

rant business. Be careful not to list uses that could lead to the assignee's violating other tenants' exclusives.

Lease obligations assumed. If the lender assigns the lease, require that the assignee assume all of the tenant's lease obligations, advises Pomerantz [Clause, Par. a(iv)]. Otherwise, the assignee may not be bound by all of those obligations.

Take Action if Lender Violates Conditions

What if the assignee or subtenant doesn't meet your critical conditions, but the lender goes ahead with the assignment or sublet anyway? To protect yourself in such an event, state in the lease that the lender will have caused an "Event of Default," says Pomerantz. Also state that in that event, you can exercise against the lender whatever remedies your lease's remedies clause allows, he says [Clause, Par. b]. For example, you may be able to terminate the lease if you want to. This should give the lender an incentive to find an assignee or a subtenant that meets your critical conditions.

Negotiate Possible Lender Modifications

Expect a tenant to try to modify your critical conditions on behalf of its lender. It may ask for some lender protections when it's negotiating your lease or later when it asks a lender for a loan. For instance, the tenant may present these lender demands:

Easier conditions. A lender may want to make some or all of the conditions less stringent, says Pomerantz. For instance, it might try to make the net worth condition easier to meet by having it say that the assignee or subtenant must have only at least the net worth of the tenant at the time the lender takes over the lease, not at the time the tenant signed the lease. And it may try to expand the uses permitted

MODEL LEASE CLAUSE

Set Four Conditions for Lender's Assignment or Sublet

The following clause was drafted by Chicago attorney Daniel Pomerantz. Put it in your lease if you've allowed a strong tenant to use its lease as collateral for a loan. Although the risk that the tenant will default and the lender take over the lease and space is slim, you want protection against the lender's then installing an undesirable assignee or subtenant.

Paragraph a sets out four critical conditions that the lender's assignee must meet (the first three of which a subtenant must meet). Paragraph b lists your remedies if the lender violates those conditions. Make sure you define "New Lease" elsewhere in the lease.

Show this clause to an attorney in your area before putting it into your lease.

ASSIGNMENTS/SUBLETS BY TENANT'S LENDER

- a. Conditions to Assignment/Sublet.** Notwithstanding the provisions of Clause [*insert # of assignment/subletting clause*], if Lender shall acquire title to Tenant's interest in this Lease, by foreclosure of a mortgage hereon, by assignment in lieu of foreclosure, or under a New Lease, Lender shall not be permitted to assign this Lease or sublet all or any part of the Premises (the assignee of such assignment or subtenant of such sublet being "Assignee") unless:
- (i) Assignee's net worth is greater than \$[*insert amount*];
 - (ii) Assignee does not primarily engage in the sale of [*insert prohibited uses and uses barred by other tenants' exclusives*] and is not [*insert names of prohibited prospective tenants*];
 - (iii) Assignee's use of the Premises will be limited to the following uses: [*insert permitted uses here*]; and
 - (iv) In the event of an assignment, Assignee assumes, in writing, in a form acceptable to Landlord, all of Tenant's obligations under the Lease and Lender shall provide Landlord with a copy of such assumption/transfer document.
- b. Landlord's Remedies.** Any breach by Lender of the terms contained in Paragraph a hereof will be considered an Event of Default and Landlord may exercise its applicable remedies under Clause [*insert # of remedies clause*] hereof against Lender.

for the space to increase the pool of prospective assignees and subtenants.

Try to resist giving in to those demands. If you don't, you could end up with an undesirable, financially unstable tenant or one that clashes with your tenant mix, warns Pomerantz.

Lender keeps all assignment/sublet profits. Expect a savvy lender to demand that it be allowed keep all profits from the assignment or sublet, says Pomerantz. You can try to negotiate this point, but unless the lease is drastically below market, the lender probably won't budge on its demand.

Lender released from liability. A lender may demand that you agree to release it from all liability under the lease after an assignment, says Pomerantz. You may want the extra security of a financial institution backing the lease after an assignee takes over, but most lenders don't see themselves filling that role, he says. Try to resist the release if you can, although you may have to agree to it in the end, he notes. ▲

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