



COMMERCIAL LEASE LAW INSIDER®

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Prevent Tenant from Killing Your Chances of Future Financing

It can be tough to get a powerful tenant to sign a subordination, nondisturbance, and attornment (SNA) agreement when you're trying to get financing from a lender. The lender's SNA agreement may contain some terms that the tenant doesn't like. If the tenant refuses to sign the agreement—or takes a long time arguing over the points in it—you could end up losing your financing.

You may think you can prevent the tenant from throwing a monkey wrench into your financing plans by getting it to promise in the lease that in the future it will sign any SNA agreement that has "reasonable" terms. But this strategy is faulty, warns New York City attorney Robert P. Reichman. You may wind up arguing with the tenant over the definition of "reasonable." And simply getting the tenant to agree in advance to accept a list of points you think a future lender will require may not be totally effective either.

Reichman has a better idea: Say in the lease that the tenant must accept the terms of any future SNA agreement if these terms are the same as those the lender typically includes in SNA agreements with similarly situated tenants. Then, if an SNA agreement has a provision that the tenant doesn't like—but that's commonly

used by the lender with similar tenants—too bad. The tenant must sign it anyway.

To help you implement this strategy, we've given you a Model Lease Clause on p. 3.

SNA Agreement Is Crucial to Financing

Every owner knows that it's crucial to get a tenant to agree in the lease that the lease will be "subordinate"—that is, lower in priority—to any future mortgages. Without this agreement, you'll have a tough time getting any financing.

But a powerful tenant won't agree to subordinate its lease to a future mortgage unless the lender signs a "nondisturbance" agreement at the time of the subordination. This means the lender agrees that it will neither terminate the lease after the foreclosure nor throw out the tenant. If the lender agrees to the nondisturbance, it will also demand that the tenant agree to an "attornment." This means the tenant will recognize the lender as the new "landlord" in the lease. These three agreements—subordination, nondisturbance, and attornment—are usually tied up in one document: the SNA agreement.

How Trouble Develops

Problems often arise over an SNA agreement, because lenders typically include provisions limiting their "landlord" responsibilities should they ever take over the building or shopping center after a foreclosure. Some of these limits are commonly accepted by tenants, such as the lender's refusal to be responsible for past acts or omissions of the owner whose property was foreclosed. But some limits are more onerous for tenants—and can drastically change the tenant's rights and obligations in the lease. For example, the lender will often refuse to be forced to restore the space if insurance proceeds don't cover restoration costs after a casualty.

Tenants frequently balk at provisions they believe are unreasonable—and refuse to sign the SNA agreement. Reichman has seen tenants jeopardize an owner's financing this way. By fighting with the lender over the terms of the SNA agreement, the tenant may at best delay your loan and at worst drive your lender away.

List of Lender's Points Isn't Enough

You might think you can protect yourself from this scenario by preparing a laundry list of provisions that you expect a future lender to want in

an SNA agreement—including provisions that might be controversial with a tenant. Then you can put this list in the lease and have the tenant promise in the lease to accept all the provisions in any future SNA agreement.

But the laundry list concept won't offer you full protection, says Reichman. There are three problems with relying on an all-inclusive list:

- You can't predict all the terms a lender will demand in a future SNA agreement, since you don't know which lender you'll be dealing with in the future.

- You can't predict future problems that may lead to lenders demanding new terms. For example, 15 years ago environmental problems linked to electromagnetic rays were a nonissue. But now a lender may want some sort of protection in the SNA agreement from any liability for this problem.

- A long list of controversial points might be a red flag to the tenant and spur interminable lease negotiations.

It's still a good idea to list the major provisions that practically all lenders will demand and to require the tenant to accept these provisions in a future SNA agreement, says Reichman [Clause, par. a]. Two examples: The lender won't be responsible for any previous acts or omissions by you; and it won't be bound by any lease modification to which it hasn't expressly agreed. This list will help you avoid any future arguments with the tenant over these specific provi-

sions. Just don't expect the list to do the whole job.

Make Tenant Accept SNA Given to Similar Tenants

To make sure all the important terms are covered—including controversial ones—Reichman suggests including a another requirement. Say in the lease that the tenant must sign a future SNA agreement if its terms are those typically included in *the particular* lender's SNA agreements with similarly situated tenants in similar shopping centers or office buildings [Clause, par. b].

A similarly situated tenant is one with roughly the same financial worth and rating, leasing about the same size space, and performing a similar use (e.g., office, service, retail, restaurant), explains Reichman. A similar shopping center or office building will be one that's about the same size, in a similar-type area (e.g., both in midtown New York City), with the same quality of tenants and with the same rating (e.g., a first-class building), he says. For example, if your tenant is a large office tenant in a first-class office building in downtown St. Louis, it would have to accept the terms that typically appear in the same lender's SNA agreements with other large office tenants in nearby first-class office buildings.

Tenants will accept this lease clause because it ensures that they'll get SNA terms that have already been

negotiated with similarly situated tenants. They won't be forced to accept a lender's SNA form agreement, which is likely to be more onerous, says Reichman.

Clause Works Only with Institutional Lender

Reichman has used this clause many times. And he's found it to be very effective at cutting down future problems with tenants. But, warns Reichman, the clause will generally work only if you're agreeing to deal with an institutional lender. That's because most institutional lenders have an SNA track record. There's a good chance they've negotiated an SNA agreement with a similarly situated tenant, and they can prove what terms have been negotiated. A smaller private lender may not be able to show you and the tenant other SNA agreements with similarly situated tenants.

PRACTICAL POINTER: Also have the lease clause apply to SNA agreements related to any future lease with a "ground" lessor (the owner of the land under your building) or with a "superior" lessor (in, say, a sale-leaseback). The same issues that apply to SNA agreements with lenders may arise in these situations too. ▲

CLLI Source

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MODEL LEASE CLAUSE

Don't Let Tenant Stall on Subordination, Nondisturbance, Attornment Agreement

The following lease clause was drafted by New York City attorney Robert P. Reichman. It should prevent a tenant from refusing to sign a subordination, nondisturbance, and attornment (SNA) agreement from a lender because the tenant thinks the agreement's terms are unreasonable. It should also prevent the tenant from refusing to subordinate to a prospective superior lessor or ground lessor.

Add this clause to the nondisturbance section of your lease. Paragraph a requires the tenant to promise to accept a future SNA agreement that contains certain specific terms that lenders are likely to demand and refers to a list of these terms that you'll put elsewhere in the nondisturbance section. Paragraph b says the tenant must accept SNA terms that the lender (or lessee) customarily gives to similarly situated tenants in similar buildings.

SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT

This Lease shall be subject and subordinate to (i) any mortgage or deed of trust that hereafter affects all or any portion of the Premises ("future mortgage") and (ii) any ground, overriding and underlying lease ("superior lease"). Landlord shall obtain from the holder of such future mortgage ("future mortgagee") or the lessor under such superior lease ("future lessor"), as the case may be, a subordination, nondisturbance, and attornment agreement ("SNA Agreement") for the benefit of Tenant, providing:

- a. Such terms, covenants, and conditions as set forth in Paragraph [*insert par. # in the lease's nondisturbance section listing specific lender points*]; and
- b. Such other term as such future mortgagee or future lessor customarily and consistently requires of tenants similarly situated to Tenant leasing comparable space in [*insert description of shopping center/office building, e.g., first-class building*] similar to the [*Shopping Center/Building*].