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COMMERCIAL LEASE NEWSLETTER

**THE EFFECT OF COMMERCIAL FORECLOSURES
ON COMMERCIAL TENANTS:**

**PART 2:
ATTORNMEN AND NON-DISTURBANCE**

Last month we discussed the current real estate economy, prospective commercial foreclosures and the impact and effect such trends would have on commercial tenants. We discussed attornment and subordination language in the lease which, when included, could negatively impact the interest of the tenant. This month we address non-disturbance language into a tenant's lease.

Initially, non-disturbance language in a lease is a tenant's way to avoid compromising its position and having its leasehold interest made inferior to and subject to the actions of the lender.

In addition thereto, the Commercial Tenant may want to make sure that not only does it have a non-disturbance clause in its lease as to avoid being impacted or negatively affected by a foreclosure, but the commercial tenant may also wish to consider inserting language precluding the tenant from being relocated.

Here is a brief overview of this topic:

Non-Disturbance- The tenant's way to avoid compromising its position. Many national tenants will require a non-disturbance agreement in place so that as long as the tenant is not in default of the lease and if the mortgage is foreclosed upon with the underlying commercial property being subject to such foreclosure, the following will be in place to preserve and protect the leasehold interest of the tenant:

1. The lender must acknowledge the existence of the commercial lease.

2. The lender cannot disturb the tenant's rightful possession or use of the subject lease premises provided such use is in accordance with the lease. The mortgagee or any prospective purchaser at a foreclosure sale must acknowledge the validity of the lease since such provisions may not be eliminated by foreclosure sale.
3. The tenant cannot be named as a party defendant to a lawsuit to have its interest foreclosed. If in fact suit is initiated, the commercial tenant would still have the right, based upon the contractual language contained in the lease agreement, to remove itself as a party defendant in any such foreclosure action, since they would not be a necessary or proper party to such action.
4. The foreclosing lender, or in fact any foreclosing purchaser at a prospective foreclosure sale, would need to assume the landlord's obligations under the lease which include the rights, duties and obligations the landlord owes to the non-defaulting tenant.
5. Insurance proceeds may also be disposed of in accordance with the lease interest and not in accordance with the language contained in the mortgage.

Many sophisticated commercial tenants also insert provisions that preclude the ability of the landlord to relocate the tenant. The location obtained by the tenant generally is favorable and is a location (especially in a retail setting) which suits the needs of the tenant and fits their business goals. Allowing the landlord to relocate the tenant to another less desirable location, even though comparable in size, space and features, could compromise that tenant's business, again especially in a retail setting.

It is important for a tenant to negotiate not only basic terms and conditions of the lease, but also be fully aware of the impact and effect of attornment and subordination language and non-disturbance provisions in a commercial lease which would affect that particular tenant.