The Rodney Dangerfield Clauses
Ten Lease Provisions That Get No Respect

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When negotiating commercial leases, lawyers typically focus on achieving the business objectives and protecting the legal rights and remedies of their clients. Often, however, without much thought, attorneys tack on a litany of boilerplate provisions. These provisions, which are usually relegated to the end of the lease or are sprinkled casually throughout the more "important" lease clauses, are frequently overlooked while the lawyers dwell on the weightier issues. Nevertheless, boilerplate provisions address important legal underpinnings and, if improperly drafted, can have significant legal and financial consequences. A heightened degree of care and respect toward crafting these provisions can help the parties avoid surprises.

1. Force Majeure

Occurrences defined as force majeure events excuse parties for nonperformance of their obligations under the lease. Generally, the party with the most performance obligations will want an expansive definition of force majeure events. In many cases, the determination of whether an event of default has occurred can turn on whether the cause for nonperformance is within the definition of a force majeure event as set forth in the lease. The following is a typical force majeure provision.

> The time for the performance of any act required to be done by either party shall be extended by a period equal to any delay caused by or resulting from an act of God, war, terrorism, civil commotion, fire, casualty, labor difficulties, shortages of labor or materials or equipment, governmental regulation, a restraint of law (e.g., injunctions, court or administrative orders or a legal moratorium imposed by a governmental authority), act or default of the other party, or other causes beyond the reasonable control of the party seeking the extension of time (which shall not, however, include the availability of funds), whether that time be designated by a fixed date, a fixed time, or otherwise.

Depending on the relative bargaining power of the parties and the allocation of performance obligations under the lease, applicability of the force majeure provision may be expressly limited to one of the parties. Adding a notice requirement to a force majeure provision is another means of limiting the applicability of the provision. Because the force majeure provision is effective to excuse a party from liability for nonperformance, parties often seek to expand the applicability of the provision. The following are some specific examples of force majeure issues.

Government Prohibition

A New York court has held that a temporary restraining order against a landlord was a "government prohibition" described in a lease force majeure provision. *Reade v. Stoneybrook Realty, LLC,* 882 N.Y.S.2d 8 (App. Div. 2009).

Acts of God

After Hurricane Katrina struck in 2005, lease parties litigated over the extent to which a party could be excused from performance because of force majeure. The Louisiana Court of Appeals rejected one tenant's argument that the post-hurricane depressed business climate was a continuing force majeure event under the lease. The court noted that the tenant had presented no evidence of any physical damage to the leased premises. The tenant thus was obligated to continue paying rent for the remainder of its five-year lease term following Hurricane Katrina. The tenant was excused, however, from paying rent for the two months immediately following the hurricane because the court found that "the building was inaccessible due to the aftereffects of the storm." *Meadowcrest Prof'l Bldg. P'ship v. Toursarkissian,* 1 So. 3d 555, 556 (La. Ct. App. 2008). The court therefore narrowly interpreted the force majeure provision to exclude the economic effects of the hurricane: "To rule otherwise would be to make the enforceability of leases dependent on the vagaries of the marketplace, and this we decline to do." Id.

2. Limiting Liability/Exculpatory Provisions

Landlords typically require that their liability for claims under the lease be limited by exculpatory provisions.

Judicial treatment of exculpatory clauses varies from state to state. For example, in North Carolina, courts will generally uphold exculpatory clauses unless there is evidence that the provision is actually an unconscionable penalty for enforcing the terms of the lease, that there were formation irregularities in the lease, or that there is inequality of bargaining power between the parties. *Blaylock Grading Co. v. Smith*, 658 S.E.2d 680, 682–83 (N.C. Ct. App. 2008) (upholding provision in surveying contract limiting the surveyor's damages to $50,000). In Pennsylvania, however, although the relative sophistication of the parties is similarly a factor, the courts have held that an exculpatory clause is valid and enforceable if the clause does not contravene public policy; the contract relates entirely to the parties' own private affairs; is not a contract of adhesion; and the intention of the parties is expressed with particularity and demonstrates clear and unambiguous intent to release a party from liability. *Princeton Sportswear Corp. v. H & M Assocs.*, 507 A.2d 339, 341 (Pa. 1986).

Some courts have held that an exculpatory clause in a commercial lease "must be construed strictly against the party seeking its protection." *Kaplan v. Bankers Sec. Corp.*, 490 A.2d 932, 934 (Pa. Super. Ct. 1985). See also *Ultimate Computer Servs., Inc. v. Biltmore Realty Co.*, 443 A.2d 723, 726 (N.J. Super. Ct. App. Div. 1982) (general exclusion of liability for landlord's negligence did not keep landlord from being responsible for damage to computer equipment caused by defective roof). Nebraska has applied general contract law to exculpatory clauses, considering whether the provision was clear and unambiguous; whether there was any disparity in bargaining power between the parties; and whether the provision contravened public policy. *Keenan Packaging Supply, Inc. v. McDermott*, 700 N.W.2d 645, 653–54 (Neb. Ct. App. 2005).

The following is a sample exculpatory provision:

> Landlord's liability under this Lease shall be limited to its interest in the Demised Premises, and neither Landlord nor any member or partner in Landlord nor any member, partner in any such member or partner nor any other person having any direct or indirect interest in Landlord, shall have any personal liability with respect to any of the provisions of this Lease.

Although most tenants will accept such a limitation, many will add language that precludes limitation of liability in the event of intentional misconduct of the landlord.

3. Notices

A vague or unclear notice provision can prevent the parties from efficiently enforcing critical rights and remedies under the lease. Notice provisions should specifically identify the acceptable methods of delivery and clearly specify *when* notices will be deemed to be given.

Hand Delivery Method

If hand delivery is an acceptable means of providing notice, the parties should consider whether that method is likely to be effective under their particular circumstances, taking account of the size of the entities involved and other practical considerations. In addition, the hand delivery method must expressly require an acknowledging signature, receipt, or other documentation to evidence the actual delivery.

Facsimile and E-Mail Delivery Methods

The parties should also consider whether to allow notice given by the more convenient methods of facsimile and e-mail, which will depend in part on the term of the lease since facsimile numbers and e-mail addresses will likely change over time. Accordingly, the notice provision must require the parties to update their contact information as needed. Most practitioners still require that faxed and e-mailed notices be effective only in accompanied by a hard copy.

4. Integration Provisions

An integration provision states that all prior oral agreements and representations are integrated into the final signed lease. In general, integration provisions are interpreted by the common law plain meaning rule: "When a contract contains an integration clause, extrinsic evidence may not be admitted to prove different or additional terms in the contract, although such evidence may be admitted to interpret ambiguous terms of an integrated contract." *United Artists Theatre Circuit, Inc. v. Sun Plaza Enter. Corp.*, 352 F. Supp. 2d 342 (E.D.N.Y. 2005) (citing *Proteus Books Ltd. v. Cherry Lane Music Co.*, 873 F.2d 502, 509–10 (2d Cir. 1989)). The parties should consider, however, how this provision applies to lease exhibits.

Typically, the parties will provide that the exhibits are incorporated into the integrated document even when the exhibits are attached or finalized after full execution of the lease. Although it is not unusual for the exhibits to be included as part of integrated lease provisions, the parties may overlook the effect of terms contained in the

exhibits. In one recent case, a dispute regarding the meaning of the word "proposed" contained in the exhibits to a lease allowed the tenant to introduce extrinsic evidence to interpret the lease. *Chesterfield Exch., LLC v. Sportsman's Warehouse, Inc.* 572 F. Supp. 2d 856, 867 (E.D. Mich. 2008). The tenant argued that in its lease the landlord represented that Sam's Club was the "proposed" anchor tenant for the shopping center because a plan of the shopping center attached as an exhibit to the lease depicted Sam's Club as a "proposed" tenant. The tenant argued that in this context "proposed" meant "planned" or "intended," and that the tenant entered into the lease based primarily on the presence of Sam's Club as the anchor tenant. The landlord argued that the word "proposed" merely meant "possible" or "likely." The court disagreed, holding that the extrinsic evidence demonstrated that the lease meant "intended" because "[a]fter all, it was the participation of Sam's Club that rekindled the lease negotiations." Id. at 867.

5. Surrender

Lease surrender provisions describe the physical condition of the premises required at the time of surrender by the tenant. Lease parties frequently litigate over the condition required by surrender provisions.

Common Law Surrender Requirements

If the lease is silent, the standard at surrender is generally that the "lessee is under a duty at common law to return the premises in substantially the same condition as when they were received, reasonable wear and tear excepted." *Statler Arms, Inc. v. APCOA, Inc.*, 700 N.E.2d 415, 428 (Ct. C.P. Cuyahoga Cty. 1997).

Interaction with Maintenance Provisions

When surrender provisions are litigated, a court will likely interpret the surrender provision in the context of the lease as a whole, especially in conjunction with the maintenance provisions contained in the lease. Depending on the scope of the tenant's maintenance obligations during the term of the lease, the tenant may be liable for repairs or replacements at surrender that are not apparent from a reading of the surrender provision alone. *Statler Arms*, 700 N.E.2d at 423–25, 429. See also *SLW/UTAH, L.C. v. Griffiths*, 967 P.2d 534, 536 (Utah Ct. App. 1998) (surrender clause read with the maintenance clause to require a new roof). For example, although a lease was silent about surrender, because the tenant was obligated to maintain and repair structural elements of the leased premises during the term of the lease, the court held that the tenant was liable to replace the roof on surrender of the premises. *Statler Arms*, 700 N.E.2d at 428.

Addressing Special Personal Property

In drafting a lease, counsel should be sure to address the disposition of tenant's specific personal property or fixtures on lease surrender. Satellite dishes and other telecommunications equipment installed by a tenant at its sole expense can become problematic on surrender. In many cases, the landlord will require such equipment to be removed and for the tenant to repair any damage caused by the removal.

6. Waiver Provisions

Waiver provisions address acts or omissions that have the potential to function as a renouncement of rights and remedies otherwise available under the lease. As one New York court explained: "A waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent which must be proved." *Jefpaul Garage Corp. v. Presbyterian Hosp.*, 61 N.Y.2d 442, 446 (N.Y. 1984). By including waiver provisions in a lease, the parties expressly agree that specific acts and omissions that could constitute a waiver will not be deemed a waiver. In some leases, waiver provisions also can address conduct of parties other than landlord and tenant. For example, a waiver provision that is applicable to a defined category of "Landlord's Parties," which expressly includes "independent contractors," will likely be held by its plain meaning to apply to landlord's construction subcontractors. *H & M Hennes & Mauritz LP v. Skanska USA Bldg., Inc.*, 617 F. Supp. 2d 152, 159 (E.D.N.Y. 2008).

Another basic function of waiver provisions is to "give a contracting party some assurance that its failure to require the other party's strict adherence to a contract term . . . will not result in a complete and unintended loss of its contract rights if it later decides that strict performance is desirable." *Rehoboth Mall Ltd. P'ship v. NPC Int'l, Inc.*, 953 A.2d 702, 704 (Del. 2008) (quoting *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, No. Civ.A. 1465-VCS, 2007 WL 2752912, slip op. at 27 (Del. Ch. Apr. 13, 2007)). For example, when a restaurant tenant was entitled to seven successive five-year renewal terms under a lease, the landlord could not prevent the tenant from exercising its second five-year renewal term based on the tenant's defaults during the original term, when the landlord failed to enforce its remedies during the original lease term. *Rehoboth Mall*, 953 A.2d at 704–05. In Alaska, the landlord of a supermarket property was similarly precluded from enforcing the use provision of the lease six years after the

tenant's initial violation thereof. *Carr-Gottstein Foods Co. v. Wasilla, LLC*, 182 P.3d 1131, 1140 (Alaska 2008). In that instance, the tenant relocated an affiliate-owned liquor store from a satellite location to a portion of the leased premises, and the landlord not only knew about the move but helped to facilitate it. The Supreme Court of Alaska held that the waiver clause preserved landlord's right to object to tenant's future violations of the use provision of the lease but that the landlord had effectively waived its right to object to the use of the premises for the sale of liquor.

7. Compliance with Laws

Compliance with law provisions can shift liability to one party for the costs of making the leased premises compliant with government-ordered alterations or repairs. In addition, these provisions typically make a tenant's criminal or tortious use of the property an event of default.

In general, except when the party that has assumed responsibility for legal compliance has much less bargaining power than the other party, in a commercial lease a court is likely to enforce a provision shifting the risk and expense of government-ordered alterations and repairs. *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1130–32 (Ind. 1995). A common example of a government-ordered repair is asbestos abatement. See, e.g., *Brown v. Green*, 884 P.2d 55 (Cal. 1994) (lessees assumed responsibility for complying with asbestos abatement order).

A blanket requirement in the lease, however, stating that the tenant is responsible for all government-ordered repairs and alterations may not be effective to shield landlord from all liability. The California Supreme Court has noted that when the parties seek to allocate to the tenant the burden of legal compliance, "the legal and practical scope of that duty may well be less, especially where a *short-term* commercial lease is at issue and the cost of compliance is more than a small fraction of the aggregate rent reserved over the life of the lease." Id. at 57. Similarly, if the nature of the government-ordered repair is not expressly addressed and, from the circumstances, it seems unlikely to have been anticipated by the parties, the court is unlikely to hold that the tenant is liable for it. For example, in California where a tenant paid $650 in monthly rent for a three-year term to operate a cabaret and bar on the leased premises, despite a lease provision shifting to tenant all liability for compliance with laws, the tenant was not held responsible for a city-mandated earthquake hazard reduction reconstruction that would cost $34,000. *Hadian v. Schwartz*, 884 P.2d 46 (Cal. 1994).

Counsel must take care to define precisely the respective obligations of the parties. The Indiana Supreme Court has held that a compliance with laws provision is in the nature of an indemnity, which is "strictly construed and the intent to indemnify must be stated in clear and unequivocal terms." *Fresh Cut*, 650 N.E.2d at 1132 (citing *Wilson Leasing Co. v. Gadberry*, 437 N.E.2d 500, 501 (Ind. Ct. App. 1982)). In that case, a fire destroyed a warehouse, and the court deemed ambiguous an allocation of risk for maintaining a fire sprinkler system when the lease required the tenant to maintain "electrical systems, heating and air conditioning systems, and structural frame of the building" but also impliedly required the landlord to maintain the roof, exterior walls, and foundation. The court therefore vacated the lower court decision granting summary judgment and remanded the case to the trial court.

A tenant may seek to curb its liability by limiting its compliance with law requirements to orders that are related to the tenant's particular use. *Brown*, 884 P.2d at 59. Tenants should also seek to have the landlord represent and warrant that the leased premises do not violate applicable building codes, regulations, or ordinances in effect at the commencement of the lease term. See *Hadian*, 884 P.2d at 48.

8. Estoppel Certificates/Status Statements

Over the term of a lease, estoppel certificates will be required if the landlord seeks to sell or refinance the property. Similarly, large commercial tenants also may require estoppel certificates in the event of a transfer or refinance. The party that seeks the estoppel certificates will want assurances that the other party will promptly execute them, whereas the other party will want to ensure that the form of certificate and turnaround period are not onerous.

In view of the potential for significant monetary damages in the event a party is unable to complete a contemplated transfer or financing because it is unable to produce the necessary estoppel certificate, the lease provisions requiring that the other party furnish this detailed estoppel certificate are of paramount importance. A cautionary tale from New York is illustrative. When a commercial tenant attempted to refinance its leasehold mortgage, it requested an estoppel certificate from the landlord, which the tenant was entitled to receive within 20 days. The landlord refused to issue the certificate on the grounds that the certificate form was more extensive than required by the lease and that the tenant did not send its request in accordance with the lease notice provision. The court rejected the landlord's arguments, stating that landlord "could have marked up the certificate or supplied its own form of certification . . . . The fact that plaintiff may have requested a certification of items not specifically identified in the lease did not relieve defendant of its absolute obligation to issue an estoppel certificate within 20 days of the request." *Juleah Co., L.P. v. Greenpoint-Coldman Corp.*, 853 N.Y.S.2d 313, 315 (App. Div. 2008). As a result, the court held the landlord liable for more than $450,000 in damages, which was the amount that tenant

would have saved had the contemplated refinancing been consummated.

Another consideration when drafting estoppel provisions is to avoid the potential use of an estoppel certificate by one of the parties beyond the intended purpose. In one New York case, a tenant inadvertently continued to pay rent on a portion of the leased premises that it had actually vacated. The landlord had actual knowledge of the tenant's mistake and kept silent. When the tenant refinanced, the landlord executed an estoppel certificate. The landlord then attempted to use the estoppel certificate to prevent the tenant from recovering its rent overpayments. The court applied equitable principles to permit the tenant to recover, basing its decision on the fact that landlord had actual knowledge of the mistake. *NHS Nat'l Health Servs., Inc. v. Kaufman,* 673 N.Y.S.2d 129 (App. Div. 1998).

9. Holdover

When a tenant fails to vacate the leased premises at the end of the lease term and the landlord continues to accept rental payments, the common law presumption is that the parties have agreed to extend the lease on a month-to-month basis, subject to the original terms of the underlying lease.

Because leases provide tenants with certain rights and remedies, an extension of the lease term is an extension of those protections to the tenant. In general, lease holdover provisions can clarify that the tenant's failure to vacate the leased premises is not an extension of the original lease, but rather creates a special, separate agreement. Lease holdover provisions also can delineate distinctions from the otherwise applicable common law. *Marsh-McLennan Bldg., Inc. v. Clapp,* 980 P.2d 311, 315–16 (Wash. Ct. App. 1999).

Unenforceable Penalties

Regarding the rental rate during a holdover tenancy, it is important to consider whether the jurisdiction will regard a double or triple holdover rental rate as an unenforceable penalty. In one such case, the Tennessee Court of Appeals held that a double rental rate during holdover was not an unenforceable penalty. *Brooks v. Networks of Chattanooga, Inc.*, 946 S.W.2d 321, 324–25 (Tenn. Ct. App. 1996). The court also held the tenant liable for the holdover rate even if the landlord initially accepted a lesser amount. Id. at 326–27. The holdover tenant in that case initially continued to pay only the regular rental rate applicable at the end of the lease term. The tenant argued that, because it was negotiating a new lease with the landlord and not retaining possession of the leased premises against the landlord's will, it was not a holdover tenant. Eight months later, when the parties' negotiation for a new lease broke down, the court permitted the landlord to collect double rent for the holdover period retroactively.

10. Defining Common Areas and Facilities

Tenants typically pay as additional rent a proportionate share of the real estate taxes, insurance, and maintenance costs for areas that are defined as common areas and facilities. Accordingly, the obligations of the tenant can vary widely depending on whether areas are included as part of common areas or part of the leased premises.

Electrical and Telephone Closets

A common item that parties dispute is the categorization of electrical and telephone closets. In one unreported case in New York, the tenant claimed that its lease provided the tenant with the right to use electrical and telephone closets for its telecommunication wires and equipment. The landlord argued that tenant's use of the closets was not part of the leased premises and therefore that the tenant owed the landlord licensing fees. Although the description of the leased premises specifically excluded "electrical and telephone closets," the definition of the common areas did not expressly include them. Nonetheless, the court found the definition of the "common areas" (which included "the pipes, ducts, conduits, wires and appurtenant meters and equipment" serving the leased premises in common with other areas of the building), to be broad enough to encompass the electrical and telephone closets. *Marine Buffalo Assoc., L.P. v. HSBC Bank USA,* 781 N.Y.S.2d 625 (Sup. Ct. 2003).

Control

When a lease does not include a store's loading dock within the definitions of either common area or leased premises, the parties' liability for personal injuries from unsafe conditions on the loading dock has been held to depend on the amount of control over the area respectively exercised by the parties. *Stalter v. Prudential Ins. Co. of Am.,* 632 N.Y.S.2d 602, 603 (App. Div. 1995).

Insurable Interests

If not carefully defined, the distinction between "leased premises" and "common areas" may produce unexpected outcomes. For example, a Michigan shopping center lease required the tenant to obtain insurance covering its leased premises and to pay a proportionate share of landlord's cost of insuring the shopping center's common areas. In addition, the parties intended for the tenant's policy to cover the sidewalks immediately outside of the tenant's

store. Therefore, the tenant obtained a policy covering premises "owned or used by" the tenant.

When a customer slipped and fell on the icy sidewalk immediately outside of the tenant's store, the customer brought a suit against the tenant and the landlord. The landlord was held liable as the record owner of the property. The landlord settled with the customer and then attempted to recover from the tenant's insurer. The tenant's insurer denied coverage, arguing that the phrase "owned or used by" the tenant was required to be interpreted in conjunction with the tenant's lease, which provided that tenant must obtain insurance covering "leased premises." Because the lease definition of "leased premises" did not include the sidewalks, the insurer argued that the sidewalks were not covered areas. The Sixth Circuit agreed with the insurer and upheld the denial of coverage. *Minges Creek, L.L.C. v. Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006); see also *Zurich Am. Ins. Co., v. ABM Indus., Inc.*, 397 F.3d 158 (2d Cir. 2005). Accordingly, if a tenant assumes maintenance or insurance obligations for a portion of the common area, the lease should expressly require the tenant to maintain insurance covering the specific areas.

Conclusion

In the press to meet deadlines and be responsive to clients, lawyers can overlook some of the "standard" or "boilerplate" provisions in a lease form. Also, many of these provisions appear at the end of the document, where attention spans seem to wane. Nevertheless, these provisions often address important legal foundations that, if neglected, can have unintended consequences for clients. To avoid embarrassing or costly surprises, attorneys should spend sufficient time in reviewing these less than glamorous sections of the lease and give these provisions the respect they deserve.