL LEASE: THE DEFAULT CLAUSE**

*Adam Leitman Bailey, Esq.*

*John M. Desiderio, Esq.*

[39.0]	I.	Introduction .....	39-3
[39.1]	II.	Common Provisions Of The Default Clause .....	39-5
[39.2]	A.	Events of Default .....	39-5
[39.3]	B.	Conditional Limitation and Condition Subsequent .....	39-6
[39.4]	C.	Notice Provisions .....	39-9
[39.5]	III.	Tools of the Effective Default Clause .....	39-11
[39.6]	A.	Additional Rent .....	39-11
[39.7]	B.	Rent Acceleration .....	39-13
[39.8]	C.	Late Charges .....	39-15
[39.9]	D.	Chronic Nonpayment .....	39-15
[39.10]	E.	Self-Help Evictions .....	39-17
[39.11]	IV.	Common Issues With Default Clauses .....	39-22
[39.12]	A.	Attorney Fees .....	39-22
[39.13]	B.	Liquidated Damages Provisions: Avoiding the Penalty .....	39-22

[39.14]	1. Representative Cases Where the Liquidated Damages Provision Was Not Enforced .....	39-25
[39.15]	2. Representative Cases Where the Liquidated Provision Was Enforced .....	39-27
[39.16]	C. Monetary and Non-Monetary Defaults .....	39-31
[39.17]	D. Notices to Cure and Avoiding the Yellowstone Injunction .....	39-32
[39.18]	V. Licenses .....	39-34
[39.19]	VI. Drafting for the Commercial Tenant .....	39-37
[39.20]	A. Introduction .....	39-37
[39.21]	B. Mitigation of Damages.....	39-38
[39.22]	C. Prevailing Party Clause .....	39-38
[39.23]	D. Right of Expansion Clause .....	39-39
[39.24]	E. The Option to Renew .....	39-40
[39.25]	F. Ownership and Use .....	39-40
[39.26]	G. Signage and Alterations .....	39-41
[39.27]	H. Repairs and Self-Help .....	39-42
	Appendix: Sample Default Clauses .....	39-43

## CHAPTER 40 OVERVIEW OF LEASE ENFORCEMENT

*Michelle A. Maratto Itkowitz, Esq.*  
*Jay B. Itkowitz, Esq.*

[40.0]	I. Introduction to Lease Enforcement .....	40-3
[40.1]	A. Occupancy Relationships .....	40-3
[40.2]	B. Summary Proceedings.....	40-5
[40.3]	C. Nonpayment Vs. Holdover.....	40-7
[40.4]	1. What About a Holdover for the Non-Payment of Rent? .....	40-8
[40.5]	2. Which Case Should I Bring—a Nonpayment or a Holdover?.....	40-9
[40.6]	II. Vital Preliminary Considerations in Lease Enforcement Litigation.....	40-9
[40.7]	A. Create a Lease Abstract.....	40-10
[40.8]	B. Petitioner’s Interest .....	40-12
[40.9]	C. Lease.....	40-14
[40.10]	1. Get the Whole Lease .....	40-14
[40.11]	2. How to Get Around Problems with Petitioner's Interest in the Lease.....	40-14
[40.12]	D. Arrears Report .....	40-15
[40.13]	E. Corporate Status in New York .....	40-15

[40.14]	F. Other Litigation.....	40-16
[40.15]	G. Correspondence.....	40-16
[40.16]	H. Chronology on Microsoft Excel.....	40-16
[40.17]	I. Evidence of Additional Occupants.....	40-16
[40.18]	J. Search the Tenant and the Building Online, and Look At Google Maps.....	40-17
[40.19]	K. Take a Field Trip—Go Visit the Premises.....	40-17
[40.20]	III. Predicate Notices in General.....	40-17
[40.21]	A. Predicate Notices Not Amendable.....	40-19
[40.22]	B. Who May Sign A Predicate Notice.....	40-19
[40.23]	IV. Predicate Notice When Suing For Rent—Rent Demands.....	40-20
[40.24]	A. Rent Demands.....	40-20
[40.25]	B. Lease Can Lengthen Time Requirement in Rent Demand.....	40-20
[40.26]	C. Oral Rent Demand.....	40-20
[40.27]	D. Good Faith Approximation of Arrears in Rent Demand.....	40-21
[40.28]	E. Payment or Surrender Options in Rent Demand...	40-21
[40.29]	F. Legal and Late Fees in Rent Demand.....	40-21
[40.30]	G. Service of Rent Demand.....	40-21
[40.31]	V. Predicate Notices In Holdovers.....	40-22
[40.32]	A. When No Predicate Notice Required.....	40-22
[40.33]	B. Termination of Month-to-Month Tenancy.....	40-22
[40.34]	VI. Conditional Limitations.....	40-23
[40.35]	A. Types of Defaults Subject to Conditional Limitations in a Lease.....	40-23
[40.36]	1. Non-Rent Defaults Subject to Conditional Limitations.....	40-23
[40.37]	2. Nonpayment of Rent as a Conditional Limitation.....	40-25
[40.38]	B. Notice to Cure.....	40-26
[40.39]	C. “Yellowstone” and Tolling Time to Cure Defaults.....	40-26
[40.40]	D. Termination Notice.....	40-28
[40.41]	E. Things to Keep in Mind When Terminating a Tenancy Pursuant to a Conditional Limitation.....	40-29
[40.42]	1. Service of Notices to Cure and Notices of Termination Given Pursuant to a Lease.....	40-29
[40.43]	2. Effect of Acceptance of Rent Post-Termination.....	40-29

[40.44]	F. Flow Chart of Litigation Regarding Conditional Limitations in Commercial Leases— Yellowstone.....	40-29
[40.45]	G. Non-Curable Defaults .....	40-31
[40.46]	1. Insurance Defaults.....	40-31
[40.47]	2. Other Incurable Defaults .....	40-32
[40.48]	3. Defaults the Tenant Refuses To Cure .....	40-32
[40.49]	VII. Notice of Petition and Petition .....	40-32
[40.50]	A. Elements of a Petition .....	40-32
[40.51]	B. Who to Name As a Respondent in the Petition....	40-33
[40.52]	1. Subtenants .....	40-33
[40.53]	2. Unidentified People or Business Entities Occupying the Premises .....	40-34
[40.54]	3. Do Not Name Guarantors to the Lease .....	40-34
[40.55]	VIII. Service of Process .....	40-34
[40.56]	A. Process Service—In General.....	40-35
[40.57]	B. Five Elements of Process Serving .....	40-36
[40.58]	1. Delivery of the Papers .....	40-37
[40.59]	a. Delivery Options Set Forth in RPAPL § 735.....	40-37
[40.60]	b. An Important Note on Delivery Options ..	40-37
[40.61]	2. GPS.....	40-38
[40.62]	a. GPS Rule .....	40-38
[40.63]	b. Picture Still Worth 1000 Words .....	40-40
[40.64]	3. Mailing Requirement.....	40-40
[40.65]	4. Filing the Petition and Filing Proof of Service for Petition.....	40-42
[40.66]	a. Commencing the Proceeding and Filing the Petition.....	40-42
[40.67]	b. Filing Proof of Service of Petition.....	40-42
[40.68]	5. Log Book.....	40-42
[40.69]	a. Log Book In General .....	40-42
[40.70]	b. What Must Go Into Log Book.....	40-43
[40.71]	c. Number of Log Book Entries .....	40-44
[40.72]	d. Sample Log Book Pages.....	40-44
[40.73]	IX. Motion Practice in Landlord and Tenant Court.....	40-48
[40.74]	A. Motion Practice in Summary Proceedings .....	40-48
[40.75]	1. CPLR Article 4.....	40-48
[40.76]	2. Siegels on New York Practice.....	40-49
[40.77]	3. The Uniform Rules.....	40-49
[40.78]	4. The Judge’s Rules .....	40-49
[40.79]	5. The Law of the Case.....	40-50

[40.80]	6. If All Else Fails, Call the Clerk With an Intelligent Question.....	40-50
[40.81]	B. Use Memos of Law; Make Attorney Affirmations and Client Affidavits Very Short .....	40-50
[40.82]	C. Motion Practice Timing and Strategy .....	40-50
[40.83]	X. Frequently Litigated Issues In Commercial Landlord and Tenant Law .....	40-52
[40.84]	A. Actual Eviction and Constructive Eviction.....	40-52
[40.85]	B. Refusal to Sublet .....	40-53
[40.86]	C. No-Counterclaims Provision.....	40-54
[40.87]	D. Surrender .....	40-55
[40.88]	E. Alleged Oral Agreements.....	40-55
[40.89]	F. No-Waiver Claims .....	40-56
[40.90]	G. Use of Premises.....	40-57
[40.91]	H. Notice Was Not Issued By the Landlord With Whom Tenant Entered the Lease .....	40-57
[40.92]	I. Viability of Cross-Default Provisions .....	40-58
[40.93]	J. Signage of Sidewalk Sheds .....	40-58
[40.94]	XI. Strategy and Gamesmanship .....	40-60
[40.95]	A. When to Start Litigation.....	40-61
[40.96]	B. Trial Readiness.....	40-61
[40.97]	C. Adjournments .....	40-62
[40.98]	D. Traverse.....	40-63
[40.99]	E. Calling the Tenant As Your First Witness .....	40-63
[40.100]	XII. Stipulations Of Settlement .....	40-64
[40.101]	A. Judgment of Possession and Warrant of Eviction .....	40-64
[40.102]	B. Itemize Arrears—Money Judgment—Satisfaction of Money Judgment.....	40-65
[40.103]	C. Payment Applied First to Current Rent Due .....	40-66
[40.104]	D. Security Deposit.....	40-66
[40.105]	E. Further Orders to Show Cause .....	40-67
[40.106]	F. “Broom Clean,” What to Do With the Keys, and Property Left Behind.....	40-67
[40.107]	G. Sole Possession .....	40-68
[40.108]	H. Holdover Period .....	40-68
[40.109]	I. Guarantee .....	40-68
[40.110]	J. General Releases .....	40-68
[40.111]	K. Attorney Fees .....	40-69
[40.112]	L. Routine Matters.....	40-69
[40.113]	XIII. Making Eviction Day Happen.....	40-69
[40.114]	A. Obtaining the Warrant.....	40-69

[40.115]	B. Scheduling the Marshal.....	40-70
[40.116]	C. Marshal’s Notice .....	40-70
[40.117]	D. Meeting the Marshal.....	40-71
[40.118]	E. Two Options on Eviction Day.....	40-71
[40.119]	1. Legal Possession .....	40-72
[40.120]	2. Move Out Eviction.....	40-72
[40.121]	3. For Both Types of Evictions .....	40-73
[40.122]	a. Take Pictures .....	40-73
[40.123]	b. Marshal’s Inventory.....	40-73
[40.124]	F. Preventing/Delaying the Eviction .....	40-73
[40.125]	1. Order to Show Cause.....	40-73
[40.126]	a. Service of An Order to Show Cause Is Important .....	40-74
[40.127]	b. Check Stays In Order To Show Cause Carefully .....	40-74
[40.128]	c. Post-Eviction Order to Show Cause .....	40-74
[40.129]	2. Marshal Is Uncomfortable Evicting .....	40-74
[40.130]	XIV. Attorney Fees .....	40-75
[40.131]	A. Landlord and Tenant Cases and Attorney Fees.....	40-75
[40.132]	B. Prevailing Party Status .....	40-75
[40.133]	C. How to Make a Motion for Attorney Fees .....	40-76
[40.134]	1. Cite the Lease and the Relevant Statute .....	40-76
[40.135]	2. Explain Why Your Fees Are Reasonable.....	40-76
[40.136]	3. Invoices .....	40-77
[40.137]	a. Proper Invoicing .....	40-77
[40.138]	b. Defending Your Bills.....	40-77
[40.139]	4. Exhibits for Attorney Fees Hearing .....	40-77
[40.140]	XV. Stays Pending Appeal.....	40-78
[40.141]	A. In General.....	40-78
[40.142]	B. Time Frames for Perfecting Appeals .....	40-80
[40.143]	C. Time Frames for Arguing Appeals.....	40-80
[40.144]	D. Further Appeals.....	40-81
[40.145]	E. The Bond.....	40-82

## **PART VI—LENDER’S ISSUES**

### **CHAPTER 41 HOW LENDER’S COUSEL REVIEWS A LEASE**

*Joshua Stein, Esq.*

[41.0]	I. Why Mortgage Lenders Care About Leases .....	41-3
[41.1]	II. Some Preliminary Questions: Defining the Lease Review.....	41-7

[41.2]	A. What Lease? .....	41-8
[41.3]	B. Missing Documents.....	41-8
[41.4]	C. What Deliverable?.....	41-9
[41.5]	III. Dealing With Problems .....	41-10
[41.6]	IV. General and Financial Questions.....	41-14
[41.7]	A. Tenant.....	41-14
[41.8]	B. Space .....	41-14
[41.9]	C. Term .....	41-15
[41.10]	D. Rent .....	41-15
[41.11]	E. Security Deposit.....	41-16
[41.12]	F. Construction Obligations .....	41-16
[41.13]	V. Landlord and Lender Shared Concerns .....	41-18
[41.14]	A. Casualty and Condemnation .....	41-19
[41.15]	B. Go Dark.....	41-21
[41.16]	C. Abatement Rights.....	41-24
[41.17]	D. Assignment/Subletting.....	41-24
[41.18]	E. Termination/Cancellation Rights .....	41-26
[41.19]	F. Unreasonable Burdens .....	41-27
[41.20]	G. Options and Preemptive Rights.....	41-29
[41.21]	H. Exculpation .....	41-29
[41.22]	I. Protection on Alterations and Contest.....	41-30
[41.23]	J. Concessions to Creditworthy Tenants.....	41-30
[41.24]	VI. Lender Protection Issues .....	41-31
[41.25]	A. Estoppel Certificates .....	41-32
[41.26]	B. Priorities .....	41-32
[41.27]	C. Attornment .....	41-33
[41.28]	D. Cure Rights.....	41-34
[41.29]	E. Direct Rent Payment .....	41-34
[41.30]	F. Conditions to Lender Protections.....	41-35
[41.31]	G. One Last Category of Issues .....	41-35

## **CHAPTER 42 MODEL LEASE REVIEW CHECKLIST**

*Joshua Stein, Esq.*

## **CHAPTER 43 THE USE AND MISUSE OF ESTOPPEL CERTIFICATES**

*Andrew L. Herz, Esq.*

*Hope K. Plasha, Esq.*

[43.0]	I. Introduction .....	43-3
[43.1]	II. Elements of an Estoppel Certificate.....	43-6



[43.2]	A. Identification of the Lease and All Amendments and Related Documents.....	43-6
[43.3]	B. Confirmation of Factual Matters Not Documented Within the Lease Itself .....	43-7
[43.4]	C. Confirmation of Independent Facts Relating to the Tenant.....	43-8
[43.5]	D. Confirmation of Matters Set Forth in the Lease....	43-8
[43.6]	E. Attempts to Modify the Lease by the Landlord or, More Often, Its Lender.....	43-9
[43.7]	III. Obligation to Deliver Estoppel Certificates .....	43-10
[43.8]	IV. Is an Estoppel Certificate Effective? .....	43-11
[43.9]	V. Problems and Pitfalls.....	43-12
[43.10]	VI. Conclusion.....	43-13

## **CHAPTER 44 MODEL TENANT ESTOPPEL CERTIFICATE**

*Joshua Stein, Esq.*

## **CHAPTER 45 MODEL NONDISTURBANCE AGREEMENT AND REPORT**

*Joshua Stein, Esq.*

[45.0]	I. Introduction .....	45-3
[45.1]	II. Overall Approach and Purpose.....	45-5
[45.2]	III. Use of the Model SNDA Agreement .....	45-6
[45.3]	A. Recordation .....	45-6
[45.4]	B. Use Outside New York .....	45-6
[45.5]	C. Estoppel Certificate .....	45-6
[45.6]	IV. Negotiable Issues.....	45-7
[45.7]	A. Basic Economic Terms of Lease.....	45-7
[45.8]	B. Security Deposit.....	45-7
[45.9]	C. Construction Work.....	45-8
[45.10]	D. Casualty and Condemnation Repairs .....	45-8
[45.11]	E. Deed in Lieu of Foreclosure.....	45-9
[45.12]	F. Options .....	45-9
[45.13]	G. Amendments and Modifications .....	45-10
[45.14]	H. Offset Rights .....	45-10
[45.15]	I. Estoppel Certificate .....	45-10
[45.16]	J. Opportunity to Cure Landlord's Default.....	45-10
[45.17]	K. Nonrecourse .....	45-12
[45.18]	L. Landlord's Payment Obligations.....	45-13
[45.19]	M. Future Advances.....	45-10
[45.20]	V. Additional Issues to Consider.....	45-11

[45.21]	A. Payment of Rent to Mortgagee .....	45-12
[45.22]	1. Tenant’s Covenant .....	45-12
[45.23]	2. Landlord’s Acknowledgment.....	45-12
[45.24]	B. Tenant Exculpation .....	45-13
[45.25]	C. Bankruptcy of Mortgagee .....	45-13
[45.26]	D. Bankruptcy of Landlord .....	45-14
[45.27]	E. Miscellaneous.....	45-14

**CHAPTER 46 JOURNEY THROUGH THE NINE CIRCLES OF HELL: A TENANT’S ODYSSEY IN NEGOTIATING NONDISTURBANCE AGREEMENTS**

*Joel R. Hall, Esq.*

[46.0]	I. Introduction .....	46-3
[46.1]	II. Subordination of Lease or Mortgage.....	46-3
[46.2]	III. Negotiating the Subordination Clause of the Lease....	46-14
[46.3]	IV. Negotiating the Nondisturbance Agreement .....	46-24
[46.4]	V. Conclusion.....	46-65
	Exhibit A: Subordination, Nondisturbance and Attornment Agreement .....	46-67

**CHAPTER 47 NEW YORK STATUTES ON COMMERCIAL LEASING**

*Joshua Stein, Esq.*