Wednesday, October 23, 2019
3:30 PM - 4:45 PM

Peer to Peer 2

Resolving Disputes: A Peer to Peer Discussion of Thought Provoking Dilemmas from a Litigator's Lens

Gary S. Kessler
Kessler Collins P.C.
2100 Ross Avenue, Suite 750
Dallas, TX 75201
GKessler@kesslercollins.com

Howard K. Jeruchimowitz
Greenberg Traurig, LLP
77 West Wacker, Suite 3100
Chicago, IL 60601
Jeruchimowitzh@gtlaw.com

This article provides an overview and explores deeper the peer to peer topics raised from a litigator's perspective. The topics and article are broken up into four topics: (1) shopping center issues related to the legalization of marijuana; (2) issues related to drop box locations; (3) issues related to surrender conditions and move out obligations; and (4) issues related to assignments and bankruptcy matters.

I. <u>Issues Related To Marijuana-Related Businesses</u>

With the legalization of marijuana spreading nationally for both medical and recreational use, it will likely raise multiple landlord/tenant and shopping center issues. The state laws allowing for the growing and selling of marijuana might contravene federal law and there will always remain an open question whether that will be enforced. Although there are multiple leasing and drafting issues to consider, this article raises various potential litigation issues the parties may encounter.

1. **Compliance with Laws:** Most likely leases at the shopping center both with the tenant with the marijuana-related business and other tenants have a compliance with Laws type warranty. Serious consideration to this often boiler plate provision needs to be contemplated as to what "Laws" means.

2. **Zoning and Special Use:** Most litigation activity has revolved around zoning and special permit issues. Although cities/municipalities generally cannot prohibit the operation of dispensaries, reasonable regulations and restrictions are permitted.

3. **Exclusives/Consent:** There are likely exclusives or use provisions that prohibit these types of businesses or tenants. Consent rights will likely become an issue. Many existing leases will have consent rights and the wording of those consent rights may prove challenging to allow such businesses in the shopping center. Also, getting consent from a lender and obtaining insurance coverage may prove challenging.

4. **CAM:** Issues will arise on the sharing of common area maintenance charges and whose responsibility it is for specific charges. Such likely issues will be increased security or lighting.

5. **Lease Termination:** As these types of tenants are unique, there could be issues related to premature termination if the tenant is not in compliance with Laws. Also, if there are tenant improvements, which may be unsuitable for replacement tenants, reimbursement may become an issue especially if there are guaranties. Finally, surrendering the property in a suitable condition upon termination may be impacted.

As an example of recent cases:

1. In *Greensun Group, LLC v. City of Bellevue*, the Appellate Court reversed the trial court's dismissal of the marijuana company's tortious interference claim. Based on the city's conduct in denying company's application of a retail marijuana store, the appellate court found that the marijuana company's claim that the city tortiously interfered with the company's business expectancy by thwarting the company's attempt to open a retail store should not have been

summarily dismissed because the record showed the existence of genuine issues of material fact on all the elements of the tort. 436 P.3d 397 (Wash. Ct. App. 2019).

2. Although *PharmaCann Penn, LLC v. BV Dev. Superstition, LLC* dealt with removal/remand issues, the overall lawsuit centers on use issues as the deed to the property at a shopping center prohibits using the property as a drug store for any "unlawful" purpose. The new owner of the property sued seeking a declaratory judgment that it may open a medical marijuana dispensary on the property despite those deed restrictions. Civil Action No. 17-4635, 297 F. Supp. 3d 537 (E.D. Pa. 2018).

3. In *Green Cross Medical, Inc. v. Gally*, the Appellate Court reversed a lower court's decision that dismissed the tenant's breach of contract claim against the landlord who revoked the lease to operate a medical marijuana dispensary because the lease violated both federal and state law and was therefore void for illegality. The Appellate Court found that a lease agreement was not void for illegality even if the lessee's plan to operate a medical dispensary would have violated federal law. The court reasoned that the lease was not conditioned upon operation of a dispensary and the right to sublease the property was a valuable commercial right involving no controversy, the lease was not illegal under Arizona law because the law provided that a registered nonprofit medical marijuana dispensary could not be denied any right or privilege, which included the right to enforce a lease, and federal illegality did not bar the lessee from seeking contract damages. 395 P.3d 302 (Ariz. Ct. App 2017).

II. <u>Issues Related To Drop Box Locations</u>

Although no known cases have been identified, the issues drop box locations could implicate are exclusives if the drop box is "selling" items that might be part of a tenant's exclusive or co-tenancy problems if the drop box is taking up space that a tenant might claim is comprising the gross leasable area.

A. <u>Exclusives</u>

An exclusive use or restrictive covenant is a provision typically found in a tenant's lease that obligates the landlord to prohibit other tenants from displaying or selling certain goods or services at other parts of the shopping center, or prohibiting a specific tenant or type of tenant. This is done mainly to keep out competition while affording developers the ability to maintain a balanced and diversified tenant mix.

Exclusives have been challenged as unreasonable, overly broad, and contrary to public policy. They are strictly construed by the courts and, if the provision is ambiguous, courts will interpret the exclusive narrowly. That said, courts rarely strike them down as wholly unenforceable and there have been only limited circumstances in which exclusives are deemed invalid. For example, in *Citibrook II, L.L.C. v. Morgan's Foods of Missouri, Inc.*, a Missouri Appellate Court recognized that a restrictive covenant cannot continue "forever." 239 S.W.3d 631, 636 (Mo. Ct. App. 2007). In *Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc.*, the Indiana Supreme Court found that an assignee could not enforce an exclusivity clause preventing the landlord from leasing to another grocery store where the assignee did not operate a grocery store and used the restrictive covenant only as a means to stifle competition. 829 N.E.2d 512, 516 (Ind. 2005).

Some issues that may arise include (1) whether the exclusive runs with the land; (2) the definition of the excluded use (*i.e.*, grocery); (3) the measure of "primary business" to determine if the exclusive is violated; (4) whether the sale is on the premises or off the premises; and (5) whether injunctive relief is available and the difficulty in proving damages.

For example, in *Providence Square Associates, LLC v. G.D.F., Inc*., 211 F.3d 846 (4th Cir. 2000), the Court of Appeals reversed the trial court's ruling that the exclusive was not violated. Plaintiff shopping center lessor alleged that defendant supermarket operated a drug store in violation of the exclusivity provision in the lease of defendant drug store, and that defendant drug store withheld rent. Defendant drug store alleged that plaintiff lessor wrongfully permitted defendant supermarket to operate a pharmacy and a photo drop box, and that defendant supermarket wrongfully violated the restrictive covenant in defendant drug store's lease and tortiously interfered with defendant drug store's lease. The court held that the restrictive covenant prohibiting another drug store was intended to avoid the competitive sale of prescription medicines and photo finishing services and defendant supermarket's sale of such medicines and photo service was thus precluded, even though such sales were incorporated into a larger business and constituted only a small portion of defendant supermarket's total revenue. Under such circumstances, defendant drug store also properly alleged defendant supermarket's tortious interference with defendant drug store's lease with plaintiff lessor. Therefore, the Fourth Circuit ruled that defendant supermarket's sale of prescription medicines and photo services violated the exclusivity provision in defendant drug store's lease with plaintiff shopping center lessor which was intended to prohibit such sales, **even if such sales were a minimal portion of defendant supermarket's business.**

The most recent and comprehensive case on the power of and difficulty with exclusives is *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC* saga that started in 2012 and continues through 2019. This case was an in-depth analysis as to whether exclusives run with the land and the application of restrictive covenants for "staple of fancy groceries" and "sales area" not defined in the lease.

As summarized by the first Appellate decision, *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008 (11th Cir. 2014), the District Court, in applying the Grocery Exclusive, found the term "staple or fancy groceries" difficult to define, but to include only food and nonalcoholic beverages. The District Court found the term "sales area" to be limited to the footprint of the display unit, excluding aisle space. The District Court declined to imply an additional restriction in the covenant that grocery sales be "incidental to the [defendant's] business." Then, the Eleventh Circuit affirmed in part and reversed in part certain of the District Court's finding as to the breadth of the restrictive covenant. Relying on precedent in *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC*, 811 So.2d 719 (Fla. 3d DCA 2002), the Appellate Court found that the District Court interpreted "staple of fancy groceries" and "sales area" too narrowly as to only food items, including nonalcoholic beverages, and measuring sales area only by shelving space.

Following the first appeal and remand, the District Court summarized the difficulty of these exclusives:

> I am once again tasked with the job of defining "groceries" as the term is used in a grocery exclusive, which is being applied to variety stores located in shopping centers with a major grocery store. The amount of attorney and judicial time and resources that have been expended in an attempt to define this seemingly simple but evolving term is astounding. After working on this case for over four years, it is apparent that the marketplace is rapidly and continually evolving and grocery stores are selling more and different products than ever before. Crafting a list of products that are considered groceries is a daunting task, especially in light of ever-expanding offerings. This may be a case where I am "faced with the task of trying to define what may be indefinable."

Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 2015 U.S. Dist. LEXIS 178867, at *7-*8 (S.D. Fla. Aug. 17, 2015) (interpreting the *99 Cent* definition to "food and household supplies" associated with the preparation and service of food, as well as he maintenance of a clean kitchen (as the primary place where food is prepared)), *rev'd* 881 F.3d 835, 843-45 (11th Cir. 2018) (finding that the District Court violated the mandate and ordered the lower court to apply the broader definitions for groceries and sales area).

B. Co-Tenancy

Co-tenancy clauses are common in retail leases. Their purpose is to provide tenants with a remedy in the event a co-tenancy condition is not met, such as when a specified major tenant fails to open or a certain percentage of occupancy is not achieved at the remainder of the shopping center. From a tenant's perspective, such provisions are critical because the tenant is counting on certain co-tenants in the shopping center and a certain foot traffic and business. Small shops really do rely on the ability of the major anchor tenant to draw customers to the shopping center who will also shop at their businesses.

There is usually a co-tenancy for when the tenant is to open and an ongoing co-tenancy. Remedies range from being released from an obligation to open, to rent abatement, or lease termination. From the tenant's perspective, it will want an expansive co-tenancy condition typically tied to a percentage of the GLA of the shopping center and often tied to specific retailer or like replaceable retailers. From the landlord's perspective, it would want a narrower co-tenancy on percentage of gross leasable area built, and want the ability to replace the tenant and backfill the space, as well as impose a time limit for the tenant to remain on reduced rent or to be able to recapture the tenant's space.

A potential issue is the definition of the co-tenancy, such as what is meant by "Gross Leasable Area" and how to calculate whether the co-tenancy is satisfied. *See, e.g., Claire's Boutiques, Inc. v. Brownsburg Station Partners LLC,* 997 N.E.2d 1093, 1101 (Ind. Ct. App. 2013) (ruling that the trial court erred as a matter of law when it concluded that the occupancy level in the operating co-tenancy provision is based on gross leasable area rather than "70% of non-department retail store tenants"); *Garrison Lifestyle Flemington, LLC v. Talbots,* 2012 N.J. Super. Unpub. LEXIS 1827, *17 (2012) ("Based upon the lease and surrounding circumstances, this Court finds a factual dispute as to whether the parties intended the calculation of gross leasable area to include all areas depicted on the site plan, that is 171,575 square feet, or only 113,430 square feet of the Shopping Center as currently built."); *Best Buy Stores, L.P. v. Manteca Lifestyle Ctr., LLC,* 859 F. Supp. 2d 1138, 1148 (E.D. Cal. 2012) (finding that the term "gross leasable area" as used in the lease lends itself to two interpretations either meaning "Gross Leasable Area" on the Site Plan that was explicitly incorporated into the lease or refer to a number that can only be determined after a building is constructed).

Another issue is whether the tenant that claims a co-tenancy violation needs to prove financial impact. Typically, the courts find the co-tenancy condition and remedy enforceable without considering extrinsic evidence of financial impact. For example, in *Old Navy, LLC v. Center Developments Oregon, LLC*, 2012 WL 2192284 (D. Or. June 13, 2012), the District Court upheld the tenant's rent remedy, that provided that when a "key store" closed, Old Navy was entitled to pay a lower rent of "two percent (2%) of all gross sales made in the premises for each month" or "the amount of minimum rent then applicable." Old Navy had the right to close its doors, but continue paying rent until it decided to reopen, and had the right to terminate the lease if the "Operating Requirements" were not met for more than nine months. The District Court found that such a provision would not be considered a liquidated damages provision, but rather a tiered rent structure triggered if a co-tenancy was not satisfied. The District Court, therefore, did not consider any evidence or argument that the remedy bore a relationship to Old Navy's anticipated or actual damages.

In *Hickory Grove, LLC v. Rack Room Shoes, Inc.*, 2012 WL 1836330 (E.D. Tenn. May 21, 2012), the District Court found that the lease entitled the tenant to pay only 4% of gross sales or the Guaranteed Minimum Rent defined in the lease for a co-tenancy failure. When the shopping center lost a "key client," as defined in the lease, and replaced it with an unqualified tenant, Rack Room decided to stay at the shopping center based on a reduced percentage of sales for the co-tenancy failure. The landlord argued that the co-tenancy provision was punitive in nature and bore no relationship to actual damages suffered by Rack Room. The landlord even offered evidence that Rack Room experienced an increase in sales with the replacement. The District Court did not consider the evidence because: (1) the unambiguous language of the lease did not require the tenant to show decreased sales to invoke the co-tenancy provision; and (2) the landlord did not show any evidence of fraud or undue mistake or that the provision was unconscionable.

However, in a case of first impression, the California Court of Appeals ruled that although the co-tenancy clause was not unconscionable, the rent abatement negotiated between the parties was an unenforceable penalty but that the tenant's right to terminate was enforceable. *See Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 182 Cal. Rptr. 3d 235 (Cal. Ct. App. 2015).

In summary, the co-tenancy provision at issue conditioned the tenant Ross Dress for Less' obligation to open a store and pay rent on Mervyn's (a department store chain) operating a store in the shopping center on the commencement date of the lease. The landlord did not own the Mervyn's parcel. The clause did not have any end date for the rent abatement, nor did it require Ross to pay any rent regardless of whether it was open and operating or not. The provision also granted Ross the option to terminate the lease if Mervyn's ceased operations and was not replaced at that location by an acceptable retailer within 12 months. This opening co-tenancy condition was not satisfied because Mervyn's filed for bankruptcy and did not open its store. Ross took possession of its space, but never opened for business, never paid rent, and terminated the lease after the 12-month cure period expired. The landlord claimed that Ross was obligated to pay rent for the full term because the provisions authorizing rent abatement and termination were unconscionable or, alternatively, an unenforceable penalty

.

The trial court agreed with the landlord that the rent abatement and termination under the co-tenancy provision were unconscionable and an unreasonable penalty, and found that Ross breached the lease. The California Court of Appeals found that the co-tenancy provision was not procedurally unconscionable and negotiated by sophisticated and experienced parties.

As to the remedies of rent abatement and termination for failure to satisfy the co-tenancy, each remedy was examined separately. Even though the remedies under the co-tenancy provision were negotiated by the parties, the trial court found, and the Court of Appeals affirmed, that the rent abatement provision constituted an unreasonable penalty because (1) the tenant did not anticipate it would suffer any damages from Mervyn's not being open on the lease commencement date and (2) the value of rent forfeited under the provision was approximately $39,500 per month. The Court of Appeals held: "There is no reasonable relationship between $0 of anticipated harm and the forfeiture of $39,500 in rent per month and, therefore, the trial court correctly concluded the rent abatement provision was an unenforceable penalty."

Some takeaways from the *Grand Prospect* case are: (1) this is likely limited to a California specific case; (2) the rent abatement provision allowed Ross to pay nothing and had no end date even if it opened and operated its store, but the outcome might have been different if the rent abatement had the more traditional percentage off (like 50%), was tied to anticipated sales, or set a definite time; (3) the outcome might have also been different if Grand Prospect had control over Mervyn's space to control whether Mervyn's occupied or operated its business or to find a replacement tenant; (4) the court may have been swayed by the fact that Grand Prospect paid over $2.3 million in tenant improvements before Ross took possession of the leased premises (it is worth noting that if Ross would have been required to taken possession within a reasonable time after the improvements, there would not have been a co-tenancy failure); and (5) the case has opened the door in certain factual circumstances to striking down rent abatement for a co-tenancy failure if it bears no relationship to the harm of the tenant. To be enforceable and avoid the risk, such rent abatement should be reasonably related to the lost sales, lost profits, or other damage a tenant anticipates it might suffer if the required co-tenant does not occupy the space or open for business.

III. Issues Related To Surrender Conditions And The Impact of <u>Lease Provisions On A Tenant's "Move Out" Obligations</u>

A. <u>General Overview of the Law</u>

There has been an increase in claims by Landlords that relate to the condition of leased premises at move out. The obligations of the tenant are typically dictated by the terms of the lease agreement. There are three general lease descriptions of what is expected at the time the premises are surrendered: (i) the premises be left in good condition with all systems in good working order reasonable wear and tear excluded; (ii) the premises be restored to the condition that existed at the commencement date of the lease or (iii) the premises be left in "broom clean" condition. An interesting case is *Tobin v Gluck* 137 F. Supp. 3d 278 (E.D.N.Y. 2015). The parties had entered into a stipulation of settlement relating to litigation over the tenancy. The stipulation, which the court treated as a lease for purposes of its analysis, required the tenant to surrender possession of the premises in empty, broom clean condition and repair except for ordinary wear and tear. At surrender the landlord noted that there were electrical wires that were "loose", trash was in the property around the building, the soil and groundwater under the building were contaminated and there were concrete columns added to the premises that were not present at commencement. The court analyzed whether the term premises incorporated the land outside of the building and found that it did based on the fact this was a single tenant property. It observed that in a multi-tenant building like a shopping center the inquiry would have been limited to the actual premises and not the condition of the land. In addressing what "broom clean" means the court held:

> The tenant's obligation to leave the premises 'in good condition' has long been interpreted to require the tenant not only to keep the premises in as good condition as when it entered, but 'to put, keep, and leave the premises in a state of good repair.' " (citing *1029 Sixth, LLC v. Riniv Corp.*, 9 A.D.3d 142, 777 N.Y.S.2d 122 (2004))). The requirement to surrender the premises in "good order and condition" does not create an "obligation to remove properly authorized and properly constructed alterations and to restore the premises to the conditions originally existing at the commencement of the lease" but rather "require[s] only that a tenant repair and restore actual injury, physical damage, deterioration or waste of the premises caused by the tenant." *Civic Realty Co. v. N.Y. Tel. Co.,* 16 Misc.2d 660, 190 N.Y.S.2d 3, 6 (Sup.Ct.1959). The express obligation to surrender leased premises in "broom clean" condition has been interpreted to require that the premises be free of garbage, refuse, trash and other debris at the time of surrender. *1029 Sixth,* 777 N.Y.S.2d at 127; *Akron Meats,* 553 N.Y.S.2d at 357.

The court also addressed the tenant's obligation when removing trade fixtures by quoting with approval a holding that it must do so with as little injury as possible to the freehold and where the injury done is more than insignificant, it must repair and restore the freehold to its original condition. As for damages the court applied a measure of damages which required the tenant to pay the reasonable cost to restore the premises to the condition in which it should have been surrendered.

What happens when a tenant has multiple leases over an extended period and during the tenancy makes substantial approved alterations? In *Harris v Warren Family Properties* 207 Ore. App. 732 (2006) the court analyzed a lease provision that required the tenant to restore the premises to its "original condition". The landlord argued that was the condition that existed on the commencement of the first lease between the parties. The parties had in fact entered a series of leases over an extended period. The court, relying mainly on the integration clause in the last lease, concluded that the "original condition" referred to the condition of the last lease between the parties.

If the tenant negligently causes a fire loss at the premises which renders the premises uninhabitable and affects a termination of the lease, what obligation does the tenant have to restore the premises to its original condition? This typically is answered none since the landlord has insurance and the lease usually contains a waiver of subrogation. In *Raush v. Allstate* 388 Md. 690

(2005), the Court of Appels was confronted with a subrogation claim where the tenant did not notify the landlord's insurer of the request for a waiver of subrogation. The lease required the tenant to surrender the property at the end of the lease in the same condition as when received, ordinary wear and tear excepted. The court struggled with the test to apply when determining whether the tenant would be obligated to reimburse the insurer for the proceeds it paid to restore the premises. Ultimately, the court stated that it would look at the lease as a whole and determine whether it was reasonably anticipated that the tenant would be required to reimburse the landlord's insurer. One factor in the lease that was highlighted was the surrender language.

It seems that HVAC equipment is at the center of many of the disputes upon a tenant's departure. In *Nadler v American Motors Sales Corporation*, 764 F.2d 409 (5th Cir. 1985), the court discussed whether the reasonable wear and tear exception in a surrender clause also applied to an obligation of the tenant to maintain the HVAC system in good repair during the lease term when the system failed at the very end of the lease. Finding the lease to be a long-term obligation (10 years), the court ruled that the exception would not apply to the obligation to maintain the equipment even though the system failed at the end of the end of the lease term. The reasonable wear and tear would exception would not save the tenant.

In *Namie v. W. M. Milam & Son, Inc.,* 349 So.2d 996 (La. Ct. App. 1977) the court was presented with a lease that required the tenant to restore the premises to its original condition ordinary wear and tear, damage by fire, flood, act of god, termites or other casualty excepted. The wooden floor was destroyed by beetles. The landlord arguing that beetles are not termites sought to hold the tenant to its contractual obligation to restore the floor to its original condition. The court somehow reasoned that termite damage "includes in its common understanding, damage done by beetles" and the landlord lost.

In determining just how far a tenant had to go to satisfy a surrender obligation the court in *Prospect Hill v. Tyco*, 328 F.2d 179 (D. Mass. 2004), in a case involving "hold over" rent, did not require the tenant to remove contaminated concrete flooring pursuant to a lease which included surrender language which obligated Tyco to surrender the premises in same condition as existed on the commencement date reasonable wear and tear and damage by fire or other casualty excluded. However, the surrender clause did not stop there, stating that notwithstanding the broad language above, the tenant had to remove all equipment, ducts, fixtures material or other property that are or might be contaminated. The court noted that the floor did not come within the unambiguous language of the surrender clause and found Tyco was not obligated to remove the floor so its failure to timely do so did not result in a hold over under the lease.

If the surrender clause is breached, the measure of damages will vary by jurisdiction. In Ohio for instance the measure of damages for temporary injury to land is the cost of repairs unless the cost of repairs exceeds the diminution of market value caused by the breach in which case the diminution is the proper measure. *Ohio Environmental Development LP v. Envirotest Systems Corp.* 478 F.2d 963 (N. D. Ohio 2007). The court fashioned the damage model as the difference between the market value of the property had it been tendered at surrender in the condition required under the lease less the market value at the time of surrender. The cost of repairs was only found to be admissible to assist in establishing the value at surrender.

B. Fixtures vs. Trade Fixtures and the Impact of the Distinction on Surrender

If a tenant's property that is attached to a leasehold is held to be a "fixture", it has become part of the realty and is no longer characterized as personal property. In contrast, a "trade fixture" never becomes part of the realty because the intent of the attachment was specifically to advance the business operating therein. Although fixtures cannot be removed from the leasehold at the conclusion of a lease, trade fixtures generally can be removed unless otherwise provided in a lease. Accordingly, whether a tenant's property attached to a leasehold is found to be a fixture or a trade fixture has a substantial consequence.

A fixture is a category of improvements, which broadly include anything that permanently enhances the value of premises. Improvements include all additions to the leased premises (except for trade fixtures). More specifically, when a tenant's property is attached to the premises and cannot be removed without materially damaging the property, it is no longer the personal property of the tenant but becomes a fixture that is part of the premises. *Logan v. Mullis*, 686 S.W.2d 605, 606 (Tex. 1985). The determination of whether property has become a fixture is typically a question of fact that is resolved by looking to the intent of the tenant. Objective evidence of intent to attach property to the realty will establish as a matter of law whether the property has become a fixture.

In contrast, when a tenant attached personal property to the leased premises that enables the tenant to carry on the business contemplated by the lease and the property is removable without permanent or material injury to the premises, it will be classified as a "trade fixture." Although this concept is similar to a fixture, it is distinct in that the property never loses its identity as property of the tenant because the objective intent of the attachment to the premises is to advance the tenant's business rather than improve the premises.

As noted above, under Texas law, a tenant can generally remove trade fixtures at the end of its lease, unless there is a lease term preventing the removal of trade fixtures. Alternatively, a lease may explicitly provide that trade fixtures do not become the landlord's property at the lease's conclusion.

Notably, even if attached property is a trade fixture that would otherwise be removable, some courts have found that if they are not removed before, or within a reasonable time after, the surrender of the premises, trade fixtures are ruled to be abandoned and become the landlord's property. *See, e.g.*, *City of St. Peters v. Hill*, 9 S.W.3d 652, 654 (Mo. Ct. App. 1999). Tenants have been found to have no claim for theft of trade fixtures if there is no attempt made to regain possession of property. Although the typical rule is that a tenant is required to remove trade fixtures prior to, or within a reasonable time after, the termination of the lease or surrender of the premises, exceptions to the rule may arise in several circumstances, and some jurisdictions may employ other rules.

C. Hold Over And Impact on Surrender

A "holdover tenant" is a tenant who maintains possession of a leased premises after expiration of its lease. A holdover tenant's rights depend in part on whether it becomes a tenant at will or a tenant at sufferance. A "tenant at will" is a holdover tenant who "holds possession with the landlord's consent but without fixed terms (as to duration or rent)." Black's Law Dictionary 1604. In contrast, a "tenant at sufferance" is "[a] tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired." Black's Law Dictionary 1605. Accordingly, a tenancy at sufferance is identified by the lack of landlord consent to the holdover tenant's continued possession.

If a lease specifically provides that its terms continue to apply for a holdover tenant, there is an implied agreement to permit a holdover and the tenant will likely be classified as a tenant at will. However, if a lease does not specifically address a holdover situation, the conduct of the parties will determine the tenant's status. *See, e.g., Mount Calvary Missionary Baptist Church v. Morse St. Baptist Church*, 2005 WL 1654752, at *7 (Tex.App.-Fort Worth 2005, no pet.) (mem.op.). If a tenant continues to possess the premises and pay rent, and the landlord continues to accept the rent without objection, the tenant will likely be classified as a tenant at will. In that situation, the terms of the prior lease will continue to govern absent an agreement to the contrary. *See, e.g., Carrasco v. Stewart*, 224 S.W.3d 363, 368 (Tex.App.-El Paso 2006, no pet.). Continued possession alone is not sufficient to create a tenancy at will.

A landlord should preemptively address a potential holdover tenant situation by ensuring that the lease contains a holdover rent term that provides it with a full measure of recovery for any damages caused by the tenant's actions. Otherwise, a court will be charged with determining the proper damages for the prolonged possession of the property. The measure of recovery is the market rental value of the premises, the reasonable rental value, or the reasonable value for the use of the premises for the holdover period.

IV. Issues Related To Other Tenant Mix Issues

A. Issues Arising From Assignment & Subletting Consent

The "retail apocalypse" and changing demographics has left many retail shopping center tenants with a space or excess space that it does not need or cannot afford. Considering the likelihood that a landlord is willing to terminate a lease in this situation, may tenants may seek to assign its lease or sublet all or a portion of their premises. In considering assignment and subletting, it is important to note the distinction between an assignment and a sublease, as it impacts who the landlord can look to for performance of the obligations under the lease. An assignment is a conveyance of the entire estate in question, for the entirety of the unexpired term, leaving no reversionary estate in assignor. *Davis v. Vidal*, 151 S.W. 290 (Tex. 1912). A sublease is a conveyance of anything less; a transfer all or part of the unexpired term but retaining a reversionary interest (*e.g.* – materially different rent or material different terms and conditions). For an assignment, the landlord and assignee have privity of estate and privity of contract, meaning landlord can enforce the terms of the lease directly against the assignee. For a sublease, the landlord retains privity of contract with the original tenant, but there is no privity of contract between landlord and sublessee, unless there is an express assumption of the obligations by subtenant, meaning landlord can enforce the terms of the lease against the original tenant, but not the subtenant, and neither can subtenant enforce rights against the landlord.

Generally, an assignment or sublease is permitted unless expressly prohibited by the lease agreement. In most jurisdictions, if the lease is silent, then the tenant may assign or sublet without the landlord's prior consent. However, in some jurisdictions (TX for example), if the lease is silent an assignment or sublease always requires the prior consent of landlord. TEX. PROP. CODE §91.005.

With respect to landlord's consent, does the landlord have to act reasonably in granting consent? Unless expressly stated, there is no implied covenant for landlord to act reasonably in withholding consent. *Reynolds v. McCullough739* S.W.2d 424 (Tex.App – San Antonio 1987). Additionally, if the lease fails to provide a standard, the courts are split as to whether a standard is applied. In certain states, courts will apply a "reasonableness" standard to landlord's consent, in other states, courts have held that there is no reasonableness standard. Therefore, it is important for the lease to expressly provide standards for landlord's consideration, including: (i) creditworthiness/net worth of transferee; (ii) business experience of transferee in conducting operations; (iii) suitability of premises for proposed use; (iv) tenant mix/exclusive uses; and (v) availability of other space for the prospective transferee.

There are many issues for landlords to consider in granting consent, including, but not limited to (i) the liability of the original tenant (not an issue for a sublease as the original tenant remains primarily liable due to privity of contract), (ii) suitability and use of the premises, (iii) creditworthiness of the transferee. Tenants should try to balance landlord's consent to provide that certain transfers are permitted without landlord's consent, such as (i) transfers to affiliates; (ii) corporate transactions (sales mergers and acquisitions); and/or (iii) transfer for estate planning purposes.

Landlords will typically want the right to recapture the premises following tenant's transfer request. Recapture rights should include a time period for landlord to exercise recapture, and tenant will want the option to withdraw transfer request to avoid recapture.

Aside from the assignment and subletting provisions in a lease, tenant should also consider certain other lease provisions relevant to tenant's ability to transfer: (i) signage – proposed transferee must have the ability to alter signage; (ii) permitted Use – provision should be as broad as possible for tenant to allow for another tenant to assume the lease (ex - all lawful purposes); (iii) renewal and option rights – many landlords provide that these rights are personal to the original tenant; and (iv) alterations - proposed transferee must have the ability to alter the premises for its intended use, which are generally subject to landlord's approval.

B. Retail Shopping Center Tenant Bankruptcy

(i) Assumption & Assignment

Bankruptcy Code §365 concerns an unexpired lease, and while complicated, generally provides that a tenant may assume or reject any unexpired leases. Many tenants/debtors in bankruptcy may choose to assume and assign their lease to a third party, and ant-assignment clauses are generally not enforced; therefore, a lease may be assigned without a landlord's consent. However, to assume a lease, the trustee must cure defaults and "provide adequate assurance of future performance". "Shopping center" landlords have additional protections found in §365(b)(3), which are intended to protect the landlord and also the remaining tenants within a shopping center. §365(b)(3) provides that "adequate assurances of future performance" for a "shopping center" will include: (i) assurance that the assignee of the lease (or reorganized debtor) will have at least the same ability to pay rent as the original tenant; (ii) any percentage rent will not decline substantially; (3) assumption of the lease will be subject to all other provisions of the lease, including, radius requirements, location, use and exclusivity provisions; and (iv) assumption or assignment will not disrupt the tenant mix or balance of the shopping center. Note that "shopping center" is not defined in the Bankruptcy Code, and is decided on a case by case basis. If the landlord does not receive such adequate assurances, it may file an objection to the proposed assignment. This section of the Code gives "shopping center" landlords greater control and bargaining power in the bankruptcy process than other non-shopping center landlords.

(ii) Restricted Uses

Many, if not all, shopping center leases contain restrictive covenants and exclusive use provisions. With respect to "shopping centers" and tenant bankruptcy, assumption and assignment remains subject to the use-type restrictions of a lease, including radius, location, use, or exclusivity provisions. Therefore, regardless of bankruptcy and assignment and assumption, use restrictions in the lease can prevent an undesirable tenant from taking assignment of a debtor's lease. This may allow for a landlord to prevent an assignment to a tenant that disrupts a tenant mix and such landlord can avoid default of any other leases in the shopping center containing exclusive uses or restricted use provisions.