

# COMMERCIAL LEASE LAW INSIDER<sup>®</sup>

MARCH 2014

The Practical, Plain-English Newsletter for Owners, Managers, Attorneys, and Other Real Estate Professionals

## INSIDE THIS ISSUE

- Model Lease Clause: Set Terms of Temporary Occupancy** . . . . . 3
- Model Lease Clause: Shift Mold Responsibility to Tenant** . . . . . 6
- Recent Court Rulings** . . . . . 8
  - ▶ Owner Didn't Waive Early Termination Provisions
  - ▶ Tenant Must Pay Rent During Reduced Occupancy Period

## CRE Roundtable: Room for Improvement as Market Moves Forward

The Real Estate Roundtable's latest quarterly Sentiment Survey has some good news for CRE owners and investors: U.S. commercial real estate markets continue their gradual recovery from recession—as reflected by improving fundamentals, transaction volumes, and capital flows—and will probably remain on a modestly upward trajectory over the coming year.

Still, senior industry executives are reserved about prospects for a sustainable economic recovery. Various policy risks continue to weigh on real estate markets. These include the scheduled sunset of the Terrorism Risk Insurance Act (TRIA), which could spark a job-killing commercial real estate credit crunch; tax reforms that could cause major dislocation in real estate markets; and the economic conditions surrounding future interest rate hikes, which could put renewed pressure on valuations, complicate loan refinancing, and impede debt servicing.

"The slight uptick in our latest Sentiment Index shows our industry on a generally positive path—in keeping with broader macroeconomic trends—yet still not fully recovered, and still subject to policy-related risks," said Roundtable Chairman Robert S. Taubman, who is chairman, president, and CEO of Michigan-based Taubman Centers Inc. "U.S. policymakers must work to create a more attractive climate for job creation and investment as these are critical to real estate's health—and as real estate goes, so goes the economy," added Taubman, whose firm owns an international portfolio of regional and super-regional malls.

## FEATURE

## Cover Seven Points When Leasing Temporary Space to Long-Term Tenant

*By Nathaniel Hoffman, Esq.*

Occasionally, a prospective tenant of your office building or shopping center may need to move before its new space would be ready for occupancy. The tenant's existing lease may be expiring before the date that you're able to deliver the new space, and the tenant may be unable to hold over in its current location because it's facing a significant holdover rent or consequential damages for failure to vacate on a timely basis. Or you may be unable to deliver the space by the date the prospective tenant needs possession because your existing tenant is holding over or you don't have sufficient time to complete the build-out the new tenant requires.

In such cases, if you have vacant space in your building that can accommodate the new tenant during this interim period, your offer to give the tenant temporary space until its new premises are available can save the deal. To protect your interests in this situation, negoti-

(continued on p. 2)

## PLUGGING LOOPHOLES

## Make Tenant That Controls Its Space Responsible for Mold Issues

Responsibility for mold-related damage in commercial and residential properties has become a hot-button issue in the past several years, as major storms like Hurricane Sandy have increased the potential for flooding and subsequent mold growth, and as tenants have become more aware of environmental issues. Things like indoor air quality (IAQ) that previously weren't on tenants' radar may play a role in whether they choose a certain space over another. After all, tenants don't want to risk their employees' health by working in hazardous conditions.

(continued on p. 4)

## BOARD OF ADVISORS

<b>Jacob Bart, Esq.</b> Stroock & Stroock & Lavan LLP New York, NY	<b>Mark Morfopoulos, Esq.</b> Attorney at Law Hartsdale, NY
<b>Harvey M. Haber, QC, LSM</b> Goldman Sloan Nash & Haber LLP Toronto, ON Canada	<b>Richard F. Muhlebach, CPM, CSM, CRE</b> Woodinville, WA
<b>Sheldon A. Halpern, Esq.</b> Pircher, Nichols & Meeks Los Angeles, CA	<b>Neil T. Neumark, Esq.</b> Dykema Chicago, IL
<b>Nathaniel A. Hoffman, Esq.</b> Whyte Hirschboeck Dudek S.C. Milwaukee, WI	<b>Neil Oberfeld, Esq.</b> Greenberg Traurig LLC Denver, CO
<b>David S. Houston, Esq.</b> Reed Smith LLP Falls Church, VA	<b>Robert P. Reichman, Esq.</b> Wilk Auslander LLP New York, NY
<b>Kenneth Klassman, Esq.</b> Horwood Marcus & Berk Chartered Chicago, IL	<b>Marc L. Ripp, Esq.</b> Mack-Cali Realty Corp. Edison, NJ
<b>Abraham Lieberman, Esq.</b> O'Toole, McLaughlin, Doolley & Pecora Co., LPA Sheffield Village, OH	<b>Mark A. Senn, Esq.</b> Senn Visciano Canges P.C. Denver, CO
<b>Richard C. Mallory, Esq.</b> Allen Matkins Leck Gamble Mallory & Natsis LLP San Francisco, CA	<b>Winnifred C. Ward, Esq.</b> Downey Brand LLP Sacramento, CA
<b>Stephen J. Messing, Esq.</b> Minden Gross LLP Toronto, ON Canada	<b>Steven A. Weisfeld, Esq.</b> Beattie Padovano, LLC Montvale, NJ
	<b>Sujata Yalamanchili, Esq.</b> Hodgson Russ LLP Buffalo, NY

Editor: **Elizabeth Purcell-Gibney, J.D.**

Executive Editor: **Heather Ogilvie**

Production Director: **Kathryn Homenick**

Director of Operations: **Michael Koplin**

*Commercial Lease Law Insider* [ISSN 0736-0517 (PRINT), 1938-3126 (ONLINE)] is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

#### Volume 32, Issue 10

**Subscriptions/Customer Service:** To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our Web site, [www.vendomerealestatemedi.com](http://www.vendomerealestatemedi.com). Subscription rate: \$473 for 12 issues. **To Contact the Editor:** Email: [egibney@vendomegrp.com](mailto:egibney@vendomegrp.com). Call: Elizabeth Purcell-Gibney at (212) 812-8434. Fax: (212) 228-1308.

**To Place an Advertisement:** Please email Erin Tyler, [etyler@vendomegrp.com](mailto:etyler@vendomegrp.com), or call (216) 373-1217.

**Disclaimer:** This publication provides general coverage of its subject area. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional advice or services. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The publisher shall not be responsible for any damages resulting from any error, inaccuracy, or omission contained in this publication.

© 2014 by Vendome Group, LLC. All rights reserved. No part of *Commercial Lease Law Insider* may be reproduced, distributed, transmitted, displayed, published, or broadcast in any form or in any media without prior written permission of the publisher. To request permission to reuse this content in any form, including distribution in educational, professional, or promotional contexts, or to reproduce material in new works, please contact the Copyright Clearance Center at [info@copyright.com](mailto:info@copyright.com) or (978) 750-8400. For custom reprints, e-prints, or logo licensing, please contact Donna Paglia at (216) 373-1210 or [dpaglia@vendomegrp.com](mailto:dpaglia@vendomegrp.com).

## Temporary Space (continued from p. 1)

ate a provision like our Model Lease Clause: Set Terms of Temporary Occupancy, and include it as a part of your lease with the tenant.

### What Clause Should Say

Your clause, like ours, should cover the following seven points:

**Define the temporary space.** A temporary occupancy provision is intended to be inserted into a new lease that you're negotiating with your prospective tenant, so it contains references to other terms that are defined elsewhere in the lease. The introductory paragraph should grant the tenant the right to occupy certain space that's defined as "Temporary Premises" and shown on a floor plan or site plan attached to the lease. It also should set forth the date, known as the "occupancy date," on which such space will be available for the tenant's use [Clause, Intro.]. The occupancy date will be prior to the formal commencement date of the lease.

**State condition of temporary premises.** Make it clear to the tenant that you're furnishing the temporary premises in their current "as is" condition and that you have no obligation to repair, remodel, or improve such space in any way for the tenant's use [Clause, par. a]. Since it's intended that the occupancy will be for only a few days, weeks, or at most, months, neither party will want to spend any significant sums to prepare the space for the tenant's use.

**Specify application of other lease terms.** State that once you deliver possession of the temporary premises to the tenant, those premises are a part of the premises covered under the lease, and all of the terms of the lease will be applicable from that date [Clause, par. b]. Accordingly, you won't need to restate those provisions that specifically apply to the occupancy of the temporary premises. Especially important are the provisions relating to insurance, indemnification, and default clauses. And prior to delivering the temporary space to the tenant, you'll want to make sure that you receive evidence of insurance from the tenant in the form and manner set forth in the lease.

If there are any provisions of the lease that don't apply during the temporary occupancy, specifically mention them in this section. In our Model Clause, the tenant has no obligation to pay Base Rent or Additional Rent (CAM, taxes, insurance, etc.) during its occupancy, but there may be circumstances where it would be appropriate for the tenant to be responsible for payment of some or all of such charges, in which case you should modify your provision accordingly.

**List charges tenant should pay.** Even when you're providing the temporary premises to your new tenant as an accommodation without the payment of rent, it's appropriate for the tenant to pay you for utilities and services that you're providing in connection with its use. Require your tenant to pay you for the direct costs you incur as a result of the tenant's occupancy, including signage, keys, wiring, electricity, and janitorial services [Clause, par. c]. Your building or

center may provide other services that should be inserted in this list, such as the cost of operators needed for the use of freight elevators. A tenant may need clarification on what charges it will be expected to pay for.

**Establish your right to lease temporary premises.** You certainly don't want to lose your ability to continue to market the temporary premises during the temporary occupancy. To do this, retain the right to enter the temporary premises at any time to show the space to prospective tenants [Clause, par. d]. You can also provide that if you find a new tenant for that space, you can relocate your tenant to other comparable premises in the same building or another building in the center. You'll have to evaluate whether a relocation is feasible under the circumstances, and be prepared for the tenant's objection that it shouldn't be required to move again before its permanent location is ready.

**Address relocation of tenant to permanent premises.** Require the tenant to vacate the temporary premises and move into the permanent premises within a short time after the formal commencement date of the lease when you have delivered possession of the permanent premises to the tenant in the required condition [Clause, par. e].

State that the tenant must move all of its furniture, trade fixtures, equipment, and personal property at its sole cost and surrender possession of the temporary premises to you in the condition required in the surrender clause of the lease. That clause should provide that upon termination of the lease, the premises must be broom clean and

(continued on p. 4)

## MODEL LEASE CLAUSE

### Set Terms of Temporary Occupancy

If timing is an issue with a prospective tenant that needs to move to your building or center before its long-term space would be ready, you could offer temporary space that it may use until then. It might save a deal that would otherwise fall through. The following Model Lease Clause, drafted by Wisconsin attorney Nathaniel Hoffman, can help you set the terms of a temporary occupancy with a tenant who will eventually move to another space in your building or center. Consult with your attorney before adapting this language for your leases.

#### OCCUPANCY OF TEMPORARY PREMISES

Notwithstanding anything to the contrary contained in this Lease, commencing on [insert date] (the "Occupancy Date"), Tenant shall have the right to occupy the premises commonly known as Suite [insert #] on the [insert #] floor of the Building as shown on Exhibit [insert #] attached hereto (the "Temporary Premises") on a temporary basis and on the following terms and conditions:

- a. The Temporary Premises shall be taken and accepted in their present "as is" condition, and Landlord shall not be obligated to do any remodeling, renovation, or repair work with respect thereto.
- b. From and after the Occupancy Date, the Temporary Premises shall be included as a portion of the Premises demised under this Lease, and Tenant's occupancy shall be subject to all of the terms, covenants, and provisions of this Lease except as otherwise provided herein and except that Tenant shall have no obligation to pay Base Rent or Additional Rent to Landlord.
- c. Tenant shall reimburse Landlord for any direct expenses incurred by Landlord as a result of Tenant's use and occupancy of the Temporary Premises including, without limitation, signage, keys, wiring, electricity, and janitorial services, within thirty (30) days after receipt of Landlord's bill therefor.
- d. Landlord shall have the right to enter the Temporary Premises at any time to show the same to prospective tenants. In the event that Landlord leases the Temporary Premises to a third party, then Tenant shall vacate the Temporary Premises and surrender the same to Landlord in the condition specified in this Lease on or before the date designated by Landlord (the "Designated Date"), and Landlord shall furnish Tenant other comparable space in the Building or another building owned by Landlord in the Project which shall then become the Temporary Premises.
- e. On or before the date (the "Surrender Date"), which is three (3) business days after the Commencement Date, time being of the essence, Tenant shall, at Tenant's sole cost, relocate any furniture, furnishings, trade fixtures, equipment (including telecommunication lines and equipment), and other personal property of Tenant from the Temporary Premises to the Premises and surrender the Temporary Premises to Landlord in the condition specified in this Lease. Upon such surrender of the Temporary Premises, the Temporary Premises shall not be included as a portion of the Premises demised pursuant to this Lease.
- f. If Tenant fails to timely surrender possession of the Temporary Premises to Landlord on the Designated Date or the Surrender Date, as the case may be, then Tenant shall pay to Landlord, upon demand, the sum of \$[insert an appropriate amount, e.g., \$500 or \$1,000] per day or partial day that Tenant retains possession of the Temporary Premises. Such retention of possession shall be a breach of this Lease without the need for further notice to Tenant, and Landlord shall have all rights and remedies provided under this Lease and by law including the right to recover consequential damages suffered by Landlord.

## Temporary Space

(continued from p. 3)

in at least as good condition as when delivered to the tenant, ordinary wear and tear excepted.

**PRACTICAL POINTER:** For a short time, the tenant will have possession of both the temporary premises and the permanent premises. You may want to document the date that the tenant has properly vacated and surrendered the temporary premises so that there is no misunderstanding between you.

**Address failure to vacate temporary premises.** If your tenant fails to move out and surrender the temporary space in a timely manner, you may be unable to begin any work necessary to accommodate a new tenant of the space or to use the space for other purposes. So set forth the penalties that will give your tenant an incentive to avoid such a delay [Clause, par. f]. These include the requirement that the tenant pay a fixed sum for each day or partial day

that the tenant delays in surrendering possession. You should also retain your right to enforce all of your remedies under the lease and the right to recover consequential damages resulting from the tenant's breach. ♦

**Nathaniel Hoffman, Esq.** is an attorney in the Milwaukee office of Whyte Hirschboeck Dudek S.C., where he has been a member of the Real Estate Practice Group since 2005. Hoffman focuses his practice in all aspects of real estate transactions for both landlords and tenants.

## Plugging Loopholes (continued from p. 1)

Conscientious owners should be aware of mold and other hazards and do their best to avoid or eliminate them. However, if your tenant "controls" its space—that is, the tenant is solely responsible for repairs and maintenance—it's not appropriate to blame you for mold and the conditions that could cause it to grow. But if your lease with a tenant that controls its own space doesn't include provisions that protect you from the threat of this type of lawsuit, you could be on the hook when you could've made the tenant responsible for keeping its space free of mold growth and mold-inducing conditions.

To plug this loophole, consider adding the following mold-related requirements to your leases, and ask your attorney about adapting our Model Lease Clause: Shift Mold Responsibility to Tenant, to protect your interests.

### Responsibility to Monitor Space, Pay Costs

The tenant's effective monitoring of its space can help prevent conditions that will lead to mold

growth. Your tenant should be required to regularly monitor its space for mold growth and mold-inducing conditions.

You should make it clear that this means not just actual or suspected mold growth but also actual or suspected water damage, repeated complaints of respiratory ailments or eye irritations by the tenants' employees or any other occupants in the space, and any complaints the tenant is aware of by government agencies about indoor air quality at the space [Clause, par. a(i)].

The tenant has a strong incentive to monitor the space because monitoring can protect its wallet—if the tenant can prevent mold or mold-inducing conditions, it won't need to take any further steps, such as paying for a mold inspection and remediation. At the least, by catching problems early, it may be able to keep its remediation costs down and avoid liability for mold-related claims.

Since the tenant controls the space, require it to pay for all costs of monitoring the space [Clause,

par. a]. That should reduce the likelihood that the tenant will come after you for payment.

### Tenant Must Provide Notice of Suspected Mold

Make the tenant promptly notify you in writing if, after monitoring its space, it suspects mold or mold-inducing conditions [Clause, par. a(ii)]. This way, you'll know about the problem and can check up on the tenant or other building areas that may be affected by the same mold problem (for example, the common areas adjacent to the tenant's space or an adjacent tenant's space) to ensure that the tenant promptly carries out its inspection and remediation requirements.

Don't commit yourself to sending the tenant a written acknowledgment within a fixed time after you get this notice. Because if you make the commitment but forget to send the acknowledgment, the tenant might argue that you've waived your rights under the lease, so it's no longer required to carry out its inspection and remediation obligations.

## Professional Mold Inspection Is a Necessity

If the tenant's monitoring suggests that mold or mold-inducing conditions may be present, a professional mold inspection will be necessary. The inspection's results will confirm or deny their presence. So make sure your lease covers these points:

**Prompt inspection.** If the tenant suspects mold or mold-inducing conditions, require the tenant to promptly arrange for an inspection of the space [Clause, par. b]. Any delay by the tenant could worsen a potentially hazardous situation.

This is also an opportunity to contribute to the scope of the mold inspection. You want to be sure the job is done right, but you don't want to appear to be taking control of the mold inspection (or any mold remediation needed). The space is still under the tenant's control, so any mold problem should remain the tenant's responsibility.

**Inspection notice.** Require the tenant to send you advance written notice of the inspection date and which portion of the space will be inspected. Make sure the tenant is required to send its notice at least three business days before the inspection date [Clause, par. b(i)]. Although you want the tenant to act promptly on its suspicions of mold or mold-inducing conditions, you don't want to be notified of an inspection at the last minute. You want to be able to keep tabs on the tenant's inspection efforts.

**Inspection costs.** Require the tenant to pay all the inspection costs [Clause, par. b]. If you don't address these costs in the lease, the tenant may later claim—and a court may agree—that you're

responsible for footing the bill for them.

**Mold inspection specialist.** Require the tenant to use only qualified and experienced mold consultants—such as a certified industrial hygienist (CIH) with mold experience—for the inspection [Clause, par. b(ii)]. Make sure the CIH or other consultant you hire has extensive mold experience. Otherwise, the tenant might hire a novice, who might miss a problem, misidentify the type of mold, or damage the space.

**Insurance.** Require the tenant to have the inspector carry “errors and omissions” insurance with appropriate terms and limits, to add you as an additional insured on this policy, and to provide you with evidence of the coverage and a copy of the endorsement naming you as an additional insured [Clause, par. b(iii)(A)]. This insurance will protect you if you and the inspector get sued because the inspector didn't adequately perform his or her inspection.

**Times for inspection.** Get the right to limit when the inspection can occur [Clause, par. b]. Because of the negative publicity generated by mold lawsuits, you may want to allow a mold inspection only when your building is closed—even if you have to pay for overtime to staff and security costs. This will minimize the risk that existing tenants will draw premature conclusions about mold contamination in the building.

**Discretion.** Require the tenant to have the inspection performed discreetly and confidentially [Clause, par. b(iii)(B)]. This is important because even if you limit the allowable inspection times, other tenants may be in the building during the inspection. You don't want the inspector to

reveal his purpose to other tenants or nonessential personnel or, for example, to appear in conspicuous vehicles or uniforms.

**Confidential inspection report.** Require the tenant to have the inspector prepare a report after the inspection and promptly give you a copy of it [Clause, par. b(iii)(C)]. This way, you'll know if there's mold or a mold-inducing condition in the space, and the extent of it.

Require both the tenant and its inspector to keep the inspection report and its results confidential [Clause, par. b(iii)(C)]. The inspection report contains technical information that can be easily misinterpreted by nonprofessionals, especially given the widespread negative publicity generated by toxic mold cases. You want the mold remediation plan, if needed, to be developed on the basis of sound scientific, technical, health, and safety considerations—not in an emotionally charged atmosphere. Also, keeping the inspection report confidential reduces the incentive for mold consultants to solicit business from other tenants in your building.

## Immediate Remediation Required

If the inspection results confirm the presence of mold or a mold-inducing condition in the space, mold remediation will be necessary. It's crucial to set these specifications:

**Promptness.** Require the tenant to promptly hire contractors to remediate any mold or mold-inducing conditions at the space [Clause, par. c(i)A]. Any delay by the tenant could cause the situation to worsen. And it could put you and the tenant at risk of get-

(continued on p. 7)

## MODEL LEASE CLAUSE

### Shift Mold Responsibility to Tenant

Use the following clause to make a tenant that controls its space responsible for monitoring, inspecting, and remediating mold-related hazards. Show this clause to your attorney before tailoring it to reflect your particular building.

#### MONITORING, INSPECTING & REMEDIATING MOLD

- a. Monitoring of Premises.** Tenant, at its sole cost and expense, shall:
- (i) Regularly monitor the Premises for the presence of mold or for any conditions that reasonably can be expected to give rise to mold (the "Mold Conditions"), including, but not limited to, observed or suspected instances of water damage, mold growth, repeated complaints of respiratory ailment or eye irritation by Tenant's employees or any other occupants in the Premises, or any notice from a governmental agency of complaints regarding the indoor air quality at the Premises; and
  - (ii) Promptly notify Landlord in writing if it suspects mold or Mold Conditions at the Premises.
- b. Inspection of Premises.** In the event of suspected mold or Mold Conditions at the Premises, Tenant, at its sole cost and expense, shall promptly cause an inspection of the Premises to be conducted, during such time as Landlord may designate, to determine if mold or Mold Conditions are present at the Premises, and shall:
- (i) Notify Landlord, in writing, at least [*insert #, e.g., 3*] days prior to the inspection, of the date on which the inspection shall occur, and which portion of the Premises shall be subject to the inspection;
  - (ii) Retain an industrial hygienist certified by the American Board of Industrial Hygienists ("CIH") or an otherwise qualified mold consultant (generally, "Mold Inspector") to conduct the inspection; and
  - (iii) Cause such Mold Inspector to:
    - (A) Obtain or maintain errors and omissions insurance coverage with terms and limits customarily maintained by Mold Inspectors, adding Landlord as an additional insured with respect to Landlord's vicarious liability, and provide to Landlord evidence of such coverage and a copy of the endorsement granting Landlord additional insured status;
    - (B) Perform the inspection in a manner that is strictly confidential and consistent with the duty of care exercised by a Mold Inspector; and
    - (C) Prepare an inspection report, keep the results of the inspection report confidential, and promptly provide a copy to Landlord.
- c. Remediation of Mold.** In the event the inspection required by Paragraph b hereof determines that mold or Mold Conditions are present at the Premises, then
- (i) Tenant, at its sole cost and expense, shall promptly:
    - (A) Hire trained and experienced mold remediation contractors to prepare a remediation plan and to remediate the mold or Mold Conditions at the Premises;
    - (B) Send Landlord notice, in writing, with a copy of the remediation plan, at least [*insert #, e.g., 3 to 5*] days prior to the mold remediation, stating:
      - (1) The date on which the mold remediation shall start;
      - (2) Which portion of the Premises shall be subject to the remediation;
      - (3) The name, address, and telephone number of the certified mold remediation contractors performing the remediation;
      - (4) The remediation procedures and standards to be used at the Premises;
      - (5) The clearance criteria to be employed at the conclusion of the remediation; and
      - (6) The date the remediation will conclude;
    - (C) Notify, in accordance with any applicable state or local health or safety requirements, its employees as well as occupants and visitors of the Premises of the nature, location, and schedule for the planned mold remediation;
    - (D) Provide Landlord with a draft of the mold remediation report and give Landlord a reasonable opportunity to review and comment thereon, and when such report is finalized, promptly provide Landlord with a copy of the final remediation report.
- d. Post-Remediation Inspection.** Tenant acknowledges and agrees that Landlord shall have a reasonable opportunity to inspect the remediated portion of the Premises after the conclusion of the mold remediation. If the results of Landlord's inspection indicate that the remediation does not comply with the final remediation report or any other applicable federal, state, or local laws, regulatory standards or guidelines, including, without limitation, the EPA Guidelines, then Tenant, at its sole cost and expense, shall immediately take all further actions necessary to ensure such compliance.

## Plugging Loopholes

(continued from p. 5)

ting sued by employees, occupants, or visitors who were exposed to the mold and became ill from it.

**Remediation notice.** Require the tenant to send you advance written notice of the remediation. The notice must tell you when the remediation will start, which portion of the space will be remediated, who will perform the remediation, and when the remediation will end. Make sure you get the notice at least three to five days before the remediation's start date [Clause, par. c(i)(B)]. This will give you some time to prepare your building staff and alert other tenants, since you may have to evacuate some areas of the building during the remediation.

Also, say in your lease that the tenant has the responsibility of notifying its employees, occupants, and visitors of the mold remediation [Clause, par. c(i)(C)].

**Remediation costs.** Make sure the tenant is solely responsible for paying all remediation costs [Clause, par. c(i)]. If you don't address this in the lease, the tenant may later claim—and a court may agree—that you're responsible for paying those costs.

**Experienced contractors.** Require the tenant to hire experienced mold remediation contractors [Clause, par. c(i)(A)]. You want only well-trained and experienced contractors, to reduce the risk of needless damage to

the space and a less than thorough job.

**Remediation plan.** Require the tenant to have its mold remediation contractors prepare a “remediation plan” before the remediation starts [Clause, par. c(i)(A)].

The remediation plan should describe the remediation standards and “clearance criteria”—that is, the level of remediation that you and the tenant agree the contractors must reach. And the remediation plan should describe the procedures that will be taken to: remediate the mold or mold-inducing conditions; dispose of the moldy materials; and protect workers, tenants, and occupants while the remediation is ongoing. Also, require the tenant to attach a copy of the remediation plan to its remediation notice [Clause, par. c(i)(B)]. This way, you'll have time to review its contents with your own expert to see what the remediation involves.

**Remediation report.** After a remediation ends, the mold remediation contractors will prepare a remediation report, which discusses the results. Make sure that the tenant is required to give you—or have the contractors give you—a draft of the remediation report so you can comment on it. Also require that you get a copy of the final remediation report [Clause, par. c(i)(D)].

**Post-remediation inspection.** Get the right to bring your own inspector into the space after you get the final remediation report. Your inspector can check the space to confirm that the remediation was done as the

report indicates and that it followed any applicable requirements or guidelines. And if this turns out not to be the case, have the right to require the tenant to fix the problem [Clause, par. d].

## Cover Mold in Other Lease Clauses

Besides adding a clause to your lease to make the tenant responsible for mold and mold-causing conditions, also take a look at your standard lease clauses and increase the protection they give you against mold-related lawsuits and other problems.

**Alterations.** Bar the tenant from using materials that are susceptible to mold growth—such as rubber foam—when making alterations.

**Insurance.** Add mold coverage to the tenant's insurance obligations.

**Waiver.** Require the tenant to waive all rights to sue you for mold-related claims.

**Indemnification.** Require the tenant to indemnify you if you're sued by third parties because of mold in the tenant's space. That is, you want the tenant to agree to pay for your defense and not to seek any reimbursement from you for any damages and penalties that may be assessed.

**Self-help.** Your lease may give you a self-help right—that is, let you enter the space and make repairs the tenant was supposed to make but didn't. If it does, make sure this right includes the right to remediate mold in the space. If it doesn't, make sure you negotiate such a provision. ♦

## RECENT COURT RULINGS

### ► Owner Didn't Waive Early Termination Provisions

**Facts:** A lease for storage space for casino equipment gave the tenant an early termination right, provided that it sent a letter in writing to the owner and paid a termination fee by a certain date. During a phone call shortly before the early termination deadline, the tenant told the owner that it intended to move out of the space and that it would send a formal letter and payment in compliance with the lease terms.

The tenant began demolishing its improvements at its own expense as it was required to by the lease before moving out, no matter when it chose to leave. It asked the owner to provide blueprints of the space and for other demolition assistance, and the owner complied. The tenant later missed the deadline, but continued its plans to leave.

The tenant eventually sent a letter and payment to the owner, but the owner returned the check with a letter stating that the tenant didn't properly exercise its early termination option and that as far as the owner was concerned, the lease was still in effect and the tenant was obligated to pay rent until the end of its term as originally agreed upon.

The tenant moved out and stopped paying rent. The owner sued the tenant for back rent, which totaled over \$2 million by the end of the lease term.

**Decision:** A Nevada trial court ruled in favor of the owner.

**Reasoning:** The tenant claimed that although it objectively had been late in sending its notice and payment for early termination, the owner's assistance with the demolition and other move-out requirements, coupled with its verbal notice, meant that the owner had waived its contractual rights under the lease to collect rent until the end of the lease term.

The court said that the language of the termination option is clear and unambiguous. The tenant was entitled to terminate the lease only if it provided written notice of its election on or before May 1, 2010, and contemporaneously with the written termination notice tendered the termination fee of \$370,560 to the owner. Early verbal notification of the termination was insufficient to exercise the early termination provision.

The court also found that the owners' assistance to the tenant in removing its improvements from the space didn't support a waiver of the owner's rights, either express or implied. Rather, the court determined that the owner cooperated with the tenant in

connection with the demolition work in order to mitigate its damages by helping to restore the facility to a condition that would maximize the marketability of the property and enhance the prospect of securing new tenants once the property was vacated by the tenant. Additionally, the lease expressly provides that nothing undertaken by the owner to mitigate damages shall waive its right to recover damages against the tenant that had breached the contract.

• ProLogis NA3 NV II, LLC v. IGT, Inc., January 2014

### ► Tenant Must Pay Rent During Reduced Occupancy Period

**Facts:** A retail tenant's lease for shopping center space gave it the right to stop operating for a "reduced occupancy period" if a major co-tenant left the center until it was replaced. While a reduced occupancy period was in effect, the tenant decided to change its retail concept and remodeled the store during the closure. The tenant claimed that the reduced occupancy clause when read together with a "disputed sums" clause in the lease permitted it to pay the lesser of minimum rent or 2 percent of gross sales for the previous month—whichever was lower—while a reduced occupancy period was in effect. It asserted that since there were no sales during the closure, it owed no rent.

The owner sent a notice of default to the tenant, asserting that the alternative of paying a percentage of gross sales was not available because the tenant had closed the store. The owner sued the tenant for unpaid rent. A trial court ruled in favor of the owner, stating that the tenant wasn't permitted to forgo paying rent while the store was closed.

**Decision:** An Arizona court of appeals upheld the lower court's decision.

**Reasoning:** The owner argued that implicit in an option to pay a percentage of gross sales rather than minimum rent was a requirement that the tenant be open for business. It contended that the tenant's interpretation of the two lease clauses taken together led to the absurd result that the tenant was permitted to occupy the premises indefinitely without paying rent. The appeals court agreed that this was unreasonable, and that the tenant was required to pay minimum rent during the disputed period. The appeals court noted that if the tenant were allowed to pay no rent during a reduced occupancy period, it would effectively allow it to tie up the property. ♦

• Ross Dress for Less, Inc. v. Westfest, LLC, January 2014