

Overcoming the Estoppel Certificate Hurdle

When selling or financing a commercial property, most purchasers and lenders require that the owner obtain estoppel certificates from all or most of the tenants at the subject property. An estoppel certificate is a document, signed by the tenant, in which the tenant certifies certain information about their lease, including the lease term, the current rent, and any claims that the tenant has against the owner. Purchasers and lenders rely on these certificates to ensure that they are not assuming any problem leases.

Although most leases require a tenant to sign such certificates when asked, it is difficult to force a tenant to sign and deliver the certificates in a timely manner. With the stringent deadlines for closing on a sale or a loan, it is important as an owner to include certain protections in each lease.

The standard estoppel certificate clause in a lease does little to motivate many tenants to sign and deliver the certificates. If the tenant does not meet the deadline, the standard lease provides that such failure equates to a default and the owner must give the tenant an additional notice and provide them with thirty additional days to respond. Only then can the owner take action against the tenant for such default.

In order to avoid this situation, each lease should include one of the following remedies for a failure by the tenant to timely provide a signed certificate:

(i) The failure is deemed an immediate default and the owner is not required to provide any additional notice or cure period. Some tenants will argue that this approach is too stringent and could cause the lease to be terminated for an inadvertent default. To remedy this concern, the lease could provide that the owner must give two requests for the certificate, with each request having a short period to respond and containing bold and all capital lettering to flag the importance of timely responding.

(ii) The failure results in the tenant being deemed to have accepted the terms of the certificate that was delivered by the owner. Purchasers and lenders may not like this approach since they will not have an actual signed certificate.

(iii) The failure results in the owner having a power-of-attorney to sign the certificate on the tenant's behalf. With this approach, purchasers and lenders will have a signed certificate; however, most tenants are not comfortable with giving the owner such power-of-attorney.

(iv) The failure causes the tenant to pay a preset dollar amount or the amount of the damages incurred by the owner as a result of such failure.

The most appropriate remedy depends on the circumstances. If the tenant occupies a major part of the property, most purchasers and lenders will require that an actual signed certificate be obtained and, therefore, the second and third remedies set forth above are not as attractive. However, as the closing deadline approaches, purchasers and lenders may become more flexible depending on how interested they are in closing the transaction.



Scott C. Butler is a partner in the Real Estate Transactions Department. He is active in all aspects of real estate transactional work including retail and office leasing, limited partnership and limited liability company agreements, acquisition, sales, brokerage and management agreements, and construction and permanent loan financing. If you have not had the opportunity to meet Scott, we encourage you to do so. He may be reached at

610.941.2560 or at sbutler@kaplaw.com.



Kudos...

We are proud to announce that **Joshua C. Quinter** was recently selected as a Pennsylvania "**Lawyer on the Fast Track**" by American Lawyer Media. Forty young lawyers in Pennsylvania are selected for this distinction by an objective judging panel. The nominees are judged on their determination, in their professional, personal and civic lives, to improve the legal landscape and the future of others. Josh is an associate in the Construction and Surety Law Department. He represents owners, general contractors, subcontractors and sureties. Josh serves as an arbitrator in both the Philadelphia and Montgomery County Courts, and is a member of various trade groups and business organizations. He is regularly published in national, regional and local publications on construction and commercial litigation related issues. Josh has been active in various political organizations and previously ran for elected office in Lower Merion Township. Our Congratulations to Josh!

New Hires...

Justin A. Bayer is an associate in the Construction & Surety Law and Commercial Litigation departments. He concentrates his practice in construction and surety law, representing owner-developers, contractors, subcontractors and sureties in the negotiation and trial of construction claims. His practice also includes litigating complex commercial and environmental law matters, as well as defending bad faith claims. Mr. Bayer was previously an associate with Kane, Pugh, Knoell, Troy & Kramer, LLP.

Timothy J. Corwin, Jr., is an associate in the Land Use, Zoning & Development Department. He concentrates his practice in the areas of land use, land development and zoning of both commercial and residential real estate. Mr. Corwin has a Master of City Planning from the University of Pennsylvania. He was previously an associate with Hartman Underhill & Brubaker, LLP in Lancaster, PA.

Attorney News...

Andrew B. Cohn, a partner in the Construction & Surety Law Department, has been named to the National Board of Directors of the Nonprofit Finance Fund (NFF). He also serves as chair of NFF's Greater Philadelphia and New Jersey Advisory Board, and of its Loan Committee. NFF, one of the nation's leading community development financial institutions, helps nonprofit organizations to strengthen their financial health and improve their capacity to serve their communities with loans, grants, and financial consulting. During its tenure, NFF has lent over \$160 million and leveraged \$1 billion of capital investment on behalf of its nonprofit clients.

Seminar News...

Kimberly L. Russell presented a seminar entitled "Employment Law from the Employer's Chair" for the National Subcontractor's Alliance on October 15, 2007. The seminar covered a variety of topics related to employee injuries/disabilities, wage and hour regulations, and company administration issues (i.e. handbooks). Ms. Russell frequently gives seminars for trade associations and companies on employment issues at their place of business. If you are interested in hosting a seminar at your company, please contact Ms. Russell at 610.941.2541 or by email at krussell@kaplaw.com

Joshua C. Quinter presented a seminar on "How to Negotiate a Good Contract" on October 18, 2007, in Allentown, PA, at the Barrister's Club of the Lehigh County Bar Association. Mr. Quinter focused on critical elements of contracts including how the new Mechanic's Lien Law affects contracts, identifying contingency payment clauses and using them to their best effect, and the risks and rewards of indemnification clauses.

©2007. *To the Point* is published by the Law Offices of Kaplin Stewart Melloff Reiter & Stein, P.C., Blue Bell, PA; Philadelphia, PA; Cherry Hill, NJ.

Its purpose is to provide general information to clients and friends and is not intended as legal advice. Readers should seek professional counsel with regard to specific applications of the information contained in this publication.

Unless otherwise expressly stated herein, all discussions and opinions are based upon the law of the Commonwealth of Pennsylvania and the State of New Jersey.

Your comments or suggestions are welcome ...

Phone: 610.260.6000 Fax: 610.260.1240 www.kaplaw.com

Editor: Adelaine Williams at 610.941.2479 *Photos:* Kevin Burch

Design/Layout: All-State Legal

Kaplin Stewart Melloff Reiter & Stein, P.C.
Union Meeting Corporate Center
910 Harvest Drive
P.O. Box 3037
Blue Bell, Pennsylvania 19422-0765