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Tenant Estoppel certificates: Navigating risks, responses and leverage - by Laura Kaplan

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When it comes to the sale or financing of real property, tenant estoppel certificates are not just formalities – they are crucial documents that confirm the status of existing leases. Tenant estoppel certificates offer prospective buyers and lenders necessary assurance regarding the property's financials and any potential risks.

A tenant's delivery of an estoppel certificate estops (i.e. prevents) the tenant from later claiming a different state of facts regarding the lease. For example, a landlord might defend against a tenant claim of default under the lease by furnishing a tenant estoppel certificate stating no lease defaults existed as of the date of the estoppel certificate. Similarly, a purchaser may object to the enforcement of a side letter or other ancillary agreement that was not identified as part of the lease in the estoppel certificate.

This DEInsight provides key strategies for negotiating tenant estoppel provisions of leases and responding to tenant estoppel requests.

Strategically Negotiating Estoppel Provisions in Leases

Here are key considerations for both landlords and tenants when negotiating estoppel provisions:

- **Focus on What Matters:** Estoppel certificates should address facts that cannot be discerned from the text of the lease itself, providing clear answers to key factual questions:
 - Are there any defaults under the lease?
 - Has the lease been amended, assigned, or has the property been sublet?
 - What are the exact rent commencement and expiration dates?
 - Are there any outstanding rent concessions or landlord obligations?
 - Does the tenant have any rent offsets or defenses?
- **Leverage Your Position:** In many cases, tenants with limited bargaining power may be more focused on other aspects of the lease, giving landlords room to implement very favorable estoppel provisions. However, landlords who impose deadlines that are too strict or reporting that requires substantial investigation may find tenants unable to realistically comply with the estoppel provision requirements. On the other hand, tenants with greater leverage may require the use of their standard estoppel form or attach a form to the lease.
- **Timing is Crucial:** The time frame for responding to estoppel requests typically ranges from 10 to 30 days. Landlords push for shorter timelines to make sure estoppels do not delay transactions. Tenants generally want relatively longer timelines to verify all facts presented in the estoppels and manage the administrative constraints under which they operate.

Efficiently Responding to Estoppel Requests

Because landlords want “clean” estoppels (stating no defaults), estoppel requests can provide an opportunity to address outstanding maintenance issues or other disputes that the landlord does not want to present to a potential buyer or lender. However, because most leases require delivery of estoppel certificates within a specified timeline (and some allow a landlord to act as the tenant’s attorney-in-fact and complete the estoppel if it is not timely delivered by the tenant), estoppel requests do not generally give tenants leverage to demand new lease terms.

Given these dynamics, tenants should keep several key considerations in mind when responding to estoppel requests:

- **Protect Your Lease Terms:** Tenants can usually point to the estoppel provision of the lease to push back on attempts by landlords, buyers or lenders to use the estoppel to clarify lease provisions or to add tenant obligations (such as notifying a lender of a landlord default or providing lenders opportunities to cure). To avoid inadvertently modifying the lease, some tenants put in their estoppel certificates a provision that indicates, wherever there is a conflict between the estoppel and the lease, the lease controls.
- **Minimize Risk:** Tenants should try to minimize the statements made in estoppel certificates, limiting them to items they are contractually required to address under the estoppel provisions of their leases. In all instances, tenants should verify the facts stated in the estoppel certificate. Many tenants use knowledge qualifiers to avoid making representations absolute (e.g., no landlord default). Such qualifiers may indicate that the statement is to the actual knowledge of a specified individual, without independent investigation. When making statements about rent credits, tenants should reserve any applicable rights to overpayments of CAM (common area maintenance), operating expenses and taxes. When making statements related to acceptance of landlord’s improvements, tenant should reserve rights to any applicable warranties.
- **Consider Seller Estoppels:** When tenants refuse to give estoppel certificates, purchasers will sometimes accept a certificate from the seller/landlord. These seller certificates are not binding on the tenant; rather, the seller is liable for any breach of representation should the statements in the estoppel be false. Sellers should take care that any liability caps on breach of representations contained in the purchase and sale agreement apply to the representations made in the seller estoppel.

Conclusion

Tenant estoppel certificates are a vital part of real estate transactions. Tenants should look to the estoppel provision of their leases to limit the factual statements required in estoppel certificates and, before signing, should perform due diligence to confirm the facts stated in the estoppel certificates. By working with an experienced legal team, you can ensure that your estoppel provisions are carefully negotiated, your responses to requests are well-crafted, and your interests are fully protected.

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