

Lease Termination Agreements: Get Out Quickly, But Carefully

By Jay A. Gitles

Regardless of the route a landlord and tenant take to arrive at the mutual decision to terminate a lease, the final steps will require execution of a lease termination agreement. Sometimes, in their haste to get out quickly, landlords and tenants overlook many issues they should consider before signing. This article will help landlords and tenants continue to get out quickly, while preventing them from overlooking issues they should consider before executing such an agreement.

SPECIFY THE PARTIES TO THE LEASE

Frequently, the parties to the lease change from the original execution of the lease, particularly in situations where the lease is terminating after many years. Ownership interests in real estate commonly change hands over time; leases are routinely assigned by parties; some or all of the leased premises are subleased from time to time; and many parties merge, get acquired or change names. In the recitals to the lease termination agreement, landlords and tenants should consider including language describing the “history” of the lease. For instance, reciting the dates and parties to the original lease and any lease amendments, and the chain of succession of any parties-in-interest might be helpful. Also, it is a good idea to include language confirming that the tenant has not assigned the lease nor subleased any interest in the leasehold premises.

IDENTIFY THE PREMISES BEING TERMINATED

The premises should be carefully defined in the termination agreement. Over the course of a long-term leasehold, the original premises leased may no longer be the same, and the parties are better served by confirming the then-existing premises. Confirming the then-existing premises will help a landlord and tenant eliminate uncertainty concerning surrender obligations and requirements concerning the condition of the space.

SPECIFY ‘EFFECTIVE DATE’ AND INCLUDE MUTUAL RELEASES

The lease termination agreement is not always effective on the date signed by the parties and should identify the specific time and date that the termination will be effective, a time which is often some date in the future. That “effective date” will be the trigger date by which the tenant releases and surrenders the premises. The lease termination agreement should include a release of the landlord by the tenant of all claims that the tenant has or may have against the landlord arising out of the lease or out of the tenant’s use and occupancy of the premises under the lease or out of the termination of the lease itself. Conversely, the effective date will also be the date by which the landlord accepts the surrender of the lease and the premises, and the landlord should release the tenant from claims the landlord has or may have against the tenant arising out of the lease or the use of the premises under the lease or the termination of the lease.

INCLUDE TERMINATION LANGUAGE (BUT CONFIRM OBLIGATIONS CONTINUE UNTIL EFFECTIVE DATE)

The landlord and tenant should include a provision stating they both agree that the lease is canceled and terminated and the term demised by the lease brought to an end as of the effective date, as if the term of the lease were otherwise fixed to expire on the effective date. Again, because the effective date is often a date set into the future, it is important to include language that the parties agree to remain obligated under the lease for liabilities through the effective date and that such obligations will survive the expiration of the term of the lease to the extent any such obligations are not fulfilled prior to the effective date.

SPECIFY EXPECTATIONS UPON DELIVERY OF POSSESSION (INCLUDING WHAT HAPPENS TO PERSONAL PROPERTY)

It is important to verify that the tenant will surrender and deliver possession of the premises to the landlord in compliance with the requirements of the lease, or to the extent the parties agree otherwise, and to indicate which obligations of the parties shall differ from those that are provided in the existing lease. Occasionally, the parties prefer to make new arrangements in the lease termination agreement concerning personal property and equipment in the premises from the arrangement originally anticipated and as set forth in the lease. If the parties intend that any of the personal property or equipment remain in the premises or be retained by the landlord, the landlord should have the tenant make representations as to the condition and working order of the personal property and equipment. If applicable, the landlord should

also have the tenant convey to the landlord all of the tenant's rights and interests in the personal property (including delivery of a warranty of title and bill of sale by the tenant to the landlord). Additionally, the landlord may want to verify independently (UCC searches) that said personal property and equipment are free and clear of liens and encumbrances and that the tenant has the right to convey the same to the landlord (or whether any third party consents or releases — such as from a lender to the tenant — are needed as a condition to the effectiveness of the conveyance of the personal property or equipment).

CLARIFY ONGOING

RENTAL OBLIGATIONS

The parties should include language describing the tenant's ongoing responsibilities for payment of base rental or additional rental under the lease through the effective date (and whether any additional rental payment obligations will survive the effective date of the lease termination agreement).

SPECIFY TERMINATION PAYMENTS

In many instances, the tenant will be required to pay the landlord for the privilege of getting the landlord's agreement to terminate the lease early. The amount of the termination payment and the terms and timing by which the payment must be made by the tenant to the landlord should be identified in the lease termination agreement. In some instances, the termination payment is made in full at the time the lease termination agreement is signed and, in other instances, the termination payment is paid on or before the effective date (or some variation or combination thereof). The landlord will want to include language indicating that the tenant's failure to make the termination payment(s) timely to the landlord is a default under the lease termination agreement, and provide the landlord with a broad array of remedies and courses of action (including

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remedies available under the lease).

IDENTIFY ANY CONDITIONS

TO THE EFFECTIVENESS

OF THE TERMINATION

Occasionally, lease termination agreements are intended to (or must) be subject to and conditioned upon the occurrence of other events (such as the landlord executing a new lease for some or all of the premises, or the tenant entering a new lease for another space controlled by the landlord, or a third party [such as a mortgagee] consenting to the lease termination). Accordingly, if any of the conditions are not fulfilled within the time specified in the lease termination agreement, the lease termination agreement should include language unwinding the lease termination agreement. From the landlord's perspective, if the lease termination agreement is unwound, the lease termination agreement should provide that the lease would remain in full force and effect. From the tenant's perspective, if any termination payment(s) have been made and the lease termination is unwound, such payments should be credited against the tenant's future rental obligations under the lease.

IDENTIFY WHETHER ANY

BROKERS HELPED BRING

ABOUT THE TERMINATION

The termination agreement should include representations concerning whether either of the parties have been represented by any brokers in connection with the termination, allocation of payment obligations as may be applicable, and indemnities from and to each other for claims of brokers, not identified in the termination agreement, claiming to have represented the parties.

CAPITALIZE ON OPPORTUNITIES

FOR ESTOPPELS

Thoughtful parties routinely view the lease termination transaction as an opportunity to obtain representations and warranties akin to what would be included in an estoppel certificate. For example, the landlord will want the tenant to represent and warrant that: 1) the tenant is the rightful owner of the tenant's interests in the lease, 2) the tenant has not made any assignment or sublease, 3) the tenant has no knowledge of any facts that would give rise to any claim

or demand or cause of action, and 4) there are no contracts outstanding for lienable work against the premises. Also, getting estoppel-like representations remade by the parties as of the effective date is prudent.

VERIFY WHETHER THERE ARE

ANY LEASE PROVISIONS THAT

SHOULD SURVIVE THE LEASE

TERMINATION AGREEMENT

The parties should make sure not to terminate the entire lease inadvertently if the parties intend certain provisions to survive. For example, environmental and other clauses that include indemnities are often intended to survive expiration or termination of a lease. If so, specify what sections of the lease are intended to survive the lease termination agreement.

REQUIRE CONFIDENTIALITY

In many instances, the landlord and/or the tenant will want the terms and provisions of the lease termination to remain strictly confidential. From the landlord's perspective, maintaining confidentiality is helpful to prevent other tenants from getting the idea that they can terminate their leases (or upon what terms they might be able to terminate their leases). A tenant, on the other hand, will commonly have public relations considerations and may want to retain a low profile, particularly if the tenant is terminating because of business reversals. If a duty to maintain confidentiality is included, the landlord and the tenant should retain the right to disclose the terms and provisions to its respective agents and professionals, so long as the agents and professionals have been advised of the confidentiality requirements.

VERIFY REQUISITE AUTHORITY

Because a lease termination may be out of the ordinary course of business, the parties may want from each other's company authorizing resolutions (such as from a board of directors) verifying the authority of the applicable company to enter into the lease termination transaction. Additionally, the parties may want to include language that the individuals signing the lease termination agreement on behalf of an entity have the authority to bind the entity to the terms of the lease termination agreement.

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DO NOT LEAVE ANY LEASE**GUARANTIES UNADDRESSED**

In circumstances where there is a guaranty of the tenant's obligations by a third party, the guarantor will want to make sure the guaranty terminates on the effective date. Also, the landlord should consider having the tenant's guarantor guaranty the tenant's obligations under the lease termination agreement.

TERMINATE ANY RECORDED**MEMORANDA OF LEASE**

If a memorandum of lease was recorded, simultaneously with the execution of the lease termination agreement, the parties should execute a recordable memorandum of lease termination agreement incorporating the recording date and document number of the original memorandum of lease.

INCLUDE BOILERPLATE CLAUSES

- Notice Provision;
- Terms Not Otherwise Defined in the Lease Termination Agreement Should Have the Meanings Specified in the Original Lease;
- Entire Agreement Clause;
- If Inconsistency Between Lease and Lease Termination, Terms of Lease Termination Control;
- Binding Upon and Inure to the Benefit of the Parties and Their Respective Heirs, Successors and Assigns;
- Counterpart Execution Permitted;
- Facsimile Transmission of Original Signature Versions Considered to Have Same Legal Effect as Originals (and agree to promptly exchange counterparts with original signatures);
- If Litigation Between the Parties, the Prevailing Party Will Recover

Costs, Including Reasonable Attorneys' Fees;

- Severability Clause;
- Agreement Deemed to Have Been Prepared Jointly and Not to Be Construed or Interpreted Against Either Party.

CONCLUSION

If a landlord and tenant spend a little time exploring the foregoing matters, they should still be able to get out of their lease quickly and will successfully avoid overlooking many important issues they should consider before signing a lease termination agreement.

