

## COMMERCIAL REAL ESTATE DOCUMENTS: DON'T OVERLOOK THE FINE PRINT

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With Passover and Easter this week, a lot of folks are traveling the skies to be with loved ones for the holidays. In the wake of last weekend's passenger removal fiasco on United, chances are they may be browsing their airline's contract of carriage for the first time ever.

As I wrote earlier this week, the fine print can sometimes contain surprises all around. It turns out the infamous United flight wasn't even "overbooked" by United's own definition, a precondition to invoking the "denial of boarding" clause. Moreover, there wasn't any justification in the contract for removing seated passengers based on overbooking or crew needs once they've boarded. Nonetheless, United summoned the long arm of the law to enforce an erroneous (or nonexistent) interpretation of its own agreement - and it apparently was not the first time this has happened.

Is there a connection to commercial real estate? Yes. Don't overlook the fine print, and don't assume an agreement says something merely because everyone acts like it does.

Parties to real estate transaction may be so accustomed to a way of doing business, or so focused on the financial terms and getting the deal done, that standard or "boilerplate" clauses often get overlooked. That's usually not a problem - until there's a disagreement. Here's a sample of just a few:

- ▶ [Notice provisions for termination and renewal.](#) When can a lease be renewed or terminated, and how must notice be given? The methods and timelines contained in these clauses may be strictly interpreted; don't assume there is a lease renewal just because rent continues to be paid.
- ▶ [Surrender clauses.](#) Do you remember what your space looked like before you moved in 10 years ago? Your lease probably requires you to return it to that condition when you leave.
- ▶ [Forum selection and costs.](#) The lease may require that another state's contract law be applied to disputes, or even require disputes to be litigated in a jurisdiction hundreds of miles away. If there's a binding arbitration clause, you may be precluded from access to the courts. Leases may also require payment of attorney's fees, court costs, and/or or predetermined "liquidated damages."
- ▶ [Merger/Entire Agreement clauses.](#) Handshake agreement? You might want to get it in writing: a merger clause specifically provides that the agreement of the parties is wholly contained within the contract, thereby barring any side agreements.
- ▶ [Indemnity and Defense.](#) Leases may require a party to defend, indemnify, and/or hold harmless another party for its wrongdoing or breach. Make sure it is clear what the scope and extent of the obligation is, and that insurers are aware of lease obligations.

Rarely is there a "form" commercial lease; most are individually crafted for the property and the parties involved. Unlike many take-it-or-leave-it consumer contacts, it is generally assumed that both parties to a commercial lease are sophisticated, and equally able to bargain lease terms at arms length. As a result, courts will more strictly enforce commercial lease provisions even when the result may seemingly be harsh.

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There may be instances where there's a compelling business reason to deviate from a prior agreement. In that regard, there's one lesson that United apparently hadn't learned: there's not many problems where a little more money won't induce people to get on the same page.

(One final thought on "overbooking" for you landlords out there: wouldn't it be nice if you could lease 110,000 square feet in a 100,000 square foot building.... and not go to jail for it?)

#### ABOUT WCRE

Wolf Commercial Real Estate is a full-service commercial real estate brokerage and advisory firm specializing in office, retail, medical, industrial, and investment properties in Southern New Jersey and the Philadelphia region. We provide a complete range of real estate services to commercial landlords, tenants, investors, developers, banks, commercial loan servicers and companies, guided by our total commitment to our clients and our community. Our team is devoted to building successful relationships, and we provide each client the highest levels of responsiveness, attention to detail, and communication even after the transaction is complete.

#### ABOUT THE AUTHOR

As Vice President of Corporate Strategies, Tony will work closely with the firm's sales professionals to spearhead the growth of the WCRE brand in southeastern Pennsylvania. With more than twenty years' experience in the legal and political arenas, he also brings a unique, multidisciplinary perspective that will help WCRE clients identify potential obstacles and capture new opportunities.

Tony has a deep understanding of the issues and people key to the real estate landscape in the region, having built trusted relationships with government and private sector leaders in both Harrisburg and Philadelphia. He has been actively involved in many civic institutions in Philadelphia, from community associations to advocacy non-profits.

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