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When a Tenant's Lender Wants a Waiver

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Key ingredients for many businesses are a lease and some sort of financing. That financing may be in the form of a loan secured by the tenant's personal property, or it may be in the form of an equipment lease. (The issues discussed below apply equally to both loans and equipment leases, so for simplicity, we will refer only to lenders, loans and collateral.)

In connection with the financing, because the collateral may be located within the tenant's leased premises, the lender will often want to enter into an agreement with the landlord. The goal of this agreement, from the lender's perspective, is to:

- be sure its lien on the collateral is superior to any lien of the landlord, and
- have the right to enter the premises to remove the collateral in case the tenant defaults on its loan.

The form of this agreement often has the landlord waiving its lien rights against the collateral and consenting to the lender's rights to enter the premises and remove the collateral. The tension, from the landlord's perspective, is that if the tenant has defaulted under its loan (creating the need for the lender to enter the premises), then the tenant may also have defaulted on the landlord's lease.

There is no statutory landlord's lien in Colorado, nor is there a concept of distraint or distress. Therefore, this article relates only to consensual liens (obtained pursuant to the Uniform Commercial Code) or judgment liens (obtained after a successful lawsuit). Other states have landlord's liens or similar rights in favor of landlords, and additional consideration may need to be given to these agreements in those states.

When presented with this type of agreement, here are some considerations for landlords:

- **Subordinate, Don't Waive:** Many lenders ask the landlord to completely waive any right to a lien on the collateral. If possible, landlords should try to subordinate their lien rights rather than completely waive them.
- **Notice of Default:** It may be difficult for landlords to track an obligation to notify a third party, so try to limit the landlord's obligation to give notices of default to the lender. If the landlord has to give notice, it is worth including the lender's contact information in the notice provisions of the lease itself.
- **Describe the Collateral:** Try to have the collateral described in detail.
 - If serial numbers or some other specific list is available, it should be used.
 - If, however, the description is more general, consider whether the following can be excluded:
 - Leasehold improvements that have been permanently installed in the premises. The lease may already provide that these are the landlord's property upon installation, so it would be helpful to clarify that in the subordination.
 - The tenant's interest in the lease itself. (See below on collateral assignments of the lease.)
- **While in the Premises:**
 - The landlord should try to limit the time that the lender can be in the space, such as 30 or 60 days after the tenant's default.
 - The landlord should try to have the lender comply with the tenant's lease obligations, including:
 - Carrying liability insurance;
 - Indemnifying the landlord for injuries or damage occurring during the removal process; and
 - Paying rent. On this point, also consider whether the lender has to cure any then-existing tenant default, especially for unpaid rent.
 - Try to limit the landlord's exposure for damage to the collateral in connection with its removal from the premises.
- **Avoid Auctions:** While a private sale in the premises may be acceptable, try to not permit auctions or other public sales.
- **Tenant and Guarantors Sign:** The tenant and any guarantors should execute the agreement, as well. This will bind the tenant to any obligations in the agreement. Having the guarantors sign will limit the guarantors' ability to argue that their obligations were negatively affected by the agreement and any concessions the landlord may have made.
- **Property Deemed Abandoned:** If the lender does not remove the collateral within a stated time, it should be deemed abandoned, permitting the landlord to remove it to make way for a replacement tenant.

Sometimes, these agreements contemplate that the tenant has collaterally assigned its interest in the lease to the lender. (Tenants should note that this type of assignment, even if the lender has not requested a direct agreement with the landlord, may require the landlord's consent under the assignment provisions of the lease.) While a collateral assignment of the tenant's interest is security for the lender's loan, it has a different enforcement mechanism than the security interest in equipment or physical personal property. If the lender exercises its rights under a collateral assignment, it then becomes the tenant. Significant considerations for the landlord in this situation are:

- How much latitude does the lender have to subsequently assign the tenant's interest in the lease to another operator or tenant? Ideally, this would be the same as is available to the original tenant under the lease's assignment provisions.
- Upon such a subsequent assignment, will the lender be released from further liability under the lease? Keeping the lender "on the hook" will protect the landlord if the replacement tenant is inexperienced and/or has modest financial strength.

In addition to the tenant's lender, the landlord likely has its own financing. The landlord should be careful not to grant or waive any rights or benefits that it has granted to its lender or that the landlord is prohibited from granting or waiving under its loan documents. Also, when drafting its loan documents, the landlord's lender may want to consider that this type of waiver is possible.

These agreements seeking a landlord's waiver or subordination and its consent come in many different forms. However, trying to incorporate the concepts above will help to protect the landlord in case the tenant defaults and the lender needs to enter the premises to remove its collateral.

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