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## **Title insurance is a worthwhile consideration for tenants of commercial properties - by John Blake**

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Title insurance can offer significant protection to tenants of commercial properties, particularly where the leasehold interest takes on the characteristics of the fee interest. In the case of a ground lease, such as an out-parcel in a shopping center, or the lease of a shell structure, a tenant may make significant initial investments in the build-out, in addition to rent and additional rent items (e.g. real estate taxes, common area charges). With a significant up-front investment, any potential of being dispossessed of the leasehold rights is significant for a tenant. While some instances in which a tenant can be dispossessed of its possessory interest are addressed in the lease itself (e.g. condemnation and casualty loss clauses), a problem with landlord's title, of which landlord may not even be aware, can yield unexpected and unpleasant results.

As a tenant holds the leasehold estate under landlord's title, the threshold issue is whether the landlord holds the entire fee interest in the premises being leased, and therefore is the correct and only party to grant the lease. Unaccounted-for ownership interests can leave a tenant dealing with a non-party to the lease in order to preserve its rights. Similarly, a prior tenant seeking to enforce rights under what may have been assumed to be an expired lease could burden the tenant with an unexpected expense. However, losses caused by these situations can be insured against through a leasehold-owner's policy.

Similarly, liens attaching to the landlord's interest in the premises pose a concern for the tenant. A tenant making a substantial, long-term investment in leased premises needs assurance that all lienholders who can cut-off landlord's title will recognize the tenant's rights under its lease, generally through a subordination, attornment and non-disturbance/recognition agreement.

A tenant's interest is also subject to the other matters affecting landlord's title, whether or not the same appear of record at the applicable registry of deeds. Easements, encroachments, appurtenant rights, exclusive use areas, parties in possession and liens can all impact the tenant's rights under its lease, directly or indirectly. Customary endorsements are available to the leasehold policy for

survey, access, utilities, restrictions (comprehensive) and zoning, subject to the required underwriting guidelines of the issuing company.

If substantial leasehold improvements are financed by the tenant, the tenant's lender may require a leasehold-loan policy insuring the priority of its leasehold mortgage. As with the leasehold-owner policy, the endorsements that are available when insuring a mortgage on the fee interest are available subject to underwriting requirements.

The particulars of the coverage afforded by a leasehold policy are contained within the ALTA 13 Endorsement (13.0 for leasehold-owners, and 13.1 for leasehold-loan). The event which triggers coverage is an eviction, defined as the "lawful deprivation" of tenant's possessory interest in the premises contrary to the lease terms, or the "lawful prevention" of tenant's use of the premises for a permitted use under the lease. The loss is calculated at the value of the leasehold interest, together with the value of the tenant's leasehold improvements, over the remaining term. Additional items covered following a loss:

- Relocation costs.
- Rent or use and occupancy charges paid to someone other than the landlord prior to the eviction.
- Post-eviction rent that may be due.
- The insured tenant's interest in a sublease, as well as damages the insured tenant may be liable to pay because of its breach of the sublease caused by the eviction.
- Reasonable costs for securing an equivalent replacement premises.
- Actual costs, less salvage value, of yet to be completed leasehold improvements.

Not every lease situation warrants a tenant getting a leasehold policy, particularly where the tenant investment is minimal and the premises may be well established (e.g. a line store in a mall). However, where the tenant's initial build-out investment is significant, the protections afforded a tenant by a leasehold title insurance policy are well worth considering.

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