

CHAPTER THIRTY-NINE

**THE ESSENTIAL GUIDE TO THE
MOST IMPORTANT CLAUSE IN
A COMMERCIAL LEASE:
THE DEFAULT CLAUSE**

**Adam Leitman Bailey, Esq.
John M. Desiderio, Esq.**

[39.0] I. INTRODUCTION

Commercial leases require an effective default clause that allows the landlord to force a tenant to comply with all lease obligations. The default clause commonly provides the procedure for obtaining an eviction or the threat of an eviction for a commercial tenant's violation of the lease. In addition, many default clauses include provisions requiring payments for unpaid rent or other damages, or for violations of non-monetary requirements in the lease, including, but not limited to, required landlord approvals for alterations and subleasing, or for failure to comply with the law and government regulations. A well-drafted default clause should incentivize a tenant to follow the protocols specified in the lease, knowing that an eviction and damages will result from a default. Because in many parts of the state, some more than others, commercial tenants are able to use the court system to delay and manipulate a landlord and its property, much time and money can be saved by negotiating a powerful and effective default clause—one that will motivate the tenant to comply with all of the terms and procedures of the lease, including the requirement for timely vacating the premises upon the expiration date of the lease.

The main objective of any default clause is to give the commercial landlord the legal means either (1) to cause the tenant to cure the breach in an expeditious manner; (2) to swiftly and efficiently obtain a judgment of eviction against a tenant in default of the lease and thus be able to re-let the premises to a new tenant ready and able to pay the rent; or (3) to minimize the landlord's out of pocket losses from the noncomplying tenant's breach of the lease. For these reasons, after the rent clause, the default clause is the most important clause in any commercial lease.

However, even the most frequently used "standard form" commercial leases permit a defaulting commercial tenant either (1) to procedurally stall a summary proceeding that would otherwise end in a swift eviction, or (2) to avoid a summary proceeding altogether by seeking equitable relief and applying for a so-called "*Yellowstone*" Injunction¹ or to use dozens of other defenses and tactics to keep the tenant in possession, often without paying rent. Since the authors started practicing law in commercial landlord-tenant court some decades ago, the courts have become less

1 See *First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc.*, 21 N.Y.2d 630, 637, 290 N.Y.S.2d 721, 724-25 (1968) where, as a matter of common law, the Court of Appeals, in *dicta*, created a declaratory judgment action that stops the clock on a notice to cure while the parties litigate whether the tenant really is defaulting on the lease. See "Notices to Cure and Avoiding the *Yellowstone* Injunction," *infra*.

tolerant of tenant tricks, and many judges will follow the strict construction of the lease no matter how poorly written.

Simple cases can go on for years of debating or litigating a poorly written default clause. In many cases poorly drafted default clauses frustrate the ability of the landlord to take back the premises and to re-let to a new tenant who would pay rent for the leased space during what, in some cases, can be an unduly lengthy period of litigation. During this period, the tenant in default can take advantage of poorly drafted lease provisions and/or equitable judicial relief to continue in possession without, in some cases, paying any rent or other monies owed under the lease.

Nevertheless, while the consequences of poor drafting can hardly ever be avoided, the parties to a commercial lease may avoid intrusive judicial revision of their lease agreement by negotiating lease terms expressly intended to preclude such judicial activism.² New York courts have consistently enforced lease provisions that produce harsh results for one party to the lease “no matter how unwise it might appear to a third party.”³ Accordingly, attorneys representing landlords should strive to negotiate lease terms providing (1) that the lease shall be terminated for the chronic nonpayment of rent, (2) that all rents due during the lease term shall be accelerated upon one or more defaults in the payment of rent, (3) that the availability of a cure period, the trigger to seeking a *Yellowstone* Injunction, either be omitted from the lease entirely or that the lease contain agreed terms to be included in a *Yellowstone* injunction, should a court be inclined to grant one, such as the amount of the bond to be posted during the *Yellowstone* period, limitations on discovery, and a requirement for expedited litigation, and (4) that all monies due under the lease, other than the specified rent, shall be deemed “additional rent,” thus also making a default in payment of such “additional rent” subject to a summary non-payment proceeding.

2 Too many cases recite that it is not the job of the court to redraft a lease when that is precisely what the court is, in effect, doing.

3 “A lease agreement, like any other contract, essentially involves a bargained-for exchange between the parties. Absent some violation of law or transgression or a strong public policy, the parties to a contract are basically free to make whatever agreement they wish no matter how unwise it might appear to a third party.” *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 412 N.Y.S.2d 62 (1978); see also *GAB Mgmt. v. Blumberg*, 226 A.D.2d 499, 641 N.Y.S.2d 340 (2d Dep’t 1966); *Queen Art Publishers, Inc. v. Animazing Gallery*, 2002 WL 452207 (N.Y.C. Civil Ct., N.Y. Co. 2002); *Grand Liberte Co-op, Inc. v. Bilhaud*, 487 N.Y.S.2d 250, 487 N.Y.S.2d 250 (App. Term, 1st Dep’t 1984).

In properly drawn commercial leases, monetary defaults give rise *both* to summary nonpayment proceedings under Real Property Actions and Proceedings Law § 711(2) (RPAPL) *and* summary holdover proceedings under RPAPL § 711(1), at the landlord's election.⁴ We note in passing that since the Supreme Court *Yellowstone* action is already slower than the local court summary proceeding, many practitioners throughout the State opt to counterclaim in a tenant's Supreme Court action with an ejectment cause of action, so that once all *Yellowstone* issues in the case are adjudicated, the eviction can proceed apace in the same proceeding, if the landlord prevails.

[39.1] II. COMMON PROVISIONS OF THE DEFAULT CLAUSE

[39.2] A. Events of Default

The commercial lease should specify all of the foreseeable circumstances where the landlord would want to protect its property interests and regain possession and control of the leased premises in order to remedy or forestall any condition, caused by a material act or omission of the tenant, or by a third party to whom the tenant is indebted, that is prejudicial to the landlord's property interests. Therefore, the most essential part of the default clause is a provision listing all of the situations that will be deemed to be an event of default under the lease.

Every lease negotiation is *sui generis* and dependent upon facts and circumstances relevant only to the particular premises and the parties involved. Nevertheless, there are several categories or "events" of default, other than property-specific defaults, that are common to most commercial leases.

1. Failure to pay rent in a particular month or months;
2. Having a pattern of late rent payments;
3. Failure to comply with any other lease term;
4. Third party action against tenant under bankruptcy or insolvency laws;

⁴ See discussion *infra* about default clauses that *appear* to give a landlord a summary holdover proceeding (RPAPL art. 7), but actually only allow for the normally longer, slower ejectment action (RPAPL art. 6).

5. Tenant's failure to use premises for Permitted Uses;
6. Illegal use of the premises or nuisance at the premises;⁵
7. Tenant's abandonment of the premises prior to the lease expiration date;
8. Guarantor in breach of its obligations under its guaranty of tenant's obligations or the death or insolvency of the Guarantor and Tenant's failure to furnish a suitable substitute;
9. Tenant's failure to provide an estoppel certificate;
10. Tenant's failure to comply with assignment or subleasing provisions; and
11. Tenant's misrepresentation regarding USA Patriot Act certification.

Each of these events of default should be negotiated for inclusion in most commercial leases.

[39.3] B. Conditional Limitation and Condition Subsequent

A conditional limitation is a lease provision that, upon the nonpayment of rent⁶ or upon the occurrence of any other event of default specified in the lease, gives the landlord the contractual right, before the expiration date specified in the lease, to prematurely terminate the lease, on a specific date set forth in a written notice of termination. By exercising this right, the landlord effectively terminates the lease prior to the date on which it would otherwise expire, as if the new termination date were the expiration date otherwise specified in the lease.

It is not the particular conduct of the tenant constituting the event of default that acts to terminate the lease.

Rather, it is by the passage of time—the period of time specified in the termination notice—that the lease auto-

5 RPAPL § 715, the so called "Bawdy House Law," gives the district attorney and a large variety of other persons (including the owner) the statutory right to bring a proceeding to cancel a tenancy, regardless of the legal rights of the parties to the tenancy, if the premises are notoriously used for any kind of illegal business.

6 In many leases, monetary defaults are specifically carved out of the conditional limitation clause. Such clauses disfavor landlords and favor tenants. Thus, whether the practitioner wants such a clause depends on who his client is.

matically comes to an end; without service of a notice specifying the date of expiration of the lease there can be no termination and the lease remains in effect.⁷

The following is one example of a conditional limitation provision:

If a Default occurs,⁸ this lease is subject to the conditional limitation that Landlord may, at any time during the continuance of the Default, give notice to Tenant that this lease shall terminate on the date specified in that notice, which date shall not be less than five (5) days after Landlord gives such notice to Tenant. If Landlord gives that notice, this lease and the Term shall expire and come to an end on the date set forth in that notice as if said date were the date originally fixed in this lease as the Expiration Date and Tenant shall quit and surrender the Premises to Landlord (but Tenant shall remain liable as provided in this lease).

The service of a notice of termination in accordance with the terms of a proper conditional limitation provision enables the landlord to maintain a summary holdover proceeding under RPAPL § 711(1) against a tenant who remains in possession beyond the expiration date specified in the notice of termination.⁹ The fact that the landlord, at its option, could bring a nonpayment proceeding in which tenant would have the right, under RPAPL § 751(1), to deposit the amount of the final judgment into court prior to the issuance of a warrant, does not preclude the landlord from ter-

7 *TSS-Seedman's, Inc. v. Elota Realty Company*, 72 N.Y.2d 1024, 1027, 534 N.Y.S.2d 925, 926 (1988) (conditional limitation provision in commercial lease, which required the landlord to give written notice to the tenant specifying the default and stating that the lease shall expire and terminate on a prescribed date “which must be at least five days after the giving of the notice [of termination],” permitted the tenant to cure the default within a separate five-day grace period in which to pay the rent, as otherwise provided in the lease, and the landlord’s service of a notice of termination, *after accepting the tenant’s rent payment within that separate five-day grace period*, was “ineffective” because the termination notice was sent after the tenant had cured the default in accordance with the lease terms). *See also Midco Nowash LLC v. #1 Travel, Inc.*, 29 Misc. 3d 254, 905 N.Y.S.2d 765 (Dist. Ct., Nassau Co. 2010).

8 In more conservatively drawn leases, conditional limitation clauses like this one rely on “Default” being a lease-defined situation that persists after the expiration of the cure period specified in the Notice to Cure. *See Yellowstone* discussion *infra* as to the advantages and disadvantages of this conservative drafting.

9 *See Perrotta v. Western Regional Off-Track Betting Corp.*, 98 A.D.2d 1, 469 N.Y.S.2d 504 (4th Dep’t 1983).

minating the lease in accordance with its terms and maintaining the hold-over proceeding instead.¹⁰

Nevertheless, because a summary holdover proceeding is entirely statutory in origin, “there must be strict compliance with the statute to give the court jurisdiction.”¹¹ It is therefore important that the notice of termination be given in connection with an act or omission, for which the landlord may invoke the *conditional limitation* provision of the lease and specify the date on which the lease shall *automatically expire*, and not be given for an act or omission constituting a breach of a *condition* of the lease that subjects the lease to termination only *at the option of the landlord*, for which an action of ejectment against a holdover tenant would be required.¹²

In other words, if the commercial lease provision is deemed a “condition subsequent,”¹³ instead of a conditional limitation, a judge may dismiss the summary proceeding in the Commercial Part of landlord-tenant court or civil court and decide that the case must be brought in State Supreme Court in an ejectment action.¹⁴ Generally, summary proceedings in the Commercial Part of landlord-tenant court proceed more quickly

10 See *Grand Liberte Coop v. Bilhaud*, 126 Misc. 2d 961, 487 N.Y.S.2d 250 (Sup. Ct., App. Term, 1st Dep’t 1984). However, in residential proceedings, termination clauses based upon monetary defaults have been held to be void as against public policy.

11 *Perrotta*, 98 A.D.2d 1.

12 *Id.*

13 The literature renders this all the more confusing by sometimes referring to conditions subsequent simply as “conditions.” A “condition subsequent” or “condition” (or even more rarely a “condition of the lease”) can be defined as a situation that gives the landlord the *option* to cancel the lease, but not until the landlord’s exercise of that option will the cancellation be actually effected. A condition subsequent may also be the unknown future occurrence of an event that will automatically cancel the lease, such as a clause which provides that, in the event of a Congressional declaration of war, the lease shall be automatically canceled. By contrast, in the event of the invocation of a “conditional limitation,” after a lease default, the expiration of the period of time specified in the notice of termination, automatically effects the cancellation of the lease. In such cases, the only question at issue may be whether the landlord’s notice of termination was given with or without first giving the tenant a notice of default specifying a time within which to cure the default. Some decisions have sought to cut through all the theory to hold that, where there is a notice to cure requirement, there is a conditional limitation, and, where there is no notice to cure requirement, there is a condition subsequent. See, e.g., *VNO 100 W. 33rd St. LLC v. Square One Manhattan, Inc.*, 22 Misc. 3d 560, 874 N.Y.S.2d 683 (N.Y.C. Civ. Ct., N.Y. Co. 2008).

14 Some local courts, like the New York City Civil Court, actually do have jurisdiction to hear ejectment actions, but typically only if the assessed value of the real property is within the monetary jurisdiction of the Court. See N.Y.C. Civil Court Act § 203(j). Since such monetary values are so low, such ejectment actions are exceedingly rare.

than do landlord-tenant cases brought in State Supreme Court. In commercial lease cases brought in landlord-tenant court, discovery is rarely permitted, and in cases where no motions are made in the Commercial Part in New York City on the return date of the petition, those matters are immediately sent out to any judge who is available to hear or try the case. Most commercial landlord-tenant cases will be concluded in a number of months in New York City and weeks in some other parts of the State.¹⁵ By contrast, the proceedings in commercial landlord tenant actions brought in State Supreme Court can extend for several years. This highlights the importance of why a proper notice of termination should be deemed given for violation of a conditional limitation of the lease and not merely for a condition subsequent thereof.

[39.4] C. Notice Provisions

A landlord's notice of default¹⁶ is distinct from a landlord's notice of termination. A notice of default specifies the particular lease provision that the tenant has violated and the period, if any, within which the tenant is obliged to cure the default before the lease becomes subject to termination under its conditional limitation provision.

The notice of default "must be sufficiently specific to demonstrate what remedial action is being required and what lease provision requires it."¹⁷ Unless the landlord demonstrates what remedial action is required by the lease, "the omission in the notice must be considered a fatal defect."¹⁸

However, even where the notice of default is not sufficiently specific on its face, the landlord may still be able to demonstrate, from the correspondence and communications between the parties prior to the notice, that the

15 In some regions of the State, the greatest source for delay in summary proceedings is the limited number of days the Court is sitting to hear such proceedings in any given week. Practitioners should acquaint themselves with the appropriate calendar practice of the court where they are bringing their proceeding. Also, in most parts of the State, State Supreme Court sits in the County Seat while the courts hearing summary proceedings are local to the location of the property in question. In those many parts of the state where there is a Village or a City contained within the boundaries of a Town, there can be two local courts, each of which has *statutory* jurisdiction to hear a summary proceeding, but only one of which actually entertains them, typically the Town Court.

16 It is also commonly known as a "Notice to Cure."

17 *White Angel Realty v. Asian Bros. Corp.*, 183 Misc. 2d 674, 676, 706 N.Y.S.2d 583, 585 (Dist. Ct., Nassau Co., 2000) citing *Chinatown Apts, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86 (1980).

18 *Chinatown Apts, Inc.*, 51 N.Y.2d 786.

tenant fully appreciated the nature of the breach stated in the notice of default. Therefore, in an appropriate case, “evidence extrinsic to the notice may be considered in assessing the notice’s sufficiency.”¹⁹ Nevertheless, attorneys should always strive to make the notice of default sufficiently specific on its face, to avoid ever having to persuade a court to admit evidence extrinsic to the notice to determine its sufficiency.

The lease usually specifies various permissible methods for landlord’s service of a notice of default upon the tenant—hand delivery, registered or certified mail, and/or recognized overnight courier. For each method of service, the lease should also specify how and when service is considered to have occurred.

The point of specifying methods by which a notice of default is to be given is, fundamentally, to ensure that the putative defaulter has actual notice and an opportunity to protest the claim of default or, if so provided, to avail itself of an opportunity to cure the default, if any.²⁰

Any ambiguity concerning the effective date on which the notice of default is deemed received by the tenant is resolved against the drafter of the lease.²¹

If the tenant wishes to preserve the right to cure a default under the lease by commencing a *Yellowstone* declaratory judgment action,²² the tenant must obtain a stay of the period within which the default may be cured by seeking an injunction in state supreme court. “The existence of a

19 *White Angel Realty*, 183 Misc. 2d 674.

20 *Gucci Am., Inc. v. Sample Sale Wholesalers, Ltd.*, 39 A.D.3d 271, 272-273, 835 N.Y.S.2d 26 (1st Dep’t 2007).

21 *See Solow Bldg. Co., LLC v. Frelau LLC*, 27 Misc. 3d 32, 899 N.Y.S.2d 794 (Sup. Ct., App. Term, 1st Dep’t 2010).

22 In form, a *Yellowstone* action is an action seeking a declaratory judgment declaring that the Tenant is *not* in default of the requirements of the lease. However, under the doctrine enunciated in the *Yellowstone* decision, if the action does not include an application for a Temporary Restraining Order and a motion for Preliminary Injunction against terminating the lease, the demand for the declaration will be rendered moot because the remedy will necessarily be too late to be effective. The standards for obtaining such a TRO and Preliminary Injunction in *Yellowstone* litigation are much more liberal than otherwise required in New York Civil Practice. Most courts require little more than a showing that there are a commercial lease and a notice to cure, the application made prior to the expiration of the notice to cure, and the formal requirement of a desire and ability to cure. Rarely are such applications denied, and if they are denied, but the denial is reversed on appeal, the appellate reversal is *nunc pro tunc* to the date of the application for the emergency relief.

period in which a violation may be cured does not depend on the contents of the notice of default, but upon the terms of the lease.”²³ Thus, although the landlord’s failure to state a cure period in the notice of default may render the notice defective, “it does not vitiate the cure period itself.”²⁴ However, the failure of a tenant to toll the curative period specified in the lease divests a court of its power to grant a temporary stay under *Yellowstone*.²⁵ The period between a notice of termination and the lease expiration date specified in accordance with the conditional limitation provision is not one within which the tenant can cure a default.²⁶ Conditions subsequent do not give rise to *Yellowstone* actions, but they also do not give rise to summary holdover proceedings.

[39.5] III. TOOLS OF THE EFFECTIVE DEFAULT CLAUSE

[39.6] A. Additional Rent

It is important that all monies the lease requires the tenant to pay during the term of the lease, other than the rent itself, be expressly designated as “additional rent.” Additional rent can include late charges, taxes, various building expenses, attorney’s fees, letters of credit, insurance, and any other items specific to the particular premises involved that the landlord requires the tenant to pay. If such items are designated as “additional rent” in the lease, the landlord may initiate a summary proceeding to recover possession of the premises for the tenant’s failure to make a required payment of additional rent, whether or not the tenant has paid the requisite monthly base rent.²⁷

23 *Empire State Bldg. Assocs. v. Trump Empire State Partners*, 245 A.D.2d 225, 228, 667 N.Y.S.2d 31, 34 (1st Dep’t 1997).

24 *Id.*; see also *TSS-Seedman’s, Inc. v. Elota Realty Company*, 72 N.Y.2d 1024, 534 N.Y.S.2d 925 (1988).

25 *See Health ‘N Sports, Inc. v. Providence Capitol Realty Group, Inc.*, 75 A.D.2d 884, 428 N.Y.S.2d 288 (2d Dep’t 1980).

26 *Id.*

27 *See Melick v. Ken’s Service Station, Inc.*, 44 Misc. 3d 143(A), 2014 WL 4251023 (Sup. Ct., App. Term, 2d Dep’t 2014).

If the lease requires the tenant to pay the particular charge but does not expressly designate the item as “additional rent,” it will not be deemed additional rent by the court.²⁸

Where the lease itself is “reasonably susceptible of more than one interpretation” as to how the additional rent is to be calculated, the court may properly consider evidence of the parties’ course of conduct, including the methodology used by the landlord in its annual billing for additional rent and the tenant’s payment of such additional rent since the beginning of the tenancy.²⁹ Nevertheless, attorneys should strive to eliminate all ambiguities concerning the calculations required to accurately determine the amounts that will become due as additional rent under the lease.

It should be noted that General Obligations Law § 7-103(1) (GOL) provides that a tenant’s security deposit, until repaid to the tenant at the termination of the lease *or applied to payments due under the lease*,

shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same.

It has been held, therefore, that the tenant’s security deposit itself is not “rent,” and it cannot be recovered in a nonpayment proceeding.³⁰ Nor does the New York City Civil Court or any Local Court have jurisdiction to order a tenant to replenish a security deposit that has been applied to payments due under the tenant’s lease obligations.³¹ However, the failure to maintain the security deposit is a breach of a substantial obligation of the lease and is therefore a proper basis for a conditional limitation and ensuing holdover proceeding.³²

28 See, e.g., *Perrotta v. Western Regional Off-Track Betting Corporation*, 98 A.D.2d 1, 469 N.Y.S.2d 504 (4th Dep’t 1983); *Rector of Trinity Church v. Chung King House of Metal, Inc.*, 193 Misc. 2d 44, 747 N.Y.S.2d 292 (NYC Civil Court 2002).

29 *One Hundred Grand, Inc. v. Chaplin*, 70 A.D.3d 513, 895 N.Y.S.2d 68, 69 (1st Dep’t 2010), citing *Chimart Assoc. v. Paul*, 66 N.Y.3d 570, 573, 498 N.Y.S.2d 344 (1986).

30 See, e.g., *225 Holding Co., LLC v. Beal*, 12 Misc. 3d 136(A), 820 N.Y.S.2d 846 (Sup. Ct., App. Term, 2d Dep’t 2006).

31 *930 Fifth Ave. Corp. v. Shearman*, 17 Misc. 3d 1126(A), 851 N.Y.S.2d 71 (N.Y.C. Civ. Ct., N.Y. Co. 2007) (Lebovits, J.).

32 See *225 Holding Co., LLC*, 12 Misc. 3d 136(A).

[39.7] B. Rent Acceleration

As the most powerful weapon ever devised for a lease, aside from the guarantee provision, rent acceleration clauses provide a wonderful way to ensure that rent payments are not only made, but are made timely. Upon a default in the payment of rent, a properly drafted acceleration clause permits the landlord to seek recovery of the total balance of rent due under the lease without having to wait until the lease's expiration date. Without a properly drafted acceleration clause, the right of the landlord to sue for damages for the breach of the lease accrues, generally, upon the termination date of the lease.³³

[I]n rare cases, agreements providing for the acceleration of the entire debt upon the default of the obligor may be circumscribed or denied enforcement by utilization of equitable principles. In the vast majority of instances, however, these clauses have been enforced at law in accordance with their terms. * * * * Absent some element of fraud, exploitive overreaching or unconscionable conduct on the part of the landlord to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties.³⁴

However, as discussed at length below, the Court of Appeals' recent decision in *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association*³⁵ casts some doubt on the full collectability of accelerated rent. In *Van Duzer*, the Court held that a hearing on the landlord's actual damages may be necessary to determine what portion of accelerated rent, undiscounted, will not constitute an otherwise forbidden penalty. Under "penalty" jurisprudence, a lease that provides for acceleration for breach of any of its terms, no matter how trivial or inconsequential, is likely to be considered an unconscionable penalty and will not be enforced by a court of equity.³⁶ For example, acceleration will not be permitted for a tenant's failure to comply with a covenant collateral to the

33 See *Muss v. Daytop Village, Inc.*, 43 A.D.2d 945, 352 N.Y.S.2d 28 (2d Dep't 1974).

34 *Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 577, 415 N.Y.S.2d 800 (1979).

35 24 N.Y.3d 528, 2 N.Y.S.3d 39 (2014). Author Bailey has his doubts about *Van Duzer* being good law and sees it as an anomaly. Since it is a relatively recent decision, there is no track record with which to evaluate this position. The doctrine announced in the case is discussed, *infra*.

36 *Fifty States Mgmt. Corp.*, 46 N.Y.2d 573.

primary obligation of the tenant. In such circumstances, acceleration will be held to constitute a forfeiture, as the damages reserved in the lease are likely to be disproportionate to any actual loss that could possibly accrue to the landlord from such breach.³⁷

However, a covenant to pay rent at a specified time “is an essential part of the bargain as it represents the consideration to be received for permitting the tenant to remain in possession of the property of the landlord.”³⁸ Therefore, acceleration is permitted as liquidated damages if the sum to be recovered is no greater than the amount the tenant would have paid had it fully performed and been entitled to possession upon payment.³⁹ Further, it has been held that a single default in the payment of rent is sufficient to effectuate an acceleration clause.⁴⁰ Moreover, where the lease terms can be construed to allow it, the tenant’s guarantor can also be held liable for the accelerated sum due under the lease.⁴¹

It should be noted that the Second Department has held that “accelerated rent” is not “rent due.”⁴² As the court explained, “accelerated rent” is “contractual damages not recoverable in a summary proceeding.” Accordingly, upon a default by the tenant, the landlord can use summary proceedings to regain possession of the premises with a judgment of eviction and a monetary judgment for past rent due. But, to recover the monies due upon the contractual claims for accelerated rent and other monetary obligations that survive the termination of the lease, the landlord must commence a plenary action.⁴³ The judgment entered for the landlord in the summary proceeding is neither *res judicata* nor an election of remedies and therefore does not bar the landlord from seeking contractual damages in the plenary action. As the Second Department further explained,

[r]es judicata is inapplicable where a party is unable to seek a certain remedy or form of relief in the first action

37 *Id.*

38 *Id.* at 578.

39 *Id.*, subject to *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

40 *GAB Management, Inc. v. Blumberg*, 226 A.D.2d 499, 641 N.Y.S.2d 340 (2d Dep’t 1996).

41 *See Madison Ave. Leasehold, LLC v. Madison Bentley Assocs. LLC*, 8 N.Y.3d 59, 861 N.Y.S.2d 254 (2006).

42 *Ross Realty v. V & A Fabricators, Inc.*, 42 A.D.3d 246, 836 N.Y.S.2d 242 (2d Dep’t 2007).

43 *Id.*; see also *930 Fifth Ave. Corp. v. Shearman*, 17 Misc. 3d 1126(A), 851 N.Y.S.2d 71 (N.Y.C. Civ. Ct., N.Y. Co. 2007); *Marketplace v. Smith*, 181 Misc. 2d 440, 694 N.Y.S.2d 893 (J. Ct., Monroe Co. 1999).

because of limitations on the subject matter jurisdiction of the court or restrictions on its authority to entertain multiple remedies or form of relief in a single action.⁴⁴

[39.8] C. Late Charges

Commercial lease clauses that impose late charges for failing to pay rent or other additional rent obligations in a timely manner, and which specify that the late charges shall also be deemed additional rent, are generally enforced by the courts.⁴⁵ However, late charges, as additional rent, may be sought only for rent that is past due. At the time of a default, where a lease does not contain a rent acceleration clause, the landlord may sue only for the amount of late charges past due at the time the action or proceeding is commenced.⁴⁶ In such cases, the landlord's entitlement for damages for the remaining installments of rent will ripen and may be sued for at the end of the lease term.⁴⁷

Whether or not the particular late charge specified in any commercial lease, or the formula used to calculate such late charge, as negotiated between sophisticated business people, may be found to be "unconscionable" will depend upon whether there is evidence suggesting that the late charge was unreasonable or against public policy.⁴⁸ The late fee must bear some reasonable relationship to the landlord's additional administrative expense by reason of the lateness. If the late fee is too high, the courts regard it as an unenforceable penalty.⁴⁹

[39.9] D. Chronic Nonpayment

A necessary part of an effective default clause is a provision enabling the landlord to cancel the lease for the frequent delinquency of rent payments, commonly referred to as a "chronic nonpayment" of rent due termination clause. It often happens that a landlord who is forced to

44 *Ross Realty*, 42 A.D.3d 246.

45 *See, e.g., Goldman v. MJI Music, Inc.*, 17 Misc. 3d 1127(A), 2007 WL 3378369 (N.Y.C. Civ. Ct., Kings Co. 2007).

46 *See, e.g., Barr v. Country Motor Car Group, Inc.*, 15 A.D.3d 985, 789 N.Y.S.2d 350 (4th Dep't 2005).

47 *Id.*

48 *See, e.g., K.I.D.E. Associates, Inc. v. Garage Estates Company*, 280 A.D.2d 251, 720 N.Y.S.2d 114 (1st Dep't 2001).

49 *Wilsdorf v. Fairfield Northport Harbor, LLC*, 34 Misc. 3d 146(A), 2012 WL 330928 (Sup. Ct., App. Term, 2d Dep't 2012).

commence a nonpayment proceeding in New York City Civil Court, or other local court with summary jurisdiction, is faced with a tenant who is either chronically late in paying the rent or does not pay the rent at all, thus causing the landlord to have to institute repeated legal proceedings to procure the timely payment of rent.⁵⁰

Including the time it takes to obtain a court date, to request shortened adjournment periods, and a resolution by settlement, trial, or default in the case of a non-appearance, the earliest a landlord can expect to obtain an eviction will be no less than three to five months after commencement of the nonpayment process.⁵¹ Even after an eviction is scheduled, RPAPL § 751(1) mandates that the tenant be given ten days to pay the amount of rent owed to stay the issuance of a warrant and avoid eviction.

For many landlords, the cycle of late payments or nonpayment is repeated continuously and, in many cases, perennially. To further exacerbate their frustration, in addition to the wasted energy, time, and money they expend in participating in the process, many cases result in empty tenancies with thousands of uncollectible dollars. Accordingly, although “[a] history of repeated nonpayment proceedings brought to collect chronically late rental payments supports an eviction proceeding on the ground that the tenant has violated a ‘substantial obligation’ of the tenancy,”⁵² attorneys should strive to draft into any default clause a provision by which the tenancy is terminated for the chronic nonpayment of rent.

A chronic nonpayment provision terminates the tenancy upon the happening of multiple defaults in the timely payment of rent. A typical clause will terminate the tenancy once a tenant fails to timely pay the rent at least three times within a twelve consecutive month period. Even where the lease contains a grace period (typically five days) within which the tenant is normally permitted to cure a default for nonpayment after issuance of a notice of default, the chronic nonpayment provision can prescribe that, after two consecutive defaults, the landlord, prior to serving the notice of termination, is not required to serve the tenant with a notice of default for a third consecutive default, but may, after the expiration of the five-day grace period, immediately serve the notice of termination. Therefore, the third consecutive default triggers the termination of the lease automati-

50 See, e.g., *National Shoes v. Annex Camera & Elecs., Inc.*, 114 Misc. 2d 751, 452 N.Y.S.2d 537 (N.Y.C. Civ. Ct., N.Y. Co. 1982).

51 Some less urban areas of the State report shorter periods, but not by a lot.

52 *Adam's Tower Ltd. Partnership v. Richter*, 186 Misc. 2d 620, 757 N.Y.S.2d 825 (Sup. Ct., App. Term, 1st Dep't 2000); see also *Sharp v. Norwood*, 89 N.Y.2d 1068, 659 N.Y.S.2d 834 (1997).

cally.⁵³ At this point the commercial tenant cannot ward off eviction by paying the rent in full. As a result of the chronic nonpayment clause, the landlord has the option of evicting the tenant, so long as the requirements of the chronic nonpayment provision have been followed and proven in court. This is one instance where the precedents are clear both that a summary holdover proceeding lies and that it does *not* require an antecedent notice to cure.⁵⁴

[39.10] E. Self-Help Evictions

Upon termination of the lease or upon the commercial tenant's defaulting on payment of rent or other lease terms, a landlord may reenter the leased premises peaceably without resort to court process, when the right to do so is expressly reserved in a commercial lease.⁵⁵ A commercial landlord's common law right to use "self-help" to reenter its property peaceably to evict a defaulting tenant or other person with no right to possession has been recognized from time immemorial.⁵⁶ Nevertheless, although the common law right of self-help reentry is not abrogated by the statutory remedy of summary proceedings,⁵⁷ it is a remedy that is rarely used and in many municipalities throughout the state abolished or restricted. The extent of self-help available also varies by Judicial Department.⁵⁸

53 See, e.g., *Midco Nowash LLC v. #1 Travel, Inc.*, 29 Misc. 3d 254, 905 N.Y.S.2d 765 (Dist. Ct., Nassau Co., 2010); see also *Estate of Birnbaum v. Yankee Whaler*, 75 A.D.2d 708, 427 N.Y.S.2d 1291 (4th Dep't 1980).

54 *Definitions Personal Fitness, Inc. v. 133 E. 58th St.*, 107 A.D.3d 617, 967 N.Y.S.2d 647 (1st Dep't 2013); *Adam's Tower*, 186 Misc. 2d 620, 717 N.Y.S.2d 825.

55 See *Bozewicz v. Nash Metalware Co., Inc.*, 284 A.D.2d 288, 725 N.Y.S.2d 671 (2d Dep't 2001); *110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc.*, 265 A.D.2d 415, 696 N.Y.S.2d 490 (2d Dep't 1999); *Jovan Spaghetti House, Inc. v. Heritage Co. of Massena*, 189 A.D.2d 1041, 592 N.Y.S.2d 879 (3d Dep't 1993).

56 See *Bliss v. Johnson*, 73 N.Y. 529, 534 (1878) ("The true owner of land wrongfully held out of possession may watch his opportunity, and if he can regain possession peaceably may maintain it—and lawfully resist an attempt by the former occupant to retake possession, nor will he be liable to be proceeded against under the statute of forcible entry and detainer. There can be no wrongful detainer by the true owner when the entry was both lawful and peaceable."); *Fults v. Munro*, 202 N.Y. 34, 39 (1911) ("Statutes relating to forcible entry and to forcible detainer, which are separate and distinct wrongs, have existed for centuries."); see also *Mayer v. UVI Holdings, Inc.*, 280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dep't 2001).

57 See *Cohen v. Carpenter*, 128 A.D. 862, 113 N.Y.S. 168 (2d Dep't 1908); *Liberty Indus. Park Corp. v. Protective Packaging Corp.*, 71 Misc. 2d 116, 335 N.Y.S.2d 333 (Special Term, Kings Co., 1972), *aff'd*, 43 A.D.2d 1020, 351 N.Y.S.2d 944 (2d Dep't 1974).

58 Practitioners should be certain to know the local ordinances on the subject prior to expressing an opinion.

Attorneys who represent commercial landlords are often reluctant to advise their clients to use this neglected self-help remedy to regain possession of leased premises from defaulting commercial tenants.⁵⁹ This reluctance stems, in part, from the perception that courts are generally hostile to a commercial landlord's use of self-help, because self-help renders a forfeiture of the premises before a tenant can litigate its right to remain in possession.⁶⁰ In addition, because of the lack of use of self-help many attorneys are unfamiliar with this body of law and are hesitant to employ such an aggressive measure. Courts also refuse to approve use of self-help where there is ambiguity in the lease terms or factual questions concerning the expiration of the lease.⁶¹ Moreover, under RPAPL § 853, a tenant wrongfully ejected from real property by force or other unlawful means may sue to recover treble damages from the landlord and be restored to possession if ejected before the end of the lease term.⁶²

As a result of the combination of general court hostility and attorney reluctance to recommend the use of proper self-help measures, commercial tenants have been allowed to violate their leases or extend them based on technical or frivolous defenses, sometimes for months or years at a time, in blatant disregard of the lease terms.⁶³ In addition to the loss of rental income that often accompanies such disputes, landlords faced with this situation lose valuable time to repair, renovate, and re-let their premises to responsible tenants. These circumstances also adversely affect any effort by the landlord to sell the leased premises to potential buyers.

Landlords have every incentive to insist on including a proper and effective self-help provision in their commercial leases. With appropriate drafting and proper execution of the self-help measures provided in their leases, commercial landlords should be able to exercise their right to peaceable reentry whenever such action is warranted. With the availability

59 Self-help is limited to the commercial context only. New York City Administrative Code § 26-521 prohibits the use of self-help in the residential context.

60 Courts created the so-called “Yellowstone” injunction to allow the parties to dispute their differences while the tenant remains in possession and to prevent forfeiture. *See, e.g., Stuart v. D&D Assocs.*, 160 A.D.2d 547, 554 N.Y.S.2d 197 (1st Dep’t 1990).

61 *See Sol De Ibiza, LLC v. Panjo Realty, Inc.*, 26 Misc. 3d 331, 890 N.Y.S.2d 806 (N.Y.C. Civ. Ct., N.Y. Co. 2009), *reversed and remanded on undeveloped record*, 29 Misc. 3d 72, 911 N.Y.S.2d 567 (App. Term, N.Y. Co. 2010).

62 *See Suffolk Sports Center, Inc. v. Belli Constr. Corp.*, 212 A.D.2d 241, 628 N.Y.S.2d 952 (2d Dep’t 1995).

63 *See, e.g., Million Gold Realty Co. v. S.E. & K. Corp.*, 4 A.D.3d 196, 772 N.Y.S.2d 271 (1st Dep’t 2004).

of self-help written into the lease, tenants are likely to be more careful to avoid any action that will place themselves in default and thereby become subject to immediate peaceable eviction. Thus, commercial landlords may both (a) provide an incentive for their tenants to comply with the lease terms, and (b) be able, when compelled to use self-help, to timely re-let the premises without first having to await the outcome of costly and lengthy litigation before doing so.

Nevertheless, landlords who use self-help will not necessarily be able to avoid all litigation. There is always a possibility that the landlord will be required to litigate (a) whether the tenant was in default at the time of the landlord's reentry, and/or (b) whether the self-help used was peaceable and otherwise lawful.⁶⁴ Therefore, landlords should (a) carefully document a tenant's default before reentering the leased premises and (b) ensure that reentry is accomplished peaceably. Where it is not crystal clear that the lease term has expired or that the tenant is in default, the landlord should not use self-help, but should resort only to summary proceedings or other legal process. However, recognizing that the outcome of any litigation is always uncertain, a landlord may view the possibility of a future, adverse treble damages judgment as a risk worth taking in order to obtain the real, current ability to re-let the premises to a responsible tenant who will pay rent during the litigation that ensues between the landlord and the evicted tenant. Also, it is wise to remember that three times zero is still zero. If there are no genuine damages, trebling them is not going to hurt the landlord.

In deciding whether or not to run that risk, the landlord should consider the kind of damages that the evicted tenant will have a right to claim, i.e., whether any injury caused by the reentry will be limited to property damage only or whether the evicted tenant will be able to claim and prove damages measured by the loss of the value of the leasehold.⁶⁵ Where the lease has expired or been terminated by reason of the default, the tenant is not entitled to possession.⁶⁶ In that situation, the tenant's damage is likely to be limited to such property damage as may occur during the course of the reentry only—the sum of which a landlord may be more than willing to bear—but a judgment that the landlord may also be able to avoid by taking care to see that the tenant's property is carefully removed from the

64 See *Maracina v. Shirmmeister*, 105 A.D.2d 672, 673, 482 N.Y.S.2d 14, 16 (1st Dep't 1984) ("RPAPL 853 no longer requires that the use of physical force be demonstrated.")

65 See *Mayes v. UVI Holdings, Inc.*, 280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dep't 2001).

66 See *110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc.*, 265 A.D.2d 415, 696 N.Y.S.2d 490 (2d Dep't 1999).

premises by persons other than the landlord itself, such as a bonded moving company, and placed in a reputable storage facility.

Whether a landlord's reentry is deemed peaceable or not will depend on whether it is made in a "forcible" manner. For a reentry to be forcible, the force used:

must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner or with personal violence, or with the threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger or personal injury if he stood up in defense of his possession.⁶⁷

In the absence of force that tends to breach the peace, hiring trucks and workers and even a garbage company to evict a tenant does not constitute forcible entry,⁶⁸ even if, in the case of a municipal landlord, the eviction is performed with the assistance of armed police.⁶⁹ However, to ensure that its use of self-help is indeed "peaceable" and that there is no confrontation during the eviction, the landlord should arrange for the reentry to occur during late night/early morning hours when the tenant's business is closed and when the landlord's agents are certain that no one is present on the leased premises before entering. When conducting the eviction, if there is any conflict with the tenant or its representatives, the attempted eviction should be abandoned and accomplished at a later date or under court order.

Upon reentry, when the peaceable self-help eviction is successful, the landlord may then change the locks or padlock the doors. To thwart any potential damage claims, the entire reentry operation should be videotaped, and all items of tenant property removed from the property should be photographed and inventoried. The tenant's property should then be placed in storage, for a reasonable period of time,⁷⁰ in accordance with a lease provision that contemplates such action in the event of an eviction.

67 *Fults v. Munro*, 202 N.Y. 34, 39 (1911).

68 *See Liberty Indus. Park Corp. v. Protective Packaging Corp.*, 71 Misc. 2d 116, 335 N.Y.S.2d 333 (Special Term, Kings Co., 1972), *aff'd*, 43 A.D.2d 1020, 351 N.Y.S.2d 944 (2d Dep't 1974).

69 *See Paulino v. Wright*, 210 A.D.2d 171, 620 N.Y.S.2d 363 (1st Dep't 1994).

70 Universal custom supported by no case law whatsoever, deems "reasonable time" to be thirty days.

Ultimately, whether or not the landlord is permitted to use self-help to regain possession of the leased premises will depend on whether the landlord's right to do so is reserved in the lease. The lease should expressly provide (a) that, if the tenant defaults in the payment of rent or commits any other violation of the lease constituting a default, the lease shall terminate automatically, (b) that the landlord may thereafter recover possession in accordance with its common law rights, (c) that the landlord may do so without any duty, requirement, or necessity to provide due process or to seek prior court approval, through summary dispossess proceedings or any other action or proceeding at law, before evicting the tenant and removing tenant's property and/or any person from the premises, and (d) that the term "re-entry" is not used in its technical or narrow sense but in the sense that the landlord may effect *physical* entry of the premises.⁷¹ Such a provision does not preclude the landlord from initiating summary proceedings if it chooses to do so. However, the landlord should exercise its options carefully. If the landlord does not use self-help initially, but commences a summary proceeding in the first instance, the right to use self-help thereafter may be considered waived.⁷²

The lease terms should also obligate the tenant to pay the landlord all monies owed by the tenant up to the time of the landlord's recovery of possession, whether the landlord recovers possession through self-help or summary proceedings. In addition, the lease should reserve the landlord's right to sue after reentry for any damages incurred as a result of the tenant's actions, such as an unlawful holdover that causes the landlord to lose an opportunity for re-letting the premises. The lease should provide that the landlord need not assert such claims against the tenant in summary proceedings only, but may do so in a separate plenary action.

While there are decided risks involved in using self-help measures, the careful landlord and the careful landlord's attorney should generally be able to avoid the pitfalls that exist and make self-help work to the landlord's benefit in the long run.

71 This clause is essential because much case law continues to define "re-entry" simply as the right to bring a summary proceeding.

72 See *Sol de Ibiza, LLC v. Panjo Realty, Inc.*, 26 Misc. 3d 331, 890 N.Y.S.2d 806 (N.Y.C. Civ. Ct., N.Y. Co. 2009), *reversed and remanded on undeveloped record*, 29 Misc. 3d 72, 911 N.Y.S.2d 567 (App. Term, N.Y. Co., 2010).

[39.11] IV. COMMON ISSUES WITH DEFAULT CLAUSES

[39.12] A. Attorney Fees

Commercial leases generally provide that the landlord may recover the attorney's fees the landlord incurs if the landlord prevails in a litigation with the tenant. However, unlike the situation in residential lease disputes, where a residential tenant who prevails over a residential landlord in an action or a summary proceeding, is enabled, by statute,⁷³ to recover the tenant's attorney fees from the landlord, the commercial tenant has no such reciprocal right to recover the tenant's attorney fees if it prevails over its commercial landlord.⁷⁴ While most attorney fees clauses allow the landlord to recover its attorney fees in the event the landlord sues the tenant under the lease, better drafted clauses also allow the landlord to recover its attorney fees for a successful defense of a suit brought by the tenant.

A reciprocal requirement for attorney fees will not be implied for the benefit of a tenant where a commercial lease does not contain a provision authorizing the tenant to recover its attorney's fees from a defeated landlord.⁷⁵ However, although a lease issued under the Loft Law⁷⁶ may be commercial in form, when, for example, it provides for limited occupancy of the premises as an artist's studio, it has nevertheless been held that "where the intent of the parties, or the effect of the lease or of applicable law, was to create or accede to a residential use, the attorney's fee recovery clause becomes a reciprocal, mutual obligation."⁷⁷

[39.13] B. Liquidated Damages Provisions: Avoiding the Penalty

Besides a guarantee, liquidated damages provisions provide the greatest incentive for commercial tenants to comply with the lease. Below, we attempt to guide the practitioner in drafting an enforceable clause that will

73 N.Y. Real Property Law § 234 (RPL).

74 See, e.g., *Reade v. Stonybrook Realty, LLC*, 63A.D.3d 433, 882 N.Y.S.2d 8 (1st Dep't 2009).

75 See, e.g., *NSB Abatement Servs., Inc. v. Detailing Café, Inc.*, 7 Misc. 3d 1025(A), 2005 WL 1189038 (Mt. Vernon City Ct., 2005).

76 N.Y. Multiple Dwelling Law, Article 7C, § 286(11).

77 *Feierstein v. Moser*, 124 Misc. 2d 369, 371, 477 N.Y.S.2d 545, 548 (Special Term, N.Y. Co., 1984).

withstand the scrutiny of a judge. Liquidated damages provisions in commercial leases are enforceable if not deemed to be a penalty that renders a forfeiture. As the New York Court of Appeals has explained:

As a general matter parties are free to agree to a liquidated damages clause “provided that the clause is neither unconscionable nor contrary to public policy.” Liquidated damages that constitute a penalty, however, violate public policy, and are unenforceable. A provision which requires damages “grossly disproportionate to the amount of actual damages provides for a penalty and is unenforceable.”⁷⁸

A contractual provision fixing damages in the event of a breach will be sustained “if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation.”⁷⁹ Liquidated damages provisions have their basis in the principle of just compensation for loss, and “a clause which provides for an amount plainly disproportionate to real damages is not intended to provide fair compensation, but to secure performance by the compulsion of the very disproportion.”⁸⁰ The burden is on the party seeking to avoid liquidated damages to show that the stated liquidated damages are in fact a penalty.⁸¹

“Whether a provision in an agreement is ‘an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances.’”⁸² Where there is doubt as to whether a liquidated damages provision constitutes an unenforceable penalty or a proper liquidated damages clause, it will be resolved in favor of a construction that holds the provision to be a penalty.⁸³ It is immaterial whether the parties have called the provision one

78 *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association, Inc.*, 24 N.Y.3d 528, 2 N.Y.S.3d 39 (2014) (internal citations omitted); see also *Truck Rent-A-Center, Inc. v. Pueritan Farms 2d, Inc.*, 41 N.Y.2d 420, 393 N.Y.S.2d 365 (1977).

79 *Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 425; *City of Rye v. Public Service Mut. Ins. Co.*, 34 N.Y.2d 470, 473, 358 N.Y.S.2d 391 (1974).

80 *Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 424.

81 *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

82 *Id.*

83 *Pyramid Ctrs. & Co. v. Kinney Shoe Corp.*, 244 A.D.2d 625, 663 N.Y.S.2d 711 (3d Dep’t 1997).

for “liquidated damages.”⁸⁴ The provision is to be interpreted as of the date it was created, not as of the date of its breach.⁸⁵ Thus, courts “must look to the anticipated loss discernible at the time of contracting and not the actual loss incurred by the breach to determine whether the liquidated damages are reasonable or whether the damages are capable of calculation.”⁸⁶ Where one party establishes that the stated liquidated damages is a penalty, the other party’s proper recovery is the amount of that party’s actual provable damages.⁸⁷

In cases where an acceleration clause provides for recovery of all future rent due as liquidated damages, the New York Court of Appeals has distinguished between (a) cases where the tenant remains in possession after being compelled to pay the total accelerated rent (where the total amount of accelerated rent is no greater than the amount that would otherwise have been paid, if timely paid by the tenant over the term of the lease),⁸⁸ and (b) cases where the tenant has vacated the premises and the landlord remains in possession.⁸⁹

In the latter case, the Court held that, “on its face,” the tenant’s argument, that permitting the landlord “to hold possession *and* immediately collect all rent due,” gives the landlord a windfall, was “compelling” because:

arguably the ability to obtain all future rent due in one lump sum, undiscounted to present-day value, and also enjoy uninterrupted possession of the property provides the landowner with more than the compensation attendant to the losses flowing from the breach – even though such compensation is the recognized purpose of a liquidated damages provision.

Accordingly, the Court determined that the defaulting tenant “should have had the opportunity to present evidence that the undiscounted accelerated rent amount is disproportionate to [the landlord’s] actual losses,

84 See *Truck Rent-A-Center, Inc.*, 41 N.Y.2d 420.

85 *Vernitron Corp. v. CF 48 Assocs.*, 104 A.D.2d 409, 478 N.Y.S.2d 933 (2d Dep’t 1984).

86 *Id.*

87 *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

88 *See Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 577, 415 N.Y.S.2d 800 (1979).

89 *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

notwithstanding that the landowner had possession, and no obligation to mitigate.”⁹⁰ The Court did *not* hold that the landlord would not be entitled to recover *any* accelerated contractual damages. The Court acknowledged it had previously held, in *Holy Properties Limited, L.P. v. Kenneth Cole Productions, Inc.*,⁹¹ “that once a tenant abandons the property prior to expiration of the lease, a ‘landlord [is] within its rights under New York law to do nothing and collect the full rent due under the lease,’”⁹² where “the parties have freely agreed to bind [the tenant] to pay rent after termination of the landlord-tenant relationship.”⁹³ Nevertheless, after *172 Van Duzer Realty Corp.*, determining the measure of those damages in such cases (whether “discounted” or not) will be subject to case by case development.

[39.14] 1. Representative Cases Where the Liquidated Damages Provision Was Not Enforced

Pyramid Ctrs. & Co. v. Kinney Shoe Corp.

244 A.D.2d 625, 663 N.Y.S.2d 711 (3d Dep’t 1997)

- Default provision in the lease provided that if tenant vacated the premises, tenant still remained liable to pay rent for the remainder of the lease period. Additionally, if tenant ceased operation prior to termination date, landlord could require tenant to “pay as liquidated damages and not as a penalty. . . double the fixed minimum rent for the remainder or unexpired portion of the term.”
- The Court determined that the provision was disproportionate to any subsequent loss suffered by the landlord and thus it was intended to coerce tenant’s performance rather than compensate landlord for tenant’s breach, and, therefore, its purpose was not to provide just compensation.⁹⁴
- In the interest of justice, the Court afforded the landlord the opportunity to present evidence of actual damages as a result of tenant’s decision to close its store before the expiration of the lease.

90 *Id.*

91 87 N.Y.2d 130 (1995).

92 *172 Van Duzer Realty Corp.*, 24 N.Y.3d 528.

93 *Id.*

94 Of course, such coercion is precisely what many landlords hope to achieve, but there is simply no way to draft a “coercive” provision in accordance with the law.

Vernitron Corp. v. CF 48 Associates**104 A.D.2d 409, 478 N.Y.S.2d 933 (2d Dep't 1984)**

- Lease had a clause which called for liquidated damages in a sum equivalent to one year's rent for a default under the lease. The lease defined the term "default" to include any breach of the covenants of the lease.
- The lease contained numerous covenants of varying degrees of importance.
- Because the court looked at the anticipated losses discernible at the time of contracting and not the actual loss incurred by the breach to determine whether the liquidated damages were reasonable, the provision was determined to be an unenforceable penalty.
- Loss attributable to certain defaults such as late payment of rent is clearly readily ascertainable and is inappropriate for application of liquidated damages.
- Loss which might occur as a result of certain minor defaults under the lease (i.e., for a two-day delay in payment of rent) would be disproportionate to the amount of liquidated damages. That is to say that where there is an obvious contrast in the seriousness of the breaches, there should be a concomitant contrast in the consequences thereof.

Irving Tire Co. v. Stage II Apparel Corp.**230 A.D.2d 772, 646 N.Y.S.2d 528 (2d Dep't 1996)**

- Prior to termination of the lease, tenant became dissatisfied and entered into negotiations with landlord for early termination.
- Tenant agreed to pay landlord \$50,000 for early termination agreement, which included a provision authorizing the landlord, in the event of a default, to enter judgment against the tenant in the sum of \$140,000.
- After paying landlord \$37,500, tenant stopped making payments because landlord had leased the store to a new tenant.
- Landlord commenced action to recover \$102,500 in damages under the liquidated damages clause of the early termination agreement.

- Provision was deemed unenforceable because the actual damages arising from tenant's breach of the early termination agreement was readily ascertainable and the \$140,000 fixed sum was disproportionate to the landlord's loss.

[39.15] 2. Representative Cases Where the Liquidated Provision Was Enforced

***New 24 W. 40th St. LLC v. XE Capital Management, LLC* 104 A.D.3d 513, 961 N.Y.S.2d 139 (1st Dep't 2013)**

- Provision in lease stated that if the tenant breached its duties under the lease, the landlord was entitled to recover as liquidated damages "an amount equal to the rent reserved hereunder for the unexpired portion of the term demised."
- Court determined the provision did not constitute a penalty because the provision did not allow recoupment of damages disproportionate to any loss which could possibly accrue to the landlord.

***Bates Adver. USA, Inc. v. 498 Seventh, LLC* 291 A.D.2d 179, 739 N.Y.S.2d 71 (1st Dep't 2002)**

- Both parties were highly sophisticated business entities, represented by accomplished and experienced real estate attorneys.
- The lease provided that if certain renovation work to be done by the landlord was not completed by the time the tenant had taken full occupancy of the initial demised premises and was conducting its ordinary business therein, then the tenant would be entitled to either a one-half day or one full day delay in the occurrence of the rent Commencement Date for each day from January 2, 1999 until the landlord substantially completed the work.
- Testimony established that this was a situation where it would be difficult, if not impossible, to calculate plaintiff's damages resulting from a breach, since there would be no way of knowing whether tenant's loss of an advertising client had been caused by construction conditions in the building.
- The parties made every reasonable effort to provide appropriate compensation in the event the landlord breached its obligations by breaking down the contemplated nine improvements into two categories;

those which if not completed would entitle the plaintiff to a half-day rent abatement for each day and those which if not completed would entitle the plaintiff to a full day rent abatement for each day left uncompleted.

- “By imposing this one-to-one proportionality between the days the breach continued and the value of the compensation, the parties successfully avoided the possibility that the tenant would obtain a benefit in gross disproportion to the injury it suffered.”
- Although the trial court ruled the provision an unenforceable penalty because the half-day abatement was applied whether one item or all nine items were lacking, the First Department determined this reasoning takes the concept of proportionality to the extreme:
 - “To require that a liquidated damages amount be set for each individual work item with the type of specificity this ruling requires, would be contrary to the concept of liquidated damages.”

Feyer v. Reiss

154 A.D. 272, 138 N.Y.S. 964 (2d Dep’t 1912)

- Case involved a three-year lease of eight tenement houses that housed sixty different tenants.
- The contract provided that: “It being expressly understood and agreed that if the lessees surrender the said premises or are dispossessed therefrom prior to the expiration of this lease in 1914, then and in that event the said eight hundred (\$800) dollars, together with any subsequent installments which shall be paid by the lessees as hereinbefore provided, shall belong to the lessor as liquidated and stipulated damages, and the parties hereto agree to stipulate such deposit as liquidated damages because they cannot ascertain the exact amount of damage which the lessor would sustain in the event of any breach or violation hereunder.”
- Court determined liquidated damages clause was valid because:
 - Lease was clear and definite as to the character of the deposit.
 - Formal expression that deposit was liquidated damages.

- Affirmative provision that the parties had agreed that deposit was liquidated damages because they could not ascertain the exact amount of damages that the landlord would sustain in the event of a breach.
- There was no excessive disproportion between the deposit and the possible damages.

Tenber Associates. v. Bloomberg L.P.

51 A.D.3d 573, 859 N.Y.S.2d 61 (1st Dep’t 2008)

- Landlord commenced a commercial holdover proceeding based upon tenant’s continued possession of office space following the expiration of the parties’ lease agreement.
- Liquidated damages clause, which provided for **two times** the existing rent in the event of a holdover, was not an unenforceable penalty.
- Tenant failed to establish that the actual amount of damages could have been anticipated in 1995, when the lease was executed.
- Tenant also failed to establish that the amount fixed was “plainly or grossly disproportionate to the probable loss.”

Parsons & Whittemore, Inc. v. 405 Lexington L.L.P.

299 A.D.2d 156, 753 N.Y.S.2d 36 (1st Dep’t 2002)

- Lease provided that if the tenant did not vacate the property within two days after the expiration of the lease, the landlord was entitled to a sum equal to **two times** the average rent and additional rent which was payable per month under the lease during the last six months of the lease.
- Court determined that the liquidated damages clause was not an unenforceable penalty since the damages could not have been anticipated in 1983, when the lease was executed and the amount fixed is not plainly or grossly disproportionate to the probable loss.

Federal Realty Ltd. Partnership v. Choices Women’s Med. Ctr., Inc.

289 A.D.2d 439, 735 N.Y.S.2d 159 (2d Dep’t 2001)

- Provision in lease stated that in the event of a failure to timely surrender the premises, the tenant “shall pay to the Owner for each month and for each portion of any month during which Tenant holds over a sum equal to **three times** the aggregate of that portion of the fixed

rent and additional rent which was payable under this lease during the last month of the term hereof.”

- Provision also stated that “the damage to the Owner resulting from any failure by Tenant to timely surrender possession of the demised premises will be substantial and will be impossible to accurately measure.”
- Court determined this was a valid liquidated damages provision because the parties’ lease contained provisions which clearly and unambiguously permitted the landlord to recover a reasonable amount of damages for any injuries which resulted from the failure to timely surrender the premises:
- Furthermore, the record was devoid of evidence that the amount of liquidated damages to which the parties agreed was grossly disproportionate to the landlord’s actual loss.

Thirty-Third Equities Co. v. Americo Group., Inc.
294 A.D.2d 222, 743 N.Y.S.2d 10 (1st Dep’t 2002)

- Provision in lease allowed landlord to collect **two and one-half times** the rent for each month that tenant was on the premises after the expiration of the lease.
- Court determined this was a valid liquidated damages clause since there was no evidence that the projection of a 250% increase in rent was unreasonable.
- Premises were in fact rented to a new tenant in an amount approximating a 250% increase.

Montgomery Trading Co. v. Cho
22 Misc. 3d 135(A), 2009 WL 400083 (Sup. Ct., App. Term, 1st Dep’t 2009)

- Provision in lease allowed landlord to collect **1.5 times** the existing rent in the event of a holdover.
- Court determined this was a valid provision since tenants failed to establish that damages could be anticipated in 1998 when the lease was executed or that the amount fixed was plainly or grossly disproportionate to the probable loss.

319 Fifth Ave. Realty v. 319 Smile Corp.**21 Misc. 3d 139(A), 875 N.Y.S.2d 824 (Sup. Ct., App. Term, 1st Dep't 2008)**

- Liquidated damages clause providing for use and occupancy at **two times** the rent in the event of a holdover was not an unenforceable penalty because damages could not be anticipated in 1997 when the lease was executed and the amount fixed was not plainly or grossly disproportionate to the loss.

[39.16] C. Monetary and Non-Monetary Defaults

Monetary events of default, such as failure to pay the rent or any of the items designated as additional rent in the lease, clearly entitle the landlord to serve a notice of default and/or a notice of termination under a conditional limitation clause. However, landlords may also serve notices of default and/or notices of termination for any designated non-monetary event of default specified in the lease.⁹⁵

In a properly drawn commercial lease, the landlord's right to terminate a lease and seek to evict a defaulting tenant, for a non-monetary event of default, rests on equal ground with the right to terminate for a monetary event of default. As previously noted, (a) so long as the non-monetary event of default is expressly defined in the lease, and (b) so long as the notice of default has specified the particular lease provision that the tenant has violated and the period, if any, during which the tenant is obliged to cure the default, the landlord may then serve a notice of termination after the expiration of the cure period.

Non-monetary events of default can also provide the basis upon which a court may deny a tenant's application for a *Yellowstone* injunction. As noted *infra*, one of the prime factors that a commercial tenant must demonstrate, in order to be eligible for obtaining a *Yellowstone* injunction, is to show that the tenant "is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." However, in those unusual cases where the tenant is clearly not prepared or willing to cure the default, the courts will not grant a *Yellowstone* injunction.

In *330 Hudson Owner, LLC v. Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York*,⁹⁶ the Court found that the

95 See "Events of Default," *supra*.

96 23 Misc. 3d 1131(A), 2009 WL 1470449 (Sup. Ct., N.Y. Co. 2009).

tenant had stopped construction on a mixed-use building it had contracted to build, as provided in its lease, and that the tenant had “no present intention to resume construction.” The Court said that “the evidence indicates that [tenant] is attempting to use its shutdown in construction as leverage to force Trinity to renegotiate its lease.” Accordingly, the Court held that a *Yellowstone* injunction was not warranted.

A similar situation occurred in *Gristede’s Operating Corp./Namdor Inc. v. Centre Financial LLC*,⁹⁷ where the Court found that the supermarket tenant’s primary interest was “in closing its store, selling its assets and assigning the lease” with no indication of “any interest, inter alia, in remaining at the premises and curing the alleged violation of the Continuous Operation provision” of the lease. Given the facts, there was no basis for granting a *Yellowstone* injunction after the expiration of the notice to cure and the service of the notice of termination.

[39.17] D. Notices to Cure and Avoiding the *Yellowstone* Injunction

The so-called “*Yellowstone*” injunction, or other similar relief, when obtained by a commercial tenant in a Supreme Court plenary action, prohibits a property owner from terminating a tenancy for a non-monetary event of default and freezes any eviction efforts that may have already commenced in a local court summary proceeding. The *Yellowstone* injunction also tolls any corrective period stated in the lease until the parties have fully litigated whether a non-monetary violation of the lease has occurred.⁹⁸ “The purpose of the *Yellowstone* injunction is to maintain the status quo so that the tenant served with a notice to cure an alleged non-monetary lease violation may challenge the propriety of the landlord’s notice while protecting a valuable leasehold interest.”⁹⁹

In order to obtain a *Yellowstone* injunction, the courts require the tenant to show (a) the existence of a commercial lease, (b) receipt from the landlord of a notice of default thereunder, a notice to cure such default, or a threat of termination of the lease, (c) application for the issuance of an injunction made prior to the termination of the cure period specified in the

97 16 Misc. 3d 1132(A), 2007 WL 2457588 (Sup. Ct., Nassau Co. 2007).

98 See *First Nat’l Stores, Inc. v. Yellowstone Shopping Ctr., Inc.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968).

99 *Garland v. Titan West Assocs.*, 147 A.D.2d 304, 307, 543 N.Y.S.2d 56, 58 (1st Dep’t 1989).

lease, and (d) the tenant's ability and desire to cure the alleged non-monetary default by any means short of vacating the premises.¹⁰⁰

The availability of the *Yellowstone* injunction provides an invaluable defensive tool to a commercial tenant. At the same time, it is one of the most paralyzing tenant weapons that the judiciary has ever created; first, because it permits tenants to cure any lease violations after the litigation is completed; second, the case is brought and tried in Supreme Court where it may take years before completion and permit an excessive period of time to cure any violation; and third, the tolling of the "cure" period gives tenants the opportunity to commit knowingly blatant transgressions of the lease during the pendency of the action.¹⁰¹

However, a cure period is not required in a commercial lease. In a case in which the commercial lease had no cure period, the tenant argued that the clause was unconscionable because the absence of a cure period precluded the tenant from seeking a *Yellowstone* injunction to stay the lease's forfeiture. The court held that a cure period was not required and noted that "while it might have precluded defensive tactics such as seeking a *Yellowstone* injunction prior to the expiration of the lease, it was part of the fully negotiated contract between represented parties. It would not be contrary to public policy to enforce the provisions of the lease under such circumstances."¹⁰²

In *New Eagle, Inc. v. H.R. Neumann Associates, Inc.*,¹⁰³ a case in which a commercial lease lacked a cure period, the Court determined that the tenant could not satisfy the elements necessary to invoke the protection of a *Yellowstone* injunction. As the Court explained:

Although the plaintiff has established that it held a commercial lease and that the thirty-day eviction notice served as a threat of termination of the lease, said notice is not susceptible to a cure. Even if its application for a

100 See, e.g., *Garland*, 147 A.D.2d 304; *Continental Towers Garage Corp. v. Contowers Assocs. Ltd. Partnership*, 141 A.D.2d 390, 529 N.Y.S.2d 322 (1st Dep't 1988); see also *Health 'N Sports, Inc. v. Providence Capitol Realty Group, Inc.*, *Health 'N Sports, Inc. v. Providence Capitol Realty Group, Inc.*, 75 A.D.2d 884, 428 N.Y.S.2d 288 (2d Dep't 1980).

101 Although, theoretically, if they are brazen enough, the Defendant-Landlord can move the court for relief.

102 *Queen Art Publishers, Inc., v. Animazing Gallery Inc.*, 2002 WL 452207, 2002 N.Y. Slip Op. 40033(U).

103 4 Misc. 3d 1005(A), 2004 WL 1609174 (Sup. Ct., Kings Co. 2004).

temporary restraining order was made prior to the termination of the lease, the plaintiff does not have the ability to effect a cure in this case: it would appear that it has not. The purpose of a *Yellowstone* injunction is to toll the running of the cure period in the landlord's notice to cure so that, after determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold. In the case at hand, there is simply no "cure" period for this Court to toll or stay.

If the cure period is eliminated from a commercial lease, tenant transgressions will decrease as the tenant's contemplation of the reality of the possibility of a swift termination and eviction, in the event of a default, is ever present. Moreover, the basis for injunctive action in the Supreme Court is also eliminated, and, when injunctive relief is denied, the question of whether or not the lease has been violated will be tried in a Civil Court proceeding, without the time impediments of discovery and the lengthy time-line of a Supreme Court matter.

Nevertheless, the omission of a cure period may be resisted in lease negotiations, and, even where the omission of a cure period is successfully negotiated, it is still possible that some judges will seek ways to insert an equitable cure period into the lease agreement. Therefore, as an alternative to entirely omitting a cure period from the lease, we recommend devising a scenario whereby time limits and other handcuffs are placed on the *Yellowstone* action within the terms of commercial lease: First, the tenant should be required to place a substantial bond, in a specified amount upon the granting of the *Yellowstone* application; Second, the scope of discovery in any resulting litigation should be limited with specific procedures pre-agreed upon to foster an expedited hearing or trial; and Third, the parties should agree that all resulting proceedings should be placed on an expedited court schedule (presuming that the court will enforce such commercial lease provisions).

[39.18] V. LICENSES

The legal relationship established between the property owner-landlord and a tenant, by a lease, is entirely distinct from the legal relationship established, by a license, between the property-owner-licensor and a licensee. Under a bona fide license agreement, the tenant-licensor owns no estate in the premises and has no right to possession. Common law principles apply, and the owner-licensor has the absolute right to use peaceable self-help, at any time, to remove a licensee from the licensed

premises for any reason or no reason.¹⁰⁴ The landlord thus avoids having to endure months or years of lengthy and frustrating litigation to regain possession of valuable real estate.

To obtain the benefit of a license agreement, the property owner must ensure that its agreement with the prospective user of the premises is indeed a license and not a lease. This is not necessarily an easy task to accomplish. Merely calling the agreement a “license” will not make it so. Whether an agreement is held to be a “license” and not a lease will depend on the presence or absence in the agreement of the three essential characteristics of a real estate license: (1) a clause allowing the licensor to revoke “at will,”¹⁰⁵ (2) the retention by the licensor of absolute control over the premises,¹⁰⁶ and (3) the licensor’s supplying to the licensee all of the essential services required for the licensee’s permitted use of the premises.¹⁰⁷

Courts have found “licenses” to be leases where any one or more of these characteristics is either missing from the agreement altogether or not sufficiently vested in the powers retained by the licensor.¹⁰⁸ However, the less control given the licensee, the more likely the agreement is to be held a license, because a license offers no autonomy, but merely allows a party “to render services within an enterprise conducted on premises owned or operated by another, who has supervisory power over the method of rendition of the services.”¹⁰⁹ Nevertheless, it has been held that the licensor’s retention of control over prices charged by the licensee, times of operation with the licensed space, and even the choice of the licensee’s employees, is no guarantee that the agreement will be held to be a license and not a lease, as such controls may be deemed “no more than

104 See *P & A Bros., Inc. v. City of N.Y. Dep’t of Parks & Rec.*, 184 A.D.2d 267, 585 N.Y.S.2d 335 (1st Dep’t 1992). Provided the license really is a license, there are *no* municipal restrictions on self help in a commercial license.

105 See *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 730 N.Y.S.2d 48 (1st Dep’t 2001) upholding the license even though the at will revocation had a built in delay period.

106 See *Karp v. Federated Dep’t Stores*, 301 A.D.2d 574, 754 N.Y.S.2d 27 (2d Dep’t 2003).

107 See *Nextel of N.Y. v. Time Mgmt. Corp.*, 297 A.D.2d 282, 746 N.Y.S.2d 169 (2d Dep’t 2002).

108 See *Miller v. City of New York*, 15 N.Y.2d 34, 255 N.Y.S.2d 78 (1964).

109 *Lordi v. County of Nassau*, 20 A.D.2d 658, 659, 246 N.Y.S.2d 502, 505 (2d Dep’t 1964).

would reasonably be demanded by a careful owner as against a lessee for [any] business.”¹¹⁰

Therefore, careful drafting of appropriate license agreements will be required, and, for this purpose, there must be close cooperation between attorneys and their clients who wish to implement a license regime. Communications to the client of the risks, as well as the benefits, of utilizing a license agreement will be essential. In addition, attorneys will need to give close attention to the objectives of the client and determine how much initial cost the client is willing to accept in order to provide the kind of “full service” agreement that will pass a court’s “license” test.

Owners will also have to make judgments about the commercial feasibility of obtaining licensees who are willing to accept license agreements with “at will” revocation clauses. Whether potential licensees are willing to sign such agreements may depend upon the type of premises that the owner is making available for licensed use; whether the licensed space is a warehouse, an office suite for multiple users, or simple storage space. To attract licensees concerned about making a substantial investment in space subject to a revocable license, owners may create new financing incentives or build into the agreement a mechanism to compensate a non-defaulting licensee for the remaining unamortized value of its investment at such time as the licensor invokes the “at will” clause of the agreement.

At present, real estate license agreements appear to be utilized primarily by owners of properties licensed to short term users of office space and to users of certain types of storage. That there is a market for such agreements is clearly apparent. Whether there is a market for real estate license agreements for other types of occupancy may not be so apparent, but, given the need of landlords to be relieved of the onerous burdens and frustrations of traditional landlord-tenant litigation, the time is fast approaching when landlords may need to test the market by striving to transform the commercial rental landscape into a true license regime.

¹¹⁰ *Miller*, 15 N.Y.2d 34; but see *Union Sq. Park Community Coalition, Inc. v. N.Y.C. Dep’t of Parks and Rec.*, 22 N.Y.3d 648, 985 N.Y.S.2d 422 (2014).

[39.19] VI. DRAFTING FOR THE COMMERCIAL TENANT

[39.20] A. Introduction

At common law, the doctrine of “caveat emptor” governed commercial leasing. By the 1970’s New York courts, relying on equitable principles, began to carve out exceptions to caveat emptor.¹¹¹ Equity gained greater currency and judicial decisions softened commercial lease provisions that potentially endangered or evicted tenants.¹¹² In recent years, courts at all levels have moved away from finding equitable solutions to prevent harsh results or evictions and have applied the terms of negotiated lease provisions. Past judicial activism by judges protecting commercial tenants’ rights has evolved into a consistent enforcement and implementation of commercial leases.¹¹³ In many cases, no matter how draconian the lease provision, New York courts have been enforcing the contents of commercial leases.¹¹⁴

In this judicial environment, many tenants have suffered severe financial consequences or lost their leases as a result of poorly drafted leases. Although temporary tenant victories providing endless delays resulting from technical mistakes and jurisdictional defect defenses are still used regularly, tenant attorneys have reason to be prudent and avoid overreliance upon such tactics. It is possible that, in a given case, their holdover commercial tenant client might be found liable, for damages suffered by the third-party incoming tenant, by reason of their client’s failure to vacate after its lease term expired.¹¹⁵

It is imperative, therefore, that commercial tenants negotiate better leases in order to protect their interests. The topics covered below contain suggestions on how commercial tenants should attempt to do so.

111 See David Frey, *The Yellowstone Injunction, or How to Vex Your Landlord Without Really Trying*, 58 Brooklyn L. Rev. 155, 161-162; see also Curtis J. Berger, *Hard Leases Make Bad Law*, 74 Columbia L. Rev. 791 (1974) (under subsection entitled “Doctrines Openly Hostile to the Landlord and the Lease”).

112 See Notices to Cure and Avoiding the *Yellowstone Injunction*, *supra*.

113 See *Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Avenue*, 1 A.D.3d 65, 767 N.Y.S.2d 99 (1st Dep’t 2003).

114 See, e.g., *Four Cees Jewelry Inc. v. 1537 Realty LLC*, 11 Misc. 3d 1056(A), 2005 WL 3803491 (Sup. Ct., N.Y. Co. 2005).

115 See *Kronish Lieb Weiner & Hellman, LLP v. Tahari, Ltd.*, 11 Misc. 3d 1057(A), 2006 WL 469310 (Sup. Ct., N.Y. Co. 2006).

[39.21] B. Mitigation of Damages

Since the Court of Appeals decided the seminal case of *Holy Properties v. Kenneth Cole Productions*,¹¹⁶ in 1995, landlords have not been required to mitigate damages when a commercial tenant defaults on its lease and surrenders or is removed from the premises. As the tenant of record remains liable for all rents due during the remainder of its lease term, a landlord has no incentive to even attempt to re-rent or alleviate a defaulting tenant of its duty to pay rent. Landlords are not obligated to mitigate prospective losses in the event of default on rent payments.¹¹⁷ This has produced exceedingly harsh results.¹¹⁸

Therefore, from a tenant's interest, every commercial lease should contain a clause which provides that, upon a default in the lease that results in the surrender or eviction from the premises, the landlord agrees to mitigate its losses and to use reasonable efforts to re-lease the demised premises. If it can be negotiated, such a clause should include a requirement by the landlord to advertise weekly and to employ a qualified real estate broker to find a new tenant to whom to lease the premises. This clause should also include a duty by the landlord to attempt to rent the premises for at least the same rent, in order to reduce any remaining rent liability.

Negotiating a mitigation of damages clause may provide a commercial tenant with a life preserver in an ocean of financial devastation.

[39.22] C. Prevailing Party Clause

Most commercial leases include a provision that a tenant must pay a landlord's legal expenses and attorney's fees in connection with any default in the lease.

Although state law mandates that such an attorney's fees clause in a residential lease is deemed to be reciprocal, the statutory mandate in residential cases does not apply to commercial leases. Despite many failing arguments to the contrary, attorney's fees provisions providing payment to the landlord in connection with a legal proceeding will not provide the

116 87 N.Y.2d 130, 637 N.Y.S.2d 964 (1995).

117 See, e.g., *Syndicate Bldg. Corp. v. Lorber*, 128 A.D.2d 381, 512 N.Y.S.2d 674 (1st Dep't 1987).

118 Even *Holy Properties* acknowledged the results to be harsh, but held that it was better to have a reliable old rule than to break new precedential ground.

same rights to a commercial tenant unless specifically stated in the tenant's commercial lease.¹¹⁹

Accordingly, a prevailing party clause should be negotiated into the commercial lease agreement. The provision should require the losing party to any action to pay the prevailing party's legal fees and expenses. Such a clause should prevent, or at least lessen, the number of frivolous and harassing lawsuits initiated by both landlords and tenants. As neither party will be able to commence a legal action without the threat of being required to fund the victorious party's legal bill, parity should prevail and thereby preclude attempts to exploit any inequitable leveraging position.

[39.23] D. Right of Expansion Clause

An expansion clause is the right or option to lease a specific additional space in the demised premises for a defined term in the future. Such an option becomes significant when a company has outgrown its space and wishes to avoid having to move to a new location and save the cost and inconvenient time delays that relocation necessitates. Financially, it saves the tenant from being forced to lease additional space if its financial situation does not dictate growth when the option becomes available.

The expansion clause allows a tenant the flexibility of either (a) taking an entirely new and larger space in the building without any financial consequences for vacating its present space, or (b) permits the tenant to simply expand its tenancy taking additional floor space or additional square feet. The expansion option also benefits the landlord by allowing it the flexibility to deliver different floors or rental space to the tenant at different times. The expansion clause also requires communication between the landlord and the tenant at certain fixed times which might not otherwise occur without a lease provision dictating such contact.

As the landlord knows when existing leases expire, it will be able to determine vacancy dates before the execution of the initial lease. As such, the negotiated expansion clause should address different possibilities for potential expansion. The expansion clause should be expressly negotiated to include: (a) a detailed description of specific potential expansion spaces, (b) the yearly rent due or an agreement to use fair market rent, and (c) any increases in taxes and/or operating expenses. In addition, a provision requiring the landlord to sue reasonable efforts to recover possession

119 See, e.g., *Huron Associates, LLC v. 210 East 86th Street Corp.*, 18 A.D.3d 231, 794 N.Y.S.2d 360 (1st Dep't 2005).

from a holdover tenant in the chosen expansion space should be included. Commercial tenants should also attempt to negotiate a right of first refusal to protect their long term interests in the premises.

[39.24] E. The Option to Renew

The option to renew has been used in practice for hundreds of years.¹²⁰ The option permits a tenant to sign on for another five or ten years at a negotiated rent. The renewal rent negotiated at the time of the initial lease is often only three to five percent above the rent for the last year of the original lease period. Since the tenant is not required to exercise the option, it can vacate the space without any liability after the initial lease term. Furthermore, after investing heavily to turn raw space into an office or store, a tenant will be more comfortable signing a lease with a shorter term with the knowledge that, at its option, it can remain for one or more renewal periods. In fact, a shorter term with option periods may be beneficial for a smaller company without the ability to forecast financial success. Finally, if the market calls for a lower rent than the renewal option specifies, negotiation may result in a decreased rent when it is time to renew.

The option to renew is beneficial to the landlord as a result of the incentives supplied and its importance as a negotiating tool. By making the option contingent on the tenant's good standing with its lease obligations during the current term, the tenant shall have an important incentive to be on its best behavior, and to comply with all of its lease obligations, to avoid losing the right to renew. Granting the option can also give the landlord an important negotiating tool that may overcome any stalemate has impeded lease negotiations.

[39.25] F. Ownership and Use

The Internet has provided a cost efficient way to provide additional protection for a tenant for the most basic foundations of the tenancy. First, when receiving a draft of a landlord's lease, the ownership interests of the entity or person listed in the agreement should be investigated. Property ownership and tax information should be checked by visiting the appropriate governmental website. Second, determine whether the commercial tenant's anticipated use of the premises is permitted by law by also visiting the relevant government website. For example, in New York City, the legal use for the premises and the certificate of occupancy can be viewed

¹²⁰ See *Crosby v. Moses*, 92 N.Y. 634 (1883).

by search the Department of Buildings website. In New York City, any premises constructed after 1938, or where significant renovations occurred in the interim, require a certificate of occupancy.

The certificate of occupancy will report the legal uses of the premises, and, if a tenant's proposed business is not listed, a competent expediter or architect should be able to determine whether legalization is possible. To legalize a new use for the premises, the architect or expediter must have all building violations corrected, and then proceed with an application for an amendment to the certificate of occupancy approving the new use.

Every tenant should attempt to include in the description of its business in the lease the catch-all phrase "any lawful use." However, obtaining a favorable use clause will not guarantee that the business will also be able to function as such. If there is any doubt about whether the premises can be lawfully used for the tenant's particular business, a provision should be negotiated giving the tenant the ability to cancel the lease upon a determination that the planned use of the premises cannot be legalized or that it cannot be made so within a reasonable time after submitting a proper application to the relevant governmental authority. During this waiting period, the lease should require that no rent become due. To facilitate the process, a provision requiring the landlord to complete any necessary forms to legalize the use or proposed alterations should be negotiated. If the lease is cancelled due to non-approval of the tenant's proposed use, the landlord should be required to return all monies forwarded to the landlord as well as to reimburse any expenses incurred by the tenant in attempting to legalize the premises.

A tenant should also retain the ability to cancel the lease if the tenant is unable to take possession on the move-in date or soon thereafter. A representation should be added whereby the landlord agrees to make a good faith effort to complete and legalize the premises, as well as to evict a holdover tenant. In an alternative to canceling the lease, the tenant should be granted a rent abatement for each day that the landlord fails to deliver possession. Upon the delayed commencement of the lease, the expiration dates of the lease should be extended, and the commencement date should be contingent on the issuance of the various approval and permits necessary to complete construction.

[39.26] G. Signage and Alterations

A disproportionate amount of commercial lease litigation derives from disputes over signs and alterations.¹²¹ In an attempt to decrease the

amount of litigation involving such items, attorney should learn a tenant's business needs and carefully adapt the lease to them. In addition, before the lease signing, negotiate the advance or pre-approval of any alteration changes and signage requests as well as any foreseeable alteration changes during the term of the lease. Specific plans, measurements, drawings and pictures should be provided and attached to the lease agreement. If possible, obtain the right to make non-structural alterations without the landlord's approval, including any alterations that are insignificant or do not require building permits. Also, include a representation by the landlord that it will remove any existing violations against the premises, so that any permit applications needed to perform the work will not be rejected. For all other alterations requiring the landlord's permission, ensure that such authorization will not be unreasonably¹²² withheld.

[39.27] H. Repairs and Self-Help

Commercial tenants should attempt to make the landlord liable for all structural repairs to the demised space and to the building, as well as non-structural repairs occasioned by the landlord's negligence.¹²³

Commercial tenants should also strive to include a self-help provision. Such a provision allows the a tenant to complete any repairs that the landlord neglects to complete within an allotted time period after notification from the tenant. This clause should allow the tenant to seek reimbursement by obtaining a rent credit for the cost of repair or by obtaining reimbursement directly from the landlord. Besides eliminating the perennial tenant's dilemma of whether it can withhold rent until necessary repairs are done, the clause will also provide a mechanism that should assist in keeping the premises free of conditions requiring necessary repairs.¹²⁴ The self-help clause will also resolve the "independent covenant" dilemma, where any rental amounts due to the landlord are deemed independent of the landlord's obligation to do repairs. Any lease provision specifying that each provision is independent of every other provision should be modified to include the tenant self-help provision.

121 See, e.g., *Marshall v. Ahamed*, 5 Misc. 3d 136(A), 2004 WL 2851209 (Sup. Ct., App. Term, 2d Dep't 2004).

122 "Unreasonably" is a term of art. It means a cause for which a specific reason can be articulated. See *Conrad v. Third Sutton Realty Co.*, 81 A.D.2d 50, 439 N.Y.S.2d 376 (1st Dep't 1981).

123 See GOL § 5-322.1.

124 See *Green 440 Ninth LLC v. Duane Reade*, 10 Misc. 3d 75, 809 N.Y.S.2d 756 (Sup. Ct., App. Term., 1st Dep't 2005).

APPENDIX

SAMPLE DEFAULT CLAUSES

Conditions of Limitation

1.01 This lease and the term and estate hereby granted are subject to the limitation that whenever Tenant, or any guarantor of Tenant's obligations under this lease, shall make an assignment for the benefit of creditors, or shall file a voluntary petition under any bankruptcy or insolvency law, or an involuntary petition alleging an act of bankruptcy or insolvency shall be filed against Tenant or such guarantor under any bankruptcy or insolvency law, or whenever a petition shall be filed by or against Tenant or such guarantor under the reorganization provisions of the United States Bankruptcy Code or under the provisions of any law of like import, or whenever a petition shall be filed by Tenant, or such guarantor, under the arrangement provisions of the United States Bankruptcy Code or under the provisions of any law of like import, or whenever a permanent receiver of Tenant, or such guarantor, or of or for the property of Tenant, or such guarantor, shall be appointed, then Landlord (a) if such event occurs without the acquiescence of Tenant, or such guarantor, as the case may be, at any time after the event continues for XXXX (XX) days, or (b) in any other case at any time after the occurrence of any such event, may give Tenant a notice of intention to end the term of this lease at the expiration of five (5) days from the date of service of such notice of intention, and upon the expiration of said five-day period this lease and the term and estate hereby granted, whether or not the term shall theretofore have commenced, shall terminate with the same effect as if that day were the expiration date of this lease, but Tenant shall remain liable for damages as provided in Article XXXX hereof.

1.02 This lease and the term and estate hereby granted are subject to the further limitations that:

- (a) if Tenant shall default in the payment of any Fixed Rent or Additional Charges, and such default shall continue for five (5) days after written notice thereof has been given to Tenant, or
- (b) if Tenant shall, whether by action or inaction, be in default of any of its obligations under this lease (other than a default in the payment of Fixed Rent or Additional Charges) and such default shall continue and not be rem-

edied as soon as practicable and in any event within XXXX (XX) days after Landlord shall have given to Tenant a notice specifying the same, or, in the case of a default which cannot with due diligence be cured within a period of XXXX (XX) days and the continuance of which for the period required for cure will not (i) subject Landlord or any Superior Lessor or any Superior Mortgagee to prosecution for a crime or any other fine or charge, (ii) subject the Premises or any part thereof or the Building or Land, or any part thereof, to being condemned or vacated, (iii) subject the Building or Land, or any part thereof, to any lien or encumbrance which is not removed or bonded within the time period required under this Lease, or (iv) result in the termination of any Superior Lease or foreclosure of any Superior Mortgage, if Tenant shall not within said XXXX (XX) day period advise Landlord of Tenant's intention to take all steps reasonably necessary to remedy such default, (y) duly commence within said XXXX (XX) day period, and thereafter diligently prosecute to completion all steps reasonably necessary to remedy the default and (z) complete such remedy, or

(c) if any event shall occur or any contingency shall arise whereby this lease or the estate hereby granted or the unexpired balance of the term hereof would, by operation of law or otherwise, devolve upon or pass to any person, firm or corporation other than Tenant, except as expressly permitted by Article XXXX (xx) hereof, or

(d) if Tenant shall abandon the Premises, or

(e) if there shall be any default by Tenant under any other lease with Landlord (or any person which, directly or indirectly, controls, is controlled by, or is under common control with, Landlord) covering space in the Building which shall not be remedied within the applicable grace period, if any, provided therefor under such other lease, or if Tenant holds over in the premises demised under such other lease,

Then, in any of said cases in clauses (a) through (e) of this Section, Landlord may give to Tenant a notice of

intention to end the term of this lease at the expiration of five (5) days from the date of the service of such notice of intention, and upon the expiration of said five days this lease and the term and estate hereby granted, whether or not the term shall theretofore have commenced, shall terminate with the same effect as if that day was the day herein definitely fixed for the end and expiration of this lease, but Tenant shall remain liable for damages as provided in Article XXXX hereof.

Chronic Nonpayment

1.03 Notwithstanding anything in this Lease to the contrary, and without limiting Landlord's other rights and remedies provided for in this Lease or at law or equity, if Tenant fails to pay by the due date any Base Rent, Additional Rent, or any other charges owing under this Lease more than [INSERT, e.g., two (2) times within any consecutive twelve (12) month period, then Landlord, at its sole election and in its sole discretion, may do one or more of the following:

- (a) If Landlord shall elect, Landlord shall have the right to terminate this Lease, in the manner provided in Section 1.02 hereof, and evict Tenant from the Premises;
- (b) Require that, beginning with the first monthly installment of Base Rent next due, the Base Rent shall no longer be paid in monthly installments, but shall be payable in advance, on a quarterly basis, on the first day of the first month of each following three-month period, with the first three-month period beginning when payment of the Base Rent is next due, in the total amount of all Base Rent due for each such three-month period;
- (c) Require Tenant to direct its bank or other financial institution or securities broker(s) to automatically and electronically transfer, in accordance with Section XXXX [INSERT AUTOMATIC TRANSFER LEASE CLAUSE] of this Lease, all Base Rent, Additional Rent, and/or other charges due under this Lease, to a bank account, or other financial or securities/brokerage account, chosen and identified by Landlord for such purpose. Landlord shall provide Tenant with written notice of the bank or other financial or securities/brokerage

account information necessary to effectuate such transfers; and/or

(d) Increase the Security Deposit by an amount that Landlord determines, in its sole and absolute discretion, to be necessary to protect Landlord's interests, provided that such amount does not exceed [INSERT, e.g., an amount equal to three (3) months of the then-applicable monthly Base Rent. Such increase of the Security Deposit shall be paid by Tenant immediately upon demand by Landlord.

Bankruptcy

1.04 (a) If Tenant shall have assigned its interest in this lease, and this lease shall thereafter be disaffirmed or rejected in any proceeding under the United States Bankruptcy Code or under the provisions of any federal, state or foreign law of like import, or in the event of termination of this lease by reason of any such proceeding, the assignor or any of its predecessors in interest under this lease, upon request of Landlord given within XXXX (XX) days after such disaffirmance or rejection, Tenant shall (a) pay to Landlord all Fixed Rent and Additional Charges then due and payable to Landlord under this lease to and including the date of such disaffirmance or rejection and (b) enter into a new lease as lessee with Landlord of the Premises for a term commencing on the effective date of such disaffirmance or rejection and ending on the Expiration Date, unless sooner terminated as in such lease provided, at the same Fixed Rent and Additional Charges and upon the then executory terms, covenants and conditions as are contained in this lease, except that (i) the rights of the lessee under the new lease, shall be subject to any possessory rights of the assignee in question under this lease and any rights of persons claiming through or under such assignee, (ii) such new lease shall require all defaults existing under this lease to be cured by the lessee with reasonable diligence, and (iii) such new lease shall require the lessee to pay all Additional Charges which, had this lease not been disaffirmed or rejected, would have become due after the effective date of such disaffirmance or rejection with respect to any prior period. If the lessee shall fail or refuse to enter into the new lease within ten (10) days after Landlord's request to do so, then in addition to all other rights and remedies by reason of such default, under this lease, at law or in equity, Landlord shall have the same rights and remedies against the lessee as if the lessee had entered into such new lease and such new lease had thereafter been terminated at the beginning of its term by reason of the default of the lessee thereunder.

(b) If pursuant to the Bankruptcy Code Tenant is permitted to assign this lease in disregard of the restrictions contained in Article XXXX hereof (or if this lease shall be assumed by a trustee), the trustee or assignee shall cure any default under this lease and shall provide adequate assurance of future performance by the trustee or assignee including (a) the source of payment of rent and performance of other obligations under this lease (for which adequate assurance shall mean the deposit of cash security with Landlord in an amount equal to the sum of one year's Fixed Rent then reserved hereunder plus an amount equal to all Additional Charges payable under Article XXXX for the calendar year preceding the year in which such assignment is intended to become effective, which deposit shall be held by Landlord, without interest, for the balance of the term as security for the full and faithful performance of all of the obligations under this lease on the part of Tenant yet to be performed) and that any such assignee of this lease shall have a net worth exclusive of good will, computed in accordance with generally accepted accounting principles, equal to at least ten (10) times the aggregate of the annual Fixed Rent reserved hereunder plus all Additional Charges for the preceding calendar year as aforesaid, and (b) that the use of the Premises shall in no way diminish the reputation of the Building as a first-class office building or impose any additional burden upon the Building or increase the services to be provided by Landlord. If all defaults are not cured and such adequate assurance is not provided within sixty (60) days after there has been an order for relief under the Bankruptcy Code, then this lease shall be deemed rejected, Tenant or any other person in possession shall vacate the Premises, and Landlord shall be entitled to retain any rent or security deposit previously received from Tenant and shall have no further liability to Tenant or any person claiming through Tenant or any trustee. If Tenant receives or is to receive any valuable consideration for such an assignment of this lease, such consideration, after deducting therefrom (a) the brokerage commissions, if any, and other expenses reasonably incurred by Tenant for such assignment and (b) any portion of such consideration reasonably designed by the assignee as paid for the purchase of Tenant's Property in the Premises, shall be and become the sole exclusive property of Landlord and shall be paid over to Landlord directly by such assignee. If Tenant's trustee, Tenant or Tenant as debtor-in-possession assumes this lease and proposes to assign the same (pursuant to Title 11 U.S.C. Section 365, as the same may be amended) to any person, including, without limitation, any individual, partnership or corporate entity, who shall have made a bona fide offer to accept an assignment of this lease on terms acceptable to the trustee, Tenant or Tenant as debtor-in-possession, then notice of such proposed assignment, setting forth (x) the name and

address of such person, (y) all of the terms and conditions of such offer, and (z) the adequate assurance to be provided Landlord to assure such person's future performance under this lease, including, without limitation, the assurances referred to in Title 11 U.S.C. Section 365(b)(3) (as the same may be amended), shall be given to Landlord by the trustee, Tenant or Tenant as debtor-in-possession no later than twenty (20) days after receipt by the trustee, Tenant or Tenant as debtor-in-possession of such offer, but in any event no later than ten (10) days prior to the date that the trustee, Tenant or Tenant as debtor-in-possession shall make application to a court of competent jurisdiction for authority and approval to enter into such assignment and assumption, and Landlord shall thereupon have the prior right and option, to be exercised by notice to the trustee, Tenant or Tenant as debtor-in-possession, given at any time prior to the effective date of such proposed assignment, to accept an assignment of this lease upon the same terms and conditions and for the same consideration, if any, as the bona fide offer made by such person, less any brokerage commissions which may be payable out of the consideration to be paid by such person for the assignment of this lease.

Reentry by Landlord

1.05 If Tenant shall default in the payment of any Fixed Rent or Additional Charges, and such default shall continue for ten (10) days after written notice thereof has been given to Tenant, or if this lease shall terminate as provided in Article XXXX hereof, Landlord or Landlord's agents and employees may immediately or at any time thereafter reenter the Premises, or any part thereof, either by summary dispossession proceedings or by any suitable action or proceeding at law, or by force or otherwise, including self-help, without being liable to indictment, prosecution or damages therefor, and may repossess the same, and may remove any person therefrom, to the end that Landlord may have, hold and enjoy the Premises. The word "reenter," as used herein, is not restricted to the narrow sense of its technical or legal meaning, but instead in the sense that the Landlord may effect physical entry of the Premises in accordance with its common law rights.

1.06 In the event of a breach or threatened breach by Tenant of any of its obligations under this lease, Landlord shall also have the right of injunction. The special remedies to which Landlord may resort hereunder are cumulative and are not intended to be exclusive of any other remedies to which Landlord may lawfully be entitled at any time and Landlord may invoke any remedy allowed at law or in equity as if specific remedies were not provided for herein.

1.07 If this lease shall terminate under the provisions of Article XXXX hereof, or if Landlord shall reenter the Premises under the provisions of this Article XXXX, or in the event of the termination of this lease, or of reentry, by or under any summary dispossession or other proceeding or action or any provision of law by reason of default hereunder on the part of Tenant, Landlord shall be entitled to retain all monies, if any, paid by Tenant to Landlord, whether as advance rent, security or otherwise, but such monies shall be credited by Landlord against any Fixed Rent or Additional Charges due from Tenant at the time of such termination or reentry or, at Landlord's option, against any damages payable by Tenant under Article XXXX hereof or pursuant to law.

Damages

2.01 If this lease is terminated under the provisions of Article XXXX hereof, or if Landlord shall reenter the Premises under the provisions of Article XXXX hereof, or in the event of the termination of this lease, or of reentry, by self-help or under any summary dispossession or other proceeding or action or any provision of law by reason of default hereunder on the part of Tenant, Tenant shall pay to Landlord as damages, at the election of Landlord, either:

- (a) a sum which at the time of such termination of this lease or at the time of any such reentry by Landlord, as the case may be, represents the then value of the excess, if any (assuming a discount at a rate per annum equal to the interest rate then applicable to 7-year Federal Treasury Bonds), of (i) the aggregate amount of the Fixed Rent and the Additional Charges under Article XXXX hereof which would have been payable by Tenant (conclusively presuming the average monthly Additional Charges under Article XXXX hereof to be the same as were payable for the last twelve (12) calendar months, or if less than twelve (12) calendar months have then elapsed since the Commencement Date, all of the calendar months immediately preceding such termination or reentry) for the period commencing with such earlier termination of this lease or the date of any such reentry, as the case may be, and ending with the date contemplated as the expiration date hereof if this lease had not so terminated or if Landlord had not so reentered the Premises, or (ii) the aggregate fair market rental value of the Premises for the same period, or

(b) sums equal to the Fixed Rent and the Additional Charges under Article XXXX hereof which would have been payable by Tenant had this lease not so terminated, or had Landlord not so reentered the Premises, payable upon the due dates therefor specified herein following such termination or such reentry and until the date contemplated as the expiration date hereof if this lease had not so terminated or if Landlord had not so reentered the Premises, *provided, however*, that if Landlord shall relet the Premises during said period, Landlord shall credit Tenant with the net rents received by Landlord from such reletting, such net rents to be determined by first deducting from the gross rents as and when received by Landlord from such reletting the expenses incurred or paid by Landlord in terminating this lease or in reentering the Premises and in securing possession thereof, as well as the expenses of reletting, including, without limitation, altering and preparing the Premises for new tenants, brokers' commissions, reasonable legal fees, and all other expenses properly chargeable against the Premises and the rental therefrom, it being understood that any such reletting may be for a period shorter or longer than the remaining term of this lease; but in no event shall Tenant be entitled to receive any excess of such net rents over the sums payable by Tenant to Landlord hereunder, nor shall Tenant be entitled in any suit for the collection of damages pursuant to this subdivision to a credit in respect of any net rents from a reletting, except to the extent that such net rents are actually received by Landlord. If the Premises or any part thereof should be relet in combination with other space, then proper apportionment on a square foot basis shall be made of the rent received from such reletting and of the expenses of reletting. If the Premises or any part thereof be relet by Landlord for the unexpired portion of the term of this lease, or any part thereof, before presentation of proof of such damages to any court, commission or tribunal, the amount of rent reserved upon such reletting shall, *prima facie*, be the fair and reasonable rental value for the Premises, or part thereof, so relet during the term of the reletting. Landlord shall not be liable in any way whatsoever for its failure or refusal to relet the Premises or any part thereof, or if the

Premises or any part thereof are relet, for its failure to collect the rent under such reletting, and no such refusal or failure to relet or failure to collect rent shall release or affect Tenant's liability for damages or otherwise under this lease.

2.02 Suit or suits for the recovery of such damages, or any installments thereof, may be brought by Landlord from time to time at its election, and nothing contained herein shall be deemed to require Landlord to postpone suit until the date when the term of this lease would have expired if it had not been so terminated under the provisions of Article XXXX hereof, or had Landlord not reentered the Premises. Nothing herein contained shall be construed to limit or preclude recovery by Landlord against Tenant of any sums or damages to which, in addition to the damages particularly provided above, Landlord may lawfully be entitled by reason of any default hereunder on the part of Tenant. Nothing herein contained shall be construed to limit or prejudice the right of Landlord to prove for and obtain as damages by reason of the termination of this lease or reentry on the Premises for the default of Tenant under this lease an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, such damages are to be proved whether or not such amount be greater than any of the sums referred to in Section XXXX hereof.

2.03 In addition, if this lease is terminated under the provisions of Article XXXX hereof, or if Landlord shall, reenter the Premises under the provisions of Article XXXX hereof, Tenant agrees that:

(a) the Premises then shall be in the condition in which Tenant has agreed to surrender the same to Landlord at the expiration of the term hereof;

(b) Tenant shall have performed prior to any such termination any covenant of Tenant contained in this lease for the making of any Alterations or for restoring or rebuilding the Premises or the Building, or any part thereof; and

(c) for the breach of any covenant of Tenant set forth above in this Section XXXX, Landlord shall be entitled immediately, without notice or other action by Landlord, to recover, and Tenant shall pay, as and for liquidated damages therefor, the cost of performing such covenant (as estimated by an independent contractor selected by Landlord).

2.04 In addition to any other remedies Landlord may have under this lease, and without reducing or adversely affecting any of Landlord's rights and remedies under Article XXXX, if any Fixed Rent, Additional Charges or damages payable hereunder by Tenant to Landlord are not paid within seven (7) days after the due date thereof, the same shall bear interest at the rate of one and one-half percent (1½%) per month or the maximum rate permitted by law, whichever is less, from the due date thereof until paid, and the amount of such interest shall be an Additional Charge hereunder. For the purposes of this Section XXXX, a rent bill sent by first class mail, to the address to which notices are to be given under this lease, shall be deemed a proper demand for the payment of the amounts set forth therein (but nothing contained herein shall be deemed to require Landlord to send any rent bill or otherwise make any demand for the payment of rent except in those cases, if any, explicitly provided for in this Lease).

Affirmative Waivers

3.01 Tenant, on behalf of itself and any and all persons claiming through or under Tenant, does hereby waive and surrender all right and privilege which it, they or any of them might have under or by reason of any present or future law, to redeem the Premises or to have a continuance of this lease after being dispossessed or ejected therefrom by process of law or under the terms of this lease or after the termination of this lease as provided in this lease.

3.02 If Tenant is in arrears in payment of Fixed Rent or Additional Charges, Tenant waives Tenant's right, if any, to designate the items to which any payments made by Tenant are to be credited, and Tenant agrees that Landlord may apply any payments made by Tenant to such items as Landlord sees fit, irrespective of and notwithstanding any designation or request by Tenant as to the items which any such payments shall be credited.

3.03 Landlord and Tenant hereby waive trial by jury in any action, proceeding or counterclaim brought by either against the other on any matter whatsoever arising out of or in any way connected with this lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Premises, including, without limitation, any claim of injury or damage, and any emergency and other statutory remedy with respect thereto.

3.04 Tenant shall not interpose any counterclaim of any kind in any action or proceeding commenced by Landlord to recover possession of the Premises (other than compulsory counterclaims).

No Waivers

4.01 The failure of either party to insist in any one or more instances upon the strict performance of any one or more of the obligations of this lease, or to exercise any election herein contained, shall not be construed as a waiver or relinquishment for the future of the performance of such one or more obligations of this lease or of the right to exercise such election, and such right to insist upon strict performance shall continue and remain in full force and effect with respect to any subsequent breach, act or omission. The receipt by Landlord of Fixed Rent or partial payments thereof or Additional Charges or partial payments thereof with knowledge of breach by Tenant of any obligation of this lease shall not be deemed a waiver of such breach.

4.02 If there be any agreement between Landlord and Tenant providing for the cancellation of this lease upon certain provisions or contingencies and/or an agreement for the renewal hereof at the expiration of the term, the right to such renewal or the execution of a renewal agreement between Landlord and Tenant prior to the expiration of the term shall not be considered an extension thereof or a vested right in Tenant to such further term so as to prevent Landlord from canceling this lease and any such extension thereof during the remainder of the original term; such privilege, if and when so exercised by Landlord, shall cancel and terminate this lease and any such renewal or extension; any right herein contained on the part of Landlord to cancel this lease shall continue during any extension or renewal hereof; any option on the part of Tenant herein contained for an extension or renewal hereof shall not be deemed to give Tenant any option for a further extension beyond the negotiated renewal or extended term continued therein.

Curing Tenant's Defaults

5.01 If Tenant shall default in the performance of any of Tenant's obligations under this lease, Landlord, any Superior Lessor or any Superior Mortgagee without thereby waiving such default, may (but shall not be obligated to) perform the same for the account and at the expense of Tenant, without notice in a case of emergency, and in any other case only if such default continues after the expiration of the applicable grace period, if any. If Landlord effects such cure by bonding any lien which

Tenant is required to bond, Tenant shall obtain and substitute a bond for Landlord's bond at its sole cost and expense and reimburse Landlord for the cost of Landlord's bond.

5.02 Bills for any expenses incurred by Landlord or any Superior Lessor or any Superior Mortgagee in connection with any such performance by it for the account of Tenant, and bills for all costs, expenses and disbursements of every kind and nature whatsoever, including reasonable counsel fees, involved in collecting or endeavoring to collect the Fixed Rent or Additional Charges or any part thereof or enforcing or endeavoring to enforce any rights against Tenant or Tenant's obligations hereunder, under or in connection with this lease or pursuant to law, including any such cost, expense and disbursement involved in instituting and prosecuting summary proceedings or in recovering possession of the Premises after default by Tenant or upon the expiration or sooner termination of this lease, and interest on all sums advanced by Landlord or such Superior Lessor or Superior Mortgagee under this Section 27.02 and/or Section 27.01 (at the Interest Rate or the maximum rate permitted by law, whichever is less) may be sent by Landlord or such Superior Lessor or Superior Mortgagee to Tenant monthly, or immediately, at its option, and such amounts shall be due and payable as Additional Charges in accordance with the terms of such bills. Notwithstanding anything to the contrary contained in this Section, Tenant shall have no obligation to pay Landlord's costs, expenses, or disbursements in any proceeding in which there shall have been rendered a final judgment against Landlord, and the time for appealing such final judgment shall have expired.

Yellowstone Injunction

6.01 Landlord and Tenant, after due consideration and negotiation at arms length, and being fully advised by their respective counsel, hereby agree that the cure period for any event of default under this Lease shall not be the subject of any application or motion by the Tenant to a Court of law for a so-called "*Yellowstone*" injunction to enjoin Landlord from maintaining a summary proceeding against Tenant, and Tenant hereby expressly and knowingly waives and relinquishes all rights it might otherwise have to seek a "*Yellowstone*" injunction or other comparable equitable relief, if and when Landlord should have occasion to issue a Notice of Default and/or a Notice to Cure under the terms of this Lease after any Event of Default, as defined in this Lease.

6.02 In the event that a Court of law should (a) declare any part of this "*Yellowstone Injunction*" provision null and void, (b) issue a "*Yellow-*

stone” injunction or other comparable equitable relief in contravention of Section “6.01” above, or (c) issue any other order inconsistent with Section “6.01” above, which results in a plenary proceeding to adjudicate whether an Event of Default has occurred under this Lease, then Landlord and Tenant hereby further agree:

- (a) That Tenant shall make current all of its Rent and/or Additional Rent obligations then due under this Lease;
- (b) That Tenant shall secure a bond in the amount of no less than One (1) Million (\$1,000,000.00);
- (c) That both parties shall cooperate in seeking to have said plenary action placed on an expedited court schedule for the purpose of obtaining an early pre-trial hearing of the case;
- (d) That discovery in any such plenary action shall be limited to (i) production of copies of the Lease, any correspondence between the parties, and any other written, photographic, video and/or electronic evidence, and any expert reports and exhibits, relating to the claimed Event of Default, and (ii) no more than three depositions of party and/or non-party witnesses representing the Landlord’s interests and no more than three depositions of party and/or non-party witnesses representing the Tenant’s interests; and
- (e) That Tenant, within the time specified in this Lease for the payment of its monthly rent, shall pay all Rent and/or Additional Rent due each month, during the pendency of such plenary action.