

Real Estate Law: Protection and remedy: How to recognize and navigate an exculpation clause



By **PATRICK J. QUIGLEY**

The commercial lease is one of the foundational documents in today's business world. Each day, landlords and tenants of every size and in every sector of the economy negotiate and execute these agreements, each, presumably, with the goal of entering into a long, mutually beneficial relationship. Landlords want to see their investments in real estate pay off, and tenants hope to secure a place that will help them realize their business goals.

Each side also wants to protect their interests, and that is where a certain lease clause is becoming more popular.

In representing national retail tenants in their commercial leases, I usually come across an "exculpation clause," which provides protection to landlords from most liabilities and damages to the tenant. While it appears that this clause started with the retail net leasing sector, I have seen it become more prevalent in standard commercial leases for all types of uses.

To better understand the "exculpation clause," let me give you an example. A lease may contain the following language: "Notwithstanding anything in this Lease to the contrary and notwithstanding any applicable law to the contrary, Landlord and Tenant hereby agree and acknowledge that the liability of Landlord (including any successor Landlord) and any recourse by Tenant against Landlord shall be limited solely and exclusively to an amount which is equal to the interest of Landlord

in the Real Property, and neither Landlord, nor any of Landlord's officers, members or partners nor their respective officers, agents, directors or employees shall have any personal liability therefore." By using this type of clause, the landlord has not only insulated itself as the real property owner, but also all of the "live bodies" that make up the landlord, namely officers, directors, members or partners of the landlord from potential tenant claims. In addition, if any claims actually pass through this insulation, then the landlord's only exposure is its interest in the real property. As you can see, this provides the landlord with a tremendous amount of protection. You can also see why it's being adopted and used in a variety of commercial leases.

So, what's a tenant to do to protect itself?

One suggestion would be to further define what "interest in the real property" in the above clause means. For example, that term should include the rental stream from the real property and proceeds from insurance or a taking. That way, the tenant does not only have to sue the landlord to lien the landlord's interest in the real property, but the tenant can also look to other remedies, like attaching or having the rents assigned to the tenant to offset its damages.

In addition, the "exculpation clause" should carve out "gross negligence or willful and wanton acts" by the landlord. New York courts have ruled that landlords cannot simply absolve themselves from gross negligence. By adding a specific carveout, it makes it absolutely clear that this is truly the case with the tenant's lease.

Finally, if a tenant's lease provides reme-

dies or warranties that are contrary to the "exculpation clause," then it is good practice to specifically call out the articles or sections that provide for those remedies. In other words, don't take the "exculpation clause" at face value and instead strike the "Notwithstanding anything in this Lease to the contrary" from the above example clause and provide specific references to where the parties have agreed to provide the tenant remedies that go beyond "landlord's interest in the real property." One example would be where the landlord has agreed to indemnify or hold the tenant harmless in the case of a real estate broker claim or environmental condition claim at the real property. These remedies should not be inadvertently limited by an exculpation clause tucked away in a lease agreement.

As mentioned above, an "exculpation clause" provides a tremendous amount of protection to landlords and the use of this type of clause is not going anywhere. In fact, it is becoming more prevalent in the leasing practice. Tenants and their attorneys need to be mindful of this, but, as illustrated above, there are creative ways to protect a tenant's interests against some of the overreach of this clause.

Long-lasting, mutually beneficial landlord-tenant relationships, adequate protection, and sensible remedies — all of these can be accomplished in the commercial lease, especially if you know what to look for.

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