

Putting The “Stop” Back In Estoppels

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Some herpetologists have observed that the most dangerous snakes are often the smallest. So too it may be said about some legal documents. Casually presented for execution by a landlord to the non-lawyer property manager or office administrator, a seemingly innocent lease estoppel certificate has the potential for creating both unpleasant and unanticipated problems for the tenant that fails to be wary of the estoppel's bite.

A landlord's request for a lease estoppel from a tenant usually arises in connection with the landlord's sale or financing of the building in which the space leased to the tenant is located. The prospective purchaser or lender is often relying on the existence of the tenant's lease in making its purchase or lending decision, and in order to independently confirm various matters concerning the lease, the prospective purchaser or lender may ask the landlord to obtain an estoppel from the tenant, which estoppel addresses the important terms of the lease. The estoppel is usually crafted or at least approved by the purchaser's or lender's counsel and may be deliberately formatted and presented in a manner intended to draw as little attention to it as possible so as to avoid scrutiny by the tenant's counsel, with the ultimate goal being that the estoppel is treated by the tenant's non-lawyer representative as "just some standard form that looked okay to me."

Because an estoppel has the potential to be a possibly significant legal document, in-house counsel accordingly should alert office managers, facilities managers and the like that estoppels are not simply standard forms with little or no legal significance.

The first place a tenant should look when it has been given an estoppel certificate is the portion of its existing lease relating to estoppels. By doing so, the tenant can determine just what, if anything, the tenant is obligated to deliver to the landlord, the time in which it must be delivered, and a description of any special sanctions that the landlord may impose by reason of the tenant's failure to timely deliver the requested estoppel. Even a moderately well-drafted landlord's form of lease will provide that the tenant is obligated to deliver an estoppel certificate (perhaps limited to a specified number of times per year) confirming a variety of matters, such as the lease commencement and termination dates, that rent has been paid through a specified date and that there are no rent credits due the tenant,

that there is no default by either the landlord or the tenant under the lease, the amount of any security deposit posted by the tenant, that the copy of the lease attached to the certificate is a true and complete copy of the lease, that the tenant has not sublet any portion of the space or assigned the lease, and that the certificate may be relied upon by a prospective purchaser or lender. It is not unusual for a landlord's form of lease to also provide that the tenant will confirm or otherwise address in the estoppel "such other matters as may reasonably be requested by the landlord," obviously creating the opportunity for disagreement between the parties.

Unless there is some good reason for the tenant to do so, the tenant should address in the estoppel only those items that it is contractually obligated to address. For several reasons, the tenant should avoid the impulse to be a "good guy" by delivering an estoppel broader than the lease requires. The tenant should assume that the clause in the lease that requires estoppels was appropriately negotiated, and the tenant should have a very good reason for going beyond the requirements of the underlying lease. It is not unusual for a landlord or a tenant to try to go beyond the requirements of the estoppel provisions in the lease by seeking to have the estoppel certificate clarify (usually for the purchaser's or lender's benefit) provisions that may not be clear in the lease. In some circumstances, purchasers and lenders may seek to effect (without actually saying so) a lease modification to change or remove a provision they do not like. For example, a purchaser may seek to have a tenant waive a first refusal right, an expansion right or otherwise, in essence, amend the lease for the benefit of the purchaser. A lender may seek to impose new obligations on the tenant for the benefit of the lender, such as those that require the tenant to agree that it will not look to the lender for defaults of the landlord, that the tenant will give the lender notice of any default by the landlord under the lease, and that the tenant will not exercise any of its rights arising out of the landlord's default (such as rights of termination, self-help or the withholding of rent) until the lender has failed to cure the landlord's default. It is not uncommon for a lender to request cure rights that extend past the applicable cure period the landlord may have. While all of these new obligations

may be perfectly appropriate for a lender or a purchaser, they may effect the waiver of some of the tenant's existing and possibly vigorously negotiated rights or the imposition of new obligations, all presumably without corresponding new benefits to the tenant. By its lack of diligence, a tenant not only may give away something it need not give away, but it might also be surprised to find that it has violated the terms of other agreements. Subordination, non-disturbance and attornment agreements, as well as lease assignments executed by tenants in connection with their landlord's financings, often will restrict the ability of the tenant to modify its lease without the consent of the lender. The tenant that amends its lease by virtue of the provisions of the estoppel may find that it has caused a violation of such other agreements.

Additionally, in older leases, where the subject of environmental conditions was not originally considered and therefore not dealt with at all (except possibly in the context that the tenant would comply with all laws, rules and regulations affecting the premises), landlords sometimes seek to rehabilitate their lease provisions through the estoppel process by including in the certificate not only representations by the tenant about environmental conditions, but also operational covenants that, while not unusual in current leases, may be outside of the scope of what a tenant is obligated to deliver.

Even if the tenant responds only to the provisions of the estoppel that are required by its lease, there is still reason for caution. While simply comparing what is attached to the estoppel certificate to the tenant's copy of the lease would intuitively seem to be an effective way for the tenant to respond to the statement in the estoppel that "attached to the estoppel certificate is a true and complete copy of the lease," the process does not end there. Often forgotten by both the landlord and the tenant are side letters relating to lease matters, rooftop license agreements, storage space license agreements, parking letters, plan approvals, landlord consents, lease amendments, extension and expansion notices, and other important agreements that may be outside of the lease document itself. Should a purchaser or lender acquire the property without knowledge of such ancillary agreements, the tenant may be both surprised and disappointed to find that the new owner of the building, relying on the tenant's state-

ment that there is nothing else, will not be bound to honor the terms of the undisclosed supplemental agreements.

The manner in which the tenant responds to the estoppel is also important. The landlord will usually seek to have the estoppel signed by the same entity that is the tenant under the lease. If, however, the entity is other than a sole proprietorship and the estoppel does not contain a qualification that the estoppel is being given only to the knowledge of the signatory (or possibly other additional and specified parties), the tenant's statements may be considerably broader than the tenant realizes.

Statements of the tenant that may be requested by the landlord – such as a seemingly innocuous confirmation by the tenant regarding the non-existence of prepaid rent or negating the tenant's rights to rent credits – are not without issues. While the tenant may feel that it can comfortably state that it has paid rent through the month in which its last payment has been made, the tenant should remember that it may have a right to receive rent credits for unused portions of its tenant improvement allowance, or apply as a rent credit overpayments in operating expenses, real estate taxes or percentage rent payments – all of which may be compromised unless carved out in the portion of the estoppel requesting confirmation from the tenant that it is not entitled to any rent credits.

Further, as a prudent attorney would do in the case of similar clauses found in opinion letters, the tenant will want to try to limit the number of parties that may rely on the estoppel certificate, and unless the lease estoppel provisions of the lease provide otherwise, the tenant might seek to specifically state by name the entities that may rely upon the certifications made in the estoppel certificate. Unless otherwise obligated to do so (e.g., if a tenant has agreed to notify a lender of any default under the lease by the landlord), in addition to limiting the parties that may rely on the certificate, the tenant should specifically disclaim the obligation to notify the parties of any change in the matters represented by the tenant in the certificate.

Often negotiated at length in the lease but forgotten in the estoppel is any limitation on the tenant's liability. If the tenant has limited its liability under the lease (e.g., its liability is limited to the assets of the tenant without any recourse to the assets of its partners), the tenant's liability under the estoppel should likewise be so limited.

Finally, care should be taken to avoid the use of undefined terms in an estoppel certificate. While terms may be separately defined in the certificate, a slightly more elegant method that reduces the chances of the use of inconsistent terminology is to use terms in the certificate as they are defined in the lease that is the subject of the certificate.

With an awareness that the apparently innocuous estoppel certificate can be more lethal than it looks, tenants can properly respond to the legitimate requests of their landlords while at the same time avoiding the bite of an inappropriate estoppel certificate.

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