

Do you really want *that* provision in your commercial lease?

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My colleague, John Friedemann, and I recently spoke to a group of landlords and tenants at the Chamber in my hometown of Healdsburg. We addressed some of the many issues that arise in commercial leasing. The group we spoke to had some great questions about hypothetical and not-so-hypothetical situations. One of the topics we discussed was the “attorneys’ fees” section of a commercial lease.

An attorneys’ fees provision of a commercial lease will usually look something like this:

“Attorneys’ Fees: In case suit should be brought for recovery of the Premises or for any sum due hereunder or because of any act which may arise out of the possession of the Premises, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including reasonable attorneys’ fees.”

The provision is often included in form leases, both residential and commercial, as well as in many leases that are custom drafted by attorneys. But, as with any agreement, just because a provision is included in a form or the first draft of a custom document, does not mean that it should be included in the final version.

An astute commercial lessor (“landlord”) would likely ask the following questions regarding each paragraph of the lease (before it is executed):

- “How will this provision affect me and my relationship with the tenant?”
- “Does this provision clearly set forth the terms of my agreement with the tenant?”

That same landlord might also consider:

- “Will there ever be any hope of recovering from the tenant, or will the tenant go straight into bankruptcy if a judgment against the tenant is ever obtained?”

A particularly astute commercial landlord might even go so far as to imagine the situation in which:

- a tenant goes to an attorney with a potential case against the landlord;
- the tenant has no money to pay the attorney; but
- the attorney finds the attorneys’ fee provision in the lease; and
- the attorney agrees to take the case at least in part because of the possibility of recovering attorneys’ fees.

Although it seems fairly innocuous, the provision excerpted above could actually empower a tenant to wage a legal battle against the landlord.

This illustration underscores the basic point. Although form leases can be a helpful starting point, and seemingly cost-effective at the outset, they may prove to be extremely costly if the terms are unclear or uncertain. Both parties should carefully examine what each provision of a form lease (and even custom lease agreements) actually says. Both parties should also be sure to understand the meaning and possible ramifications. Unclear and uncertain terms in a commercial lease can easily lead to costly litigation.