

Presenting a live 90-minute webinar with interactive Q&A

Commercial Leases: Risk Mitigation Strategies for Landlords and Tenants

WEDNESDAY, OCTOBER 10, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Iryna Lomaga Carey, Partner, **Kurzman Eisenberg Corbin & Lever**, White Plains, N.Y.

Gregory G. Gosfield, Partner, **Klehr Harrison Harvey Branzburg**, Philadelphia

Jeremiah Welch, Partner, **Saxe Doernberger & Vita**, Hamden, Conn.

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Strafford CLE Webinar

Wednesday, October 10, 2012 1:00 pm – 2:30 pm

Iryna Lomaga Carey,
Esquire
*Kurzman Eisenberg
Corbin & Lever, LLP*
(914) 286-6372
icarey@kelaw.com

Gregory G. Gosfield,
Esquire
*Klehr Harrison Harvey
Branzburg, LLP*
215.569.4164
ggosfield@klehr.com

Jeremiah M. Welch,
Esquire
*Saxe Doernberger &
Vita, PC*
203-287-2100
jmw@sdvlaw.com

10 Risks and Risk Allocation Vehicles

- Rent
- Taxes
- Insurance/Indemnity
- Operating Expenses
- Third Party Covenants

10 Risks and Risk Allocation Vehicles

- Defaults
- Dispute Resolution
- Consensual Defraying Risk
- Non-consensual Termination
- Bankruptcy

Rent

- Lease Type Base on Rent
 - “Gross Lease”
 - “Net Lease”
 - “Double Net Lease”
 - “Triple Net Lease”
 - “Bondable Lease”

Additional Rent

- Taxes
 - Tenant Carve Outs
 - Distortions from Tenant's Pro Rata Share of Taxes
 - Tax After Subdivision or Condominium
 - Distortions from Tax Disputes in Office

Additional Rent

- Insurance
 - Property Insurance
 - Types of Property Coverages
 - Base Coverage
 - Landlord Portfolio Coverage

Additional Rent

- Insurance
 - Property Insurance
 - Insured Property
 - Casualty: Lease Continuation
 - Casualty: Lease Termination
 - Tenant Leasehold Interest

Additional Rent

- Insurance
 - Types of Liability Insurance
 - Types of Insurers
 - Evidence of Coverage
 - Deductibles, Reimbursement, Under-Insurance and Self-Insurance

Additional Rent

- Insurance
 - Tenant Negligence
 - Exculpation, Exemption and Exclusion
 - Landlord Exculpatory Clauses
 - Tenant Exculpatory Clauses

Additional Rent

- Assumption of Risk – no fault
- Conditions to Indemnity
 - notice
 - no prejudice
 - co-operation
 - no settlement
 - mitigation

Additional Rent

- “Operating Costs”/”Common Area Maintenance” - neither
 - Capital Expenditures
 - Amortization Period for added rent
 - Exemption for beginning and end of lease
 - Interest Carry
 - Compliance with Law

Additional Rent

- “Operating Costs”/”Common Area Maintenance”
 - Capital Expenditures
 - Pass Through of Savings only
 - Exhausted Useful Life or repair
 - Cost Effective

Additional Rent

- “Operating Costs”/”Common Area Maintenance”
 - Administrative Costs
 - Controllable Costs
 - “Gross Up”

Tenant Costs

- Hidden Tenant Costs
 - Landlord Contractor and Service Limitations

Tenant Costs

- Electricity
 - Tenant obtains separate independent service
 - Tenants pays its “share”
 - Submetering measured by landlord
 - Utility is included in gross rent
 - Tenant installs alternative energy generation devices
 - Cost of after hours service

Third Party Covenants

- Exclusive use/Prohibited Use
- Tenant wants enforcement rights
- Tenant remedies for non-enforcement

Consensual Exits: Assignment or Sublease

- Extinguish options: extension, scale up, scale down
- Extinguish or soften exclusives
- Fee/Profit-Sharing
- Tighten covenants: “kick-out” for financial ratio or performance

Consensual Exits: Assignment or Sublease

- Consent and stipulation for eviction
- Tenant further investment in improvements
- No further tenant transfer
- Landlord relocation right
- Landlord redevelopment and termination rights

Consensual Exits: Assignment

- Assignor
 - like guarantor, unreleased
 - No right to mitigate
 - No further ownership liability
 - No duty to assignor

Consensual Exits: Sublease

- Sublandlord
 - Remains in title
 - Right to mitigate and terminate sublease

Consensual Exits: Sublease

- Subtenant
 - Sublandlord bankruptcy/default risk
 - No privity with prime landlord or its mortgagee
 - Non-disturbance

Defaults

- Remedies
 - Tenant Default
 - Rent Acceleration
 - Re-entry
 - Duty of Mitigation
 - Self-Help
 - judgment in advance

Defaults

- Remedies
 - Landlord Default
 - Lease Termination
 - Setoff
 - Windfall Claims

Dispute Resolution Alternatives

- Mediation
 - Benefits
 - Detriments
- Arbitration
 - Benefits
 - Detriments
- Litigation

Consensual Exits: Termination Agreements

- Landlord Advantages
 - Eliminate chronic drama
 - Stop hemorrhaging (legal) expenses
 - Prevent fear of bankruptcy
 - Reposition space
 - Speedy repossession for redeployment

Consensual Exits: Termination Agreements

- Tenant Advantages
 - Skip continuing expense
 - Secure strategic shedding of location
 - Avoid imminent call for upgrades
 - Eliminate festering disputes

Consensual Exits: Termination Agreements

- Posture and Protocol – Pre negotiation Agreement
 - Single representation
 - No change of position
 - Confidentiality of settlement negotiations
 - Admission/no admission of default
 - Come current/escrow rent

Consensual Exits: Termination Agreements

- Consideration – who pays whom
- Diligence – what claims by contract, statute or tort
- Inspection – condition of surrendered space, improvements, equipment (who gets it)

Consensual Exits: Termination Agreements

- Covenants– pay; turnover; cooperate
- Representations and Warranties
 - no undisclosed liabilities;
 - power and validity;
 - no third party claims;
 - no violations of law

Consensual Exits: Termination Agreements

- Release of Claims /Snapback for conditions subsequent
 - mutual;
 - floor/ceiling;
 - pre-transfer/post-transfer

Consensual Exits: Termination Agreements

- Indemnity, hold harmless, protect and defend against third party claim - collectibility;
- Waiver of defenses
- Releases

Consensual Exits: Termination Agreements

- Transfer of Property and form of Transfer
 - Surrender
 - Assign
 - Consents
- Survival of Obligations or Releases - known or unknown conditions

Consensual Exits: Termination Agreements

- Holdover – consent to judgment and eviction
 - penalty rent
 - extinguish releases
 - reinstate guaranties

Consensual Exits: Termination Agreements

- Conditions to Surrender –
 - date certain;
 - material conditions;
 - third party (lender, co-tenancy) approval;
 - substitute tenants.

Bankruptcy Issues

- Background
- Tenant Bankruptcy
 - Assumption Generally
 - Assumption of a Shopping Center Lease
 - Rejection Generally

Bankruptcy Issues

- Letters of Credit as Security Deposits
 - Landlord Collateral
 - Letter of Credit

Bankruptcy Issues

- Landlord Bankruptcy
 - No further obligation to tenant
 - Landlord breach of lease