# Shopping Center Legal Update

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Is the Tide Starting to Turn on Calculating Commercial Tenants’ Escalating Rents?

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Rent escalation provisions, of course, are included in commercial leases to provide landlords with sums additional to the base rent. The escalator arguably is designed to offset the landlord’s actual or near-actual increases in building operation expenses. Landlords argue that such provisions are necessary to protect them from the ravages of inflation over the many years a long-term commercial lease is to run. Tenants, accepting the inherent fairness of such an assumption, typically accept the escalation provision in their leases as well, without much thought or analysis. It is beyond the scope of this article to analyze, in depth, the potential for abuse in the calculation of additional rent based upon various indices often employed in commercial leases; however, for two such discussions, see Sollis, “The Potential for Abuse in Calculation of the Porter’s Wage Escalation,” Vol. 4, No. 8, The Metropolitan Corporate Counsel (August 1996), at 49–50; and Wood, Negotiating the Dangerous Shoals of a Commercial Lease (1991), at 122–50 (downloadable in .pdf format as “Facilities Handbook” at www.officeleasingusa.com).

Similarly, commercial tenants have also been all too prone in the past to accepting common area maintenance (CAM) charges calculated by commercial landlords without much scrutiny. However, in these times of mixed sales, fierce competition and diminishing margins, some commercial tenants are increasingly taking a hard look at the calculation of such pass-on costs before they automatically cut a check.

Landlords’ Conduct
The examination of escalation clauses is not merely an academic concern. Some commentators assert that errors in CAM charge billings have become “the rule, not the exception” (Lane, “Analysis and Auditing: The New Frontier in Cost Control,” Area Dev., May 1995, pp. 26, 30), and that “Landlords convey a belief that landlords have been given a ‘blank check’ and can bill any extra charge as they see fit” (Ross, “A Tenant’s Bill of Rights on Extra Charges,” Shopping Center Digest, Oct. 19, 1992, at E-172; see also, Wood & Disciullo, Negotiating and Drafting Office Leases, §1.01(2003) (Landlord leases “are extremely onerous, carefully drafted, one-sided agreements, which seek to shift landlord’s costs and risks to tenant while at the same time carefully and quietly exacting hidden profits for the landlord.”) A Washington Post exposé on landlords’ CAM billings (Singleton, “Overcharging Overhead, Some Squeezed Landlords Are Padding Upkeep Costs, Experts Say,” Washington Post, Jan. 11, 1993, Washington Business, at 1) stated that while most overcharging is due to “accounting mistakes or oversight” “[s]ometimes the tenant is being gouged . . .” and the error “is deliberate” (Id.).

A few examples: (a) “a person on the payroll who had been dead for five years”; (b) tenant was overcharged “more than $13,000.00 because of a mistake that was double the market standard established by the lease”; and (c) the tenant was overcharged “$3,753.00 because the landlord ‘forgot’ to reimburse the tenant for a tax reduction following a successful appeal of the building’s assessment.” (Id. at 20). In one lawsuit, the plaintiff alleged that it was “billed for an insurance policy...
that covered $100,000 worth of artwork not displayed in the strip shopping center, and for two Mercedes-Benz automobiles" used by the landlord and not for business. (Id. at 21). Another commentator unearthed an instance in which "rent for a [shopping] center’s marketing office" was included in 6.7% of the strip centers' and 12% of regional malls’ CAM, while "major roof resurfacing work" was included in 35.9% of strip centers' and 60.7% of regional malls' CAM. (Gralla, “Facing the CAM Dilemma,” Shopping Centers Today, Aug. 1993 at 1). Indeed, the most common CAM overcharges cited by the Washington Post include (1) mischaracterizing excludable capital costs (such as roof repair) as includable maintenance charges; (2) “excessive management fees”; and (3) “[c]osts that are specifically excluded by the terms of a tenant’s lease are lumped into a general or miscellaneous category and passed on.”

Tenants’ Responses

The first hurdle is to determine the landlord’s actual operating costs. While most leases contain a provision entitling a tenant to challenge the landlord’s calculations of such amounts, far too often the clause obligates the tenant to make the challenge within a very short period of time—say, 30 days of the receipt of the demand for payment of such amounts—after which the landlord’s calculation is conclusive and binding. Moreover, the challenge may be made only after the payment of amounts demanded as additional rent or CAM, under a typical “pay now, fight later” commercial lease clause. Even where the tenant has 90–180 days to complete the audit, the technical review necessary to complete a thorough audit of an annual operating expense statement may prove to be prohibitively expensive for a small to mid-sized tenant. Obviously, a tenant must also know how its rent escalation or CAM charges are calculated, and what components are included. A tenant should demand that an actual calculation of such charges be provided and incorporated in its lease as an example of how the rate will be calculated in the future.

For example, presume you are a tenant and find yourself in litigation/arbitration with your landlord respecting its method of calculating rent escalations or CAM charges owing under your lease. You attempt to convince the court that the landlord’s methodology is transforming the intent of such a provision from serving as a means of recapturing the landlord’s increased operating costs into a windfall profit generator. Traditional case law, particularly in a jurisdiction following New York law, is not in your corner. The New York Court of Appeals decision in George Backer Management Corp. v. Acme Quilling Co., 46 N.Y.2d 211, 413 N.Y.S.2d 135 (1978) is typical. It addressed a complaint that an escalation clause was “unconscionable” because rent escalations were measured by a common industry-wide criterion, the RAB (Realty Advisory Board) labor rate, as opposed to actual labor costs of the building. New York City’s Realty Advisory Board and Labor Relations, Inc., negotiates on behalf of many commercial building owners in New York City with Local Union of the AFL-CIO, which represents most of the commercial building porters employed in New York City. “RAB labor rate” is typically defined in a standard commercial form lease utilized in New York City and amounts to an index and not the actual cost of labor to the landlord at the building that is the subject of the lease in issue; thus, a tenant may find itself paying additional rent, even though the landlord has not even hired a porter in the subject building. The Court of Appeals wrote:

... We also note that the lease in this case was entered into at arm’s length and, ultimately, on terms—most particularly in the lease rider where paragraph 39(b) is to be found—which were the residue of suggestions and counter-suggestions on which each of the two sophisticated parties had attempted to persuade the other to join it in a meeting of the minds. True, the language of the clause may seem dull and labored to the uninitiated, an unremarkable circumstance because it recites what is largely a mathematical formula to be applied on stated contingencies. But, taken step by step, any semblance of complexity disappears. Moreover, it was not a novel provision, but one commonly found in New York City commercial leases.

Nor was it the operation of the clause unconscionable. Acme assumed the precise risk of which it now complains—that the RAB labor rate would rise so as to substantially increase its monthly rental payments. But parties are free to make their own contracts. Here Backer no doubt believed that it was to its economic advantage to tie the rent escalation clause to the RAB rate; though it needed no other reason, perhaps Backer also believed that if it were able to operate the building at lower than prevailing cost, it and not the tenants should be the beneficiary of its enterprise. Acme’s view, fueled by its own self-interest, understandably would be the opposite.

It should also be noted that in many jurisdictions, such as New York, the traditional landlord-tenant relationship is viewed as a purely commercial one, negotiated at arm’s length, and not giving rise to fiduciary concerns. See, e.g., Mobil Oil Corporation v. Rubenfeld, 72 Misc.2d 392, 339 N.Y.S.2d 623 (Sup.Ct.QueensCo. 1972). And, unfortunately, that means, in many jurisdictions, that unless you have a contractual right to audit rent escalation or CAM charges forwarded by the landlord, you may not even be able to demand such relief as a matter of equity:

We also find that the court did not err in dismissing the tenant’s fifth cause of action seeking an accounting concerning some alleged overcharged “common area” expenses. A fiduciary relationship between the parties is necessary in order to obtain an accounting [citations omitted]. The tenant has not established a fiduciary relationship justifying such a remedy [citations omitted]. (Top-All Varieties, Inc. v. Raj Dev. Co. Inc., 173 A.D.2d 604, 570 N.Y.S.2d 184 (2nd Dept. 1991).)
A few courts, however, have begun to recognize that in so far as the calculation of additional rent under a commercial lease is not subject to generally accepted accounting procedures and standards, and, as a result, the tenant is often at the mercy of a landlord in connection with the calculation of rent escalations, the law should impose a higher standard on landlords than the traditional law of the jungle. The Maryland Court of Special Appeals in *P.V. Properties, Inc. v. Rock Creek Village Associates Limited Partnership*, 77 Md.App. 77, 549 A.2d 403 (1988), held that a qualified fiduciary relationship arises between a landlord and tenant, entitling the tenant to an accounting from the landlord of the items assessed against it for CAM where all the information respecting those charges was in the exclusive control of the landlord. The court first noted that Maryland law obligates contract parties to an implied contractual condition of dealing with each other in good faith. The court reasoned that such an obligation of good faith and cooperation implied in every contract gave rise to the implied requirement on the part of the landlord to disclose fully its cost data and the basis upon which the tenant’s CAM charges were computed. Moreover, the court felt that reason and fairness required that the tenant be afforded some means of verifying the charges against it:

Otherwise, the tenant has no way of determining whether the charges it is being forced to pay fall within the scope of its obligations under the lease. The parties are under a duty to act in good faith and deal fairly with one another ([citations omitted]). Therefore, the landlord is under an obligation to act in good faith in incurring, recording and assessing common area maintenance charges.

A few other courts have been willing to take a harder look at the equities involved in the computation of, and the attendant obligation to pay, escalation rent or CAM charges demanded under a commercial lease. For example, in *Newmark & Company Real Estate, Inc. v. C&G Trimming Corp.*, 134 Misc.2d 371, 511 N.Y.S.2d 205 (NYCCC 1987), the court held:

Notwithstanding the fact that defendant read and understood the lease, it was entitled to expect that the computation of rent escalation, in futuro, would be made in good faith. It should be noted that the facts set forth in the CPA statement are not matters within the defendant’s own knowledge, nor does the defendant have the means available to it of knowing the truth by the exercise of ordinary intelligence.

This court holds that a lease provision which purports to conclusively determine a rent escalation by a computation rendered by landlord’s CPA is nevertheless subject to the right of the tenant to demonstrate, in a plenary action, that the computation was made in error or was made fraudulently . . . .

*Accord, World Wide Adjustment Bureau v. Edward S. Gordon Co., Inc.*, 111 A.D.2d 98, 489 N.Y.S.2d 231 (1st Dept 1985) (sustaining a claim of fraud on allegation that the escalation clause in issue established a formula for determining rent escalations, which was not contingent upon actual increases in real estate taxes and labor rates, thus leading to the realization of windfall profits by the landlord and creating a situation contrary to that represented by the landlord, who advised the tenant that the landlord would only be made whole for actual increases in operating charges).

Another helpful line of cases suggests that once the court is comfortable that an escalation or CAM clause was intended to do no more than to pass on to a tenant a proportionate share of the cost increases the landlord actually incurred, it should not hesitate to strike down an overreaching commercial landlord’s attempt to turn such a clause into a windfall profit center. For example, in *1100 Avenue of the Americas Associates v. Bryant Imports*, 161 Misc.2d 582, 616 N.Y.S.2d 848 (App.Term 1st Dept. 1994), the lease between the landlord and tenant contained a tax escalation clause requiring the respondent tenant to pay a specified percentage of real estate tax over the chosen base year. Subsequent to entering this lease, the landlord entered into a net lease with a third party wherein the third party occupied the entire premises except for the tenant’s space, and the third party agreed to pay the subject real estate taxes in their entirety. The court held that the economic realities of the situation precluded the landlord from obtaining from the tenant additional rent attributable to the real estate tax escalation clause. The court emphasized that tax escalation clauses have been construed as requiring actual payment by the landlord before the tenant’s contractual obligation to pay additional rental is activated. Shifting the obligation to pay the tax to another party must be viewed, the court stated, as an event that released the tenant from any obligation to pay the landlord’s merely theoretical increase in costs.

Similarly, *Fairfax Co. v. Whelan Drug Co.*, 105 A.D.2d 647, 481 N.Y.S.2d 366 (1st Dept. 1984), involved the attempt of a landlord to impose additional rental under a rent escalation clause, despite the fact that the landlord, as a result of a residential conversion of the subject commercial building, received a tax abatement under a local code. The court held that the tax provision clause was meant to provide relief for the landlord where an “assessed” tax required actual payment. In this case, the tax bill was actually reduced by more than 50%. “To allow a 4.95% payment on taxes not requiring actual payment would provide Fairfax with a windfall not envisioned by this clause.” *Accord, Rand First Associates v. 363 East 76th Street Corporation*, 297 A.D.2d 506, 747 N.Y.S.2d 13 (1st Dept. 2002); compare, however: *Sage Realty Corporation v. Omnicom*, 183 Misc.2d 574, 705 N.Y.S.2d 500 (Sup.Ct.N.Y.Co.), aff’d, 278 A.D.2d 57, 718 N.Y.S.2d 304 (1st Dept. 2000) (“there is no requirement in this state that escalation clauses in commercial leases be tied to actual costs”) with *1411 Trizicbahn-Swig, LLC v. Henry J. Siegel Co., Inc.*, 2001 NY Slip Op 40449U, 2001 N.Y. Misc. LEXIS 691 (Sup.Ct.N.Y.Co. 2001) (“Nevertheless, where the lease does not explicitly exclude a landlord’s actual costs as a measure of rent escalation computations, the court may look to actual costs as a basis for rent increases intended to offset cost of living increases, in recognition of the potential for unjust enrichment”); and *Rudd v. 176 West 87th Street Owners Corp. New York Law Journal*, Jan. 5, 2000, at 27 (Sup.Ct.N.Y.Co.) (“Unless the lease expressly provides otherwise, a landlord should not make a windfall profit from a rent escalation clause”).
Recently, in an unreported decision, Framington CVS, Inc., et al. v. Westfarms Associates, et al. (Circuit Court for the County of Oakland, State of Michigan, April 15, 2003), drugstore giant CVS, Inc., alleging that it had been overcharged and was entitled to a refund, won the right from Circuit Judge Deborah G. Tyner to audit the calculation of CAM at seven Taubman Malls in Michigan, Connecticut, Maryland and Virginia, and by defendant Westfarms, also located in Connecticut. Relying on the P.V. Properties decision discussed above, the court held that CVS was entitled to discovery to determine the “actual amount” of CAM due defendants, and, perhaps even more importantly, stated that there existed “a limited fiduciary responsibility” owing by the landlord to the tenant, particularly where the landlord maintained exclusive control over the records that documented its expenses for maintenance, and tenants “had no control over how their money was spent and had to place their trust in the landlord’s good faith.”

To be fair to landlords, many assert that “savvy landlords want to control CAM costs “ . . . because by controlling CAM costs, they can increase base rent.” (Newman, “Making Landlords Accountable for CAM Charges,” Real Est. Rev., Winter 1994, at 72, 73). For efforts by landlords to control CAM, see Gralla, supra, at 27 (zero-base budgeting and other efforts). Some landlords have tried to deal with CAM abuse issues by eliminating CAM altogether and going to a flat fixed annual increase. (Gilles, “Streamlining the Negotiating Process by Using Either Flat CAM or Gross Leases,” Comm. Leasing L. & Strategy, Aug. 2000, at 1). Indeed, the whole concept of billing for CAM or additional rent invites fierce dispute because, as one commentator wrote, “what other product or service do you purchase where the exact cost of the item is unknown until the end of the year?” (Ross, supra, at E173).

The moral: Know how your rent escalation provisions operate before you sign your lease. To the extent possible, make sure you are paying no more than the landlord’s actual increase in operating expenses, or a reasonable approximation of those expenses. Get assistance from seasoned and knowledgeable professionals when auditing the landlord’s calculation of the escalation. Finally, in the worst of all worlds, consider the possibility that you may have an argument in court that something other than the law of the jungle applies to the landlord’s calculation of additional rent owing under your lease.

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Anticipatory Repudiation: Roadmap to a Remedy

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During 2002, there were 589 shopping center construction starts in the United States. It is generally recognized that the best indication of the overall likelihood of success of any proposed new shopping center or expansion of an existing shopping center is the identity and caliber of the proposed tenant roster the developer attracts to the project. Pre- eminent among the tenant roster are the anchor tenants that are the key draw for attracting the other specialty or small-store tenants to the project and customers to the center once it opens. The anchor tenants put the project on the map. This is the case whether the proposed project is a multi-anchor regional shopping mall or a community center anchored by a supermarket, home improvement center or discount department store.

A well-negotiated anchor store lease will contain intricate terms and conditions covering the myriad issues relating to construction of the anchor store, whether by the landlord or by the anchor tenant, any other anchor stores, and the rest of the new project, including design and material benchmarks, exterior site plan and interior layout, reservations of future development sites, obtaining utility and governmental approvals, financing, other tenant leasing and the like, and will have a series of milestone events and a related time line. The anchor store lease will also contain parameters for the extension of certain milestones based on criteria negotiated to meet the specific exigencies of the project (and this may, in fact, take the form of subsequent amendments of the lease) and force majeure extensions. In addition, the lease will typically provide remedies for missed milestones, which may range from rent abatements, reimbursement for additional expenses incurred due to the delay, per diem penalties, liquidated damage payments and termination rights. Depending on the relative bargaining power of the parties, the availability of the range of remedies will be more or less calibrated to the degree of actual economic injury caused by the missed milestone. In general, if particular development milestones are not met on a timely basis, one would expect the applicable lease remedy would apply and be followed.

What happens, however, in a case where the anchor tenant or the landlord, prior to any of the stated milestones or otherwise prior to the date when performance by the other party is due, either by its actions, inactions or statements clearly indicates that it will not perform under the lease? This might happen for any of a variety of reasons. In the case of a tenant, the anchor tenant (or its parent company) may determine as a matter of company policy to discontinue the particular store operation or concept, to withdraw from or not enter into a particular geographic market, to downsize for market-specific or due to general economic conditions, or because it already has another store in the market. The landlord may refuse to perform because it has determined that the economic terms of the lease are no longer acceptable, it has decided to downsize the project or it would prefer to lease the space to another tenant. Does the injured party have to continue to perform its obligations, which may, in fact, be in vain, to preserve its claims? Can it treat the repudiation as an immediate breach and attempt to pursue alternate plans and sue for damages?

This article will focus on a recent case in California, which considered the plight of a landlord when its anchor tenant told it they would not be coming to the center 18 months prior to the date the landlord’s performance was due; the article will also look at recent cases in New York where the doctrine of anticipatory breach of a lease was applied.

California—The Eastgate Case
In *Super Saver, Inc. v. Eastgate Associates*, 2002 WL 475383 (Cal.App.2 Dist, 2002) [not officially published], a California intermediate appellate court considered claims by a landlord against its anchor tenant for anticipatory breach of its lease. Its decision affirming as to the tenant’s liability, while remanding for further proceedings on the question of damages, is particularly illuminating as to the legal and factual contours of such claims.

Eastgate Associates (“Eastgate”) entered into a lease with Super Saver, Inc. (“Super Saver”) for a 71,375 square foot store as the anchor tenant for Eastgate’s proposed redevelopment of an existing shopping center located in Fresno, Calif. Super Saver’s parent company guaranteed its performance under the lease. The lease provided that Super Saver would design and renovate the leased building at its own expense and, after construction was completed and Super Saver opened for business, Eastgate would reimburse Super Saver its construction costs. The lease allowed Super Saver to use the premises “for any lawful purpose or no purpose.”

The lease did not contain an express operating covenant, but the lease did require Super Saver to fixture and to open the premises to the public for business as “a general food supermarket with a strong price image,” fully stocked and staffed for at least one day. As is customary in anchor tenant leases, the Super Saver lease contained multiple conditions or milestones to be satisfied by the landlord or waived by the tenant within a 24-month contingency period.

The conditions pertinent to the lawsuit were (1) a financial condition requiring Eastgate to have the financial capability to pay the construction reimbursement amount and to complete the construction of certain improvements to the shopping center common areas, (2) a requirement that all bankruptcy proceedings then pending as to Eastgate and creditors’ claims would be resolved and (3) title to the shopping center had to be satisfactory to Super Saver.
Six months into the 24-month contingency period, Eastgate had obtained an interim loan, retired its prior debt and obtained the dismissal of the bankruptcy proceedings. Eastgate was also in the process of obtaining a construction loan and permanent financing for redevelopment of the center. The record indicated that Eastgate kept Super Saver apprised of such progress.

Nonetheless, only six months after entering into the lease, Super Saver notified Eastgate that it would not come to the Eastgate center because it had made a corporate decision not to proceed with the Super Saver warehouse store format and operating the Eastgate store as a smaller traditional supermarket (what would have been its only traditional supermarket in the Fresno area) was not economically feasible for the parent guarantor. In response, Eastgate sought reassurances from Super Saver that it would perform under its lease, and indicated that the lease was a crucial element to Eastgate obtaining a construction loan and permanent financing. Super Saver replied that Eastgate should no longer represent or hold out to third parties that Super Saver was its anchor tenant or would operate a supermarket at the center. Three months later, Super Saver notified Eastgate of certain title objections and that it would terminate the lease in 30 days if Eastgate failed to cure the identified title objections. Thereafter, Super Saver officially terminated the lease.

Super Saver commenced an action for declaratory relief, claiming that Eastgate had failed to satisfy the conditions precedent in the lease because it did not satisfy the title and financing conditions, and, accordingly, the lease was lawfully terminated and Super Saver owed no further obligations to Eastgate under the lease. Eastgate counterclaimed against Super Saver and the guarantor seeking damages for the anticipatory repudiation of the lease and guarantee.

Based on testimony of Super Saver’s representatives and an impressive array of Super Saver internal memoranda, the court found that (1) Super Saver had unequivocally repudiated the lease and guarantee only 6 months into the 24-month contingency period by declining to perform because Super Saver stores were not doing well elsewhere, reasons that were entirely unrelated to the contingencies in the lease; (2) until Super Saver’s repudiation, Eastgate was performing and making substantial progress in meeting the lease contingencies; and (3) but for Super Saver’s repudiation, Eastgate would have obtained its financing well within the 24-month contingency period. The court found that Super Saver’s refusal to proceed with the lease resulted in Eastgate’s not being able to proceed with its financing applications, impeded Eastgate’s ability to do certain aspects of the landlord’s work and forced Eastgate to hold up other time-critical aspects of the redevelopment project. The jury rendered a verdict, finding that Super Saver breached the lease and awarded damages to Eastgate based, in part, on a finding of the diminished value of the shopping center because of the breach.

On appeal, Super Saver argued that Eastgate had failed to prove an essential element of its claim for anticipatory breach of the lease, and that Eastgate had the ability to perform under the lease at the time of Super Saver’s repudiation. Super Saver also challenged the award of consequential damages measured by the diminished value of the shopping center. The appellate court affirmed the verdict as to Super Saver’s liability but reversed, in part, and remanded to the trial court for a determination of consequential damages that could be recovered.

The appellate court was guided by the well-settled principle that California recognizes an action for anticipatory breach when one party communicates a definite and unconditional repudiation of the contract to the other party, which action may be brought immediately even though the repudiation takes place long before the time prescribed in the contract for the promised performance and before conditions specified in the contract have even occurred.

The court dismissed Super Saver’s contention that Eastgate had to prove its ability to perform fully under the lease as of the date of Super Saver’s repudiation (which, if accepted, would have had the effect of accelerating by 18 months the due date for Eastgate’s performance). Instead, the court ruled that the injured party need only prove it would have had the ability to perform its obligations at the time its performance was due under the lease, but for the other party’s repudiation. This “capacity to perform” test recognizes the reality that the breaching party’s wrongful repudiation often renders the other party’s later performance impossible. The appellate court concluded that Eastgate had carried its burden to prove not only that, at the time Super Saver repudiated the lease, Eastgate had the capacity to perform its contingency period obligations by the 24-month date, but also that it had already taken substantial steps to perform under the lease until Super Saver repudiated, and that the repudiation prevented Eastgate from thereafter fulfilling its other obligations.

The jury awarded Eastgate damages based on two elements: (1) present value of the rent under the Super Saver lease as of the date of the jury award and (2) consequential damages measured by the diminution in value of the entire shopping center attributable to Super Saver’s breach, including lost rents from the shopping center’s other tenants.

On appeal, Super Saver did not challenge the jury award for rent under the Super Saver lease, but instead argued that Eastgate was entitled to recover only limited consequential damages for making repairs, retaking, preparing for and re-letting the premises leased to Super Saver. It argued that measuring the consequential damages by the diminished value of the rest of the shopping center was unforeseeable and speculative because no satellite leases had been signed at the time of Super Saver’s breach and because the Super Saver lease contained no obligation of continuous operation.

The appellate court found that the consequential damages recoverable should not be limited to damages for repairing and re-letting the leased premises, reasoning that California’s governing statutes and case law on consequential damages permitted recovery of consequential damages that were reasonably foreseeable by the parties when they entered into the contract and are the proximate result of the breach.
In measuring the consequential damages, the appellate court considered the terms of the lease to determine what was in the contemplation of the parties. In so doing, the appellate court identified as crucial the fact that the Super Saver lease did not contain a continuous operation covenant and, therefore, rejected consequential damages based on the diminished value of the rest of the shopping center as unforeseeable. In addition, the court determined that an award for diminished value of the entire shopping center was speculative since Eastgate had no leases with satellite tenants at the time of Super Saver’s repudiation.

The case was remanded to the trial court to ascertain the correct measure of foreseeable consequential damages “based on the nature of the deal and the parties’ expectations,” and subsequent proceedings are still pending.

The New York Cases

New York courts also have recognized an action for anticipatory breach or repudiation of commercial leases, although none of the decisions have involved an anchor tenant lease. 150/160 Associates v. Mojo-Stumer Architects, Inc., 571 NYS2d 520 (A.D.2d, 1991), involved a 10-year lease of an office building. The tenant notified the landlord four months prior to the date the landlord was to deliver possession of the premises that it would not take possession of the premises and repudiated the lease. Eventually, the landlord re-let the building to another tenant. The replacement tenant lease was for higher rent. The landlord sued to recover damages for unpaid rent for the period the building remained vacant until the commencement date under the replacement tenant lease.

The lower court granted summary judgment in favor of the landlord, finding, as a matter of law, that the landlord was entitled to treat the tenant’s repudiation of the lease four months prior to the commencement of the term as an anticipatory breach of the lease. It was, therefore, neither required to tender performance nor prove its ability to perform the lease subsequently, and was entitled to damages in the amount of the rent prescribed in the breached lease for the time the building was vacant. The appellate court affirmed on all accounts.

The New York Court of Appeals, the highest court in the state, recognized the doctrine of anticipatory breach of a lease by the lessor in a 1998 decision [IBM Credit Financing Corporation v. Mazda Motor Manufacturing (USA) Corporation, 684 NYS2d 162 (1998)]. This case involved a very complicated 23-year leveraged lease transaction pursuant to which IBM, as lessor, was to engage in a sale/leaseback transaction involving construction costs in excess of $500 million and over $1 billion in rental payments. The leveraged lease documents contained provisions for adjustments to be made to the rent prior to the commencement of the lease in the event certain kinds of changes in tax law occurred prior to closing which adversely affected the stated tax assumptions underlying the transaction and the net economic return to be realized by IBM. Five months after the lease was executed, changes in tax law came about with the passage of the Tax Reform Act of 1986.

Initially, IBM notified the lessee, Mazda, of certain tax law changes and proposed rent adjustments to take those tax law changes into account; Mazda accepted the adjustments. Subsequently, IBM notified Mazda that, because IBM might be subject to the newly enacted alternative minimum tax (“AMT”), the lease rent would have to be subject to annual adjustments for each year of the lease term. IBM estimated that Mazda’s additional rent might escalate by as much as $113 million over the lease term. Under the lease, Mazda had the right to cancel the lease prior to the closing of the sale/leaseback transaction and commencement of the lease if, as a result of any tax law change, rents increased and the leveraged lease arrangement would be more costly than conventional financing.

IBM claimed that it could not quantify the effect of the AMT because it could only be determined on a year-by-year basis and, therefore, IBM could not deliver a revised rent schedule prior to the lease commencement—even though it was required by the lease. Mazda disputed IBM’s assertion that the AMT was a change in tax law as contemplated by the lease agreement. Moreover, Mazda argued that IBM’s failure to deliver the revised rent schedule showing the impact of the AMT on the rents deprived Mazda of its cancellation rights.

IBM refused to go forward with the transaction unless Mazda accepted its interpretation of the lease. Mazda moved quickly to enter into a leveraged lease transaction with another company because the deadline for concluding this type of transaction while retaining certain grandfathered tax benefits was fast approaching.

IBM sued Mazda, claiming it breached the lease agreement, and sought recovery of total damages in excess of $171 million and over $6 million for transaction expenses. Mazda counterclaimed that it was IBM that breached the agreements and that, as a result of having to negotiate with another party, it sustained additional transactional expenses in excess of $5 million. After a bench trial, the trial court found that IBM had breached the agreement by its insistence on the new tax law interpretation, which was untenable from an economic viewpoint and outside the contemplation of the agreement; its refusal to go forward otherwise constituted an anticipatory repudiation of the agreement and, that in the face of IBM’s untenable demands, Mazda properly sought a hasty renegotiation of the leveraged lease deal with another company.

The trial judge dismissed IBM’s complaint and entered judgment in favor of Mazda on its counterclaims and awarded damages of over $5 million for additional expenses arising from the substitute transaction. The intermediate appellate court and the court of appeals each affirmed the decision of the trial court. The court of appeals held that IBM’s demand that Mazda accept a totally untenable contract interpretation, coupled with its refusal to perform its obligations unless Mazda capitulated to its interpretation, constituted an anticipatory breach of the contract.
A New York case decided in 2002 illustrates an interesting contrast on anticipatory breach. In *Canali USA, Inc. v. Solow Building Company, L.L.C.*, 739 NYS2d 362 (App.Div.1st Dept., 2002), an office lease tenant brought a breach of lease action against its landlord on the grounds that the landlord wrongfully rented to a third party additional premises leased to the plaintiff. Under the tenant’s lease, the landlord was required to make certain improvements to the additional space and the lease term was to commence on the additional premises lease commencement date.

The landlord gave the tenant notice that the work was substantially completed; the tenant responded that the work was not completed in certain respects. Thereafter, the landlord leased the new space to someone else. The landlord claimed the tenant’s refusal to acknowledge performance of the landlord’s work and to take possession of the additional premises was based on an untenable interpretation of the lease that constituted an anticipatory breach and entitled the landlord to rent the premises to a third party. The appellate court determined that the tenant’s interpretation of the lease as requiring the work to be completed, not just substantially performed, 10 days before its commencement, was not only tenable but had also been earlier communicated to the landlord without objection. The court identified the following as crucial: (1) the tenant’s rejection of the landlord’s performance notice requested that the landlord complete the work; (2) the tenant later offered to settle the dispute by agreeing to a lease commencement retroactive to the date that the work was completed; and (3) the tenant otherwise gave no indication of an intent to forego its obligations, let alone the sort of definite and final communication necessary to justify a claim of anticipatory breach. Thus, the court determined that the tenant had not breached the lease and affirmed the lower court’s grant of partial summary judgment in favor of the tenant on the issue of the landlord’s liability for breach of the lease.

In summary, the lessons to be gleaned from the California and New York decisions discussed are as follows: a claim for anticipatory breach or repudiation of a commercial lease will be sustained when (1) one party repudiates the lease by definite and unequivocal communications, made in advance of the dates required for performance, that it will not perform its obligations under the lease; (2) for a reason or reasons neither recognized nor contemplated by the agreement (e.g., a corporate decision to discontinue a particular store format or the assertion of a contract interpretation that is untenable on its face and outside the contemplation of the agreement); (3) the injured party can prove it had the capacity to perform its future lease obligations when due; and (4) the injured party could not perform its future lease obligations due to the other party’s repudiation (the so-called “but for” test). The repudiation must be definite and unequivocal—i.e., it does not contain any offer of an opportunity to cure, and it cannot be deemed to be a “lurking repudiation” where it is followed by a reasonable retraction.

The measure of damages for an anticipatory breach of lease by the tenant will generally be the value of the rents prescribed by the breached lease for the period the lease premises remain vacant plus consequential damages relating to re-letting the space or obtaining substitute performance. The New York and California cases on anticipatory breach did not specifically comment on whether the landlord would have a duty to mitigate damages. In this connection, it should be noted that New York’s highest court reaffirmed its adherence to the non-mitigation rule in the context of a breached commercial lease in a 1995 ruling.

On the other coast, California has a comprehensive statutory scheme of landlord’s remedies, which gives guidance to the landlord in its effort to mitigate and, at the same time, permits the landlord to recover foreseeable consequential damages proximately caused by the tenant’s default. As the Eastgate case demonstrated, the foreseeable consequential damages recoverable in an anticipatory breach case in California will turn in significant part on the level of operating commitment the anchor tenant had made in the lease.

A mitigation requirement in the context of an anchor tenant anticipatory breach should be tempered by the landlord’s needs to reevaluate all of its options totally before deciding whether to re-let and how to carry out the re-letting and the development of the center—e.g., will the landlord try for a new anchor tenant, or will the landlord attempt to subdivide and market the space to two or more other tenants? There are many other possible options that the landlord will want to evaluate, which should be taken into account before proceeding, given the fact that the tenant’s breach is what has created the nightmare situation for the landlord. Moreover, where the anchor tenant lease contains liberal assignment and subletting provisions in favor of the anchor tenant, the anchor tenant could have mitigated its own damages, and this should militate in favor of giving the injured landlord significant freedom in deciding how and when to proceed.

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Termination of Lease Resulted in Terminated Guaranty:
Restaurant Lease Gives Landlord Heartburn

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Many shopping center landlords require a personal guaranty to be signed by the principal(s) of their tenants, particularly if the tenant entity is a “start-up” company or otherwise has insufficient financial statements to satisfy the landlord. A recent Florida appellate court decision rebuked a landlord that tried to hold a guarantor liable for a tenant’s lease default after the landlord had entered into a termination agreement with the tenant.

In Amerishop Mayfair, L.P. v. Billante, 833 So. 2d 806 (Fla. 3d DCA 2002), the Florida Third District Court of Appeal (which includes the Miami area in its jurisdiction) affirmed the trial court’s decision, holding that when a landlord signed a termination agreement with the tenant (without notice to or consent of a guarantor of the lease), the guarantor was also released from liability.

In the Amerishop case, the landlord and Thomas Specialty Restaurants entered into a shopping center lease in February 1997. Billante signed a guaranty in which he guaranteed all the terms of the lease for the first two years of the lease. With the written consent of the landlord and the guarantor, the tenant assigned the lease to La Fontaine Restaurant, L.C. Later, La Fontaine Restaurant, L.C., defaulted on the lease, and the landlord and La Fontaine Restaurant, L.C., entered into a termination agreement regarding the lease, which released the tenant from further liability under the lease, and which contained a provision in which the landlord preserved its rights under Billante’s guaranty. However, Billante was not a party to the termination agreement nor was he notified that the termination agreement was to be executed.

A month after the termination agreement was effective, the landlord sued Billante to enforce the guaranty. The trial court ruled in favor of Billante, holding that his obligation as guarantor terminated when the tenant’s obligation was discharged pursuant to the termination agreement, and the appellate court affirmed the decision.

The landlord had attempted to argue that the language of the guaranty provided for Billante to remain liable for the tenant’s breach of the lease. The guaranty provided that “the obligations of the Guarantor herein shall be extensive with and shall remain in effect as long as Tenant’s obligations in and under said Lease . . . EXCEPT HOWEVER, bankruptcy or insolvency of the Tenant shall not release Guarantor from liability hereunder . . . .” The court rejected the landlord’s argument that the tenant was insolvent, thereby making the guaranty enforceable.

The appellate court concluded that, based on the language of the guaranty, once the tenant’s obligations ceased, so did the guarantor’s. The court also pointed out that Billante was not a party to the termination agreement and, therefore, not bound by its terms.

Although the court rejected the landlord’s argument that Billante’s obligations under the guaranty were not affected by the termination agreement, it is important to note that Billante’s guaranty expressly provided that:

. . . (3) no extensions, forbearance or leniency extended by the Landlord to said Tenant shall discharge the Guarantor and the Guarantor agrees at all times it will be liable notwithstanding same and notwithstanding the fact that the Guarantor has had no notice of any said default or of any said forbearance or extension; (4) Landlord and Tenant without notice to or consent by Guarantor may at any time or times enter into such modifications, extensions, amendments or covenants respecting the said Lease and that Guarantor shall not be released thereby, it being intended that any joinder, waiver, consent or agreement by Tenant by its own operation, shall be deemed to be a joinder, consent or agreement by Guarantor with respect thereto and that Guarantor shall continue as Guarantor with respect to the said Lease as so modified, extended, amended or otherwise affected.

Therefore, this language did not persuade the court that a release of the tenant constituted a “forbearance or leniency” or that the release constituted one of the “modifications, extensions, amendments or covenants” that would be permitted by the guaranty without resulting in a release of Billante. In fact, the court distinguished a case that held a guarantor to be liable, even after the tenant was released from liability because, in that other case, the guaranty expressly provided for the guarantor to remain liable after the tenant was released.

This holding should cause landlords and their attorneys to use even more care in dealing with amendments or other actions regarding those leases that are guaranteed. As the landlord learned in this Florida case, reliance on language in the guaranty that purports to keep the guarantor responsible despite modifications, extensions, amendments, etc. could turn out to be costly for the landlord. It is always good practice to have a guarantor join in the execution of a lease amendment, renewal or any other type of modification of the lease in order to confirm that the guarantor remains liable for its guaranty of the lease as so modified.

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Judicial Alchemy—Spinning Letters of Credit into Security Deposits

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Introduction
Prudent landlords have long looked to third parties to supply credit enhancement for commercial leases. These sources have included guaranty contracts, insurance or surety contracts, and standby letters of credit. This protection is expressly bargained for to secure repayment of monetary inducements provided to tenants that might not be recouped, upon default and bankruptcy filing by a tenant, if the Bankruptcy Code’s damage limitation was imposed. Section 502(b)(6) of the Bankruptcy Code caps the claim of a real property lessor for damages when its commercial lease is rejected.1 Being able to avoid this cap, through the use of third-party security, enables transactions to occur that might otherwise be viewed as too risky.

By far, the most popular instrument for third-party security has been the standby letter of credit. In a standby letter of credit transaction, there are three independent agreements: The first agreement is the lease; the second agreement is between the issuing bank and the tenant, and typically provides for repayment by the tenant to the issuing bank in the event the bank makes payment under the third agreement, which is the actual letter of credit. It is under this third agreement that the issuing bank becomes primarily liable to the landlord.2 The Fifth U.S. Circuit Court of Appeals in Kellogg described this by stating: “The shifting of liability to the bank rather than to the goods or services provider is the main purpose of the letter of credit.”3

Landlords have reasonably come to believe that the standby letter of credit and its proceeds were not property of the debtor’s estate. With a minor exception,4 landlords can draw under a standby letter of credit without fear of violating the §362 automatic stay or being enjoined under §105 of the Bankruptcy Code. This belief is embodied in the long-standing “independence principle,” which views the issuing bank’s obligation to the landlord as being absolute regardless of the terms of the underlying agreement or any dispute relating to such agreement.5

PPI Enterprises—The Beginning Thread
While it does appear that the reluctance of bankruptcy courts to interfere with payment under a standby letter of credit remains intact, two recent cases have caused substantial erosion to the benefits previously enjoyed through their use. In the first, the Third U.S. Circuit Court of Appeals determined that a landlord’s capped claim should be further reduced by the amount of its draw under a standby letter of credit. Solano v. PPI Enterprises (U.S.), Inc. (In re PPI Enterprises (U.S.), Inc.) 324 F. 3rd 197 (3d Cir. 2003). In analyzing whether to reduce the claim or allow the landlord to apply the letter of credit proceeds outside the capped damages, the court balanced the equities involved.6 While indicating that it might find that the equities would compel application of the proceeds to the capped damages,7 the court did not decide this as a general rule. Rather, the court stated: “Nonetheless, we need not decide the underlying question because it is clear the parties intended the letter of credit to operate as a security deposit.” PPI at 210. The lease language which the court found evidenced this intent was similar to language found in many standard leases that provide for delivery of a letter of credit.8 This may cast doubt over the credit integrity of many leases in the marketplace today. The thoughtful planning that went into a landlord’s bargain for third-party security has been disrupted by this court’s inclination to discern “intent” from lease language that seemed to indicate just the opposite. Fortunately for landlords, the court stopped there. In its opinion, the court seemed to want to go beyond what was necessary to decide the case. Had it decided that letters of credit should be afforded the same treatment as traditional security deposits, it very well may have reached the issue presented in the second of these cases.

Stonebridge—The Transformation
In PPI, the letter of credit proceeds were not in excess of the §502(b)(6) cap. As a result, the court did not have to reach the issue of whether the landlord could draw and retain letter of credit proceeds in excess of the cap. This issue, however, was recently addressed in Faulkner v. EOP-Colonmade of Dallas LP (In re Stonebridge Technologies Inc.), 29 B.R. 63 (Bankr. N. D. Tex. 2003). Pursuant to the terms of its lease, Stonebridge was required to provide security for performance of the lease to its landlord. In addition to a cash security deposit of $105,888, it caused its bank to issue a standby letter of credit in the amount of $1,430,065.74. To secure the issuing bank in the event of the bank’s payment under the letter of credit, Stonebridge executed a note payable to the bank and secured this obligation by a certificate of deposit in the amount of $1,250,000.00. The terms of the letter of credit provided that $1,430,065.74 was available for payment upon submission by the landlord of a draft drawn on the bank accompanied by the original of the letter of credit and the landlord’s statement that the draft represented funds due and owing as a result of the tenant’s failure to comply with one or more terms of the lease. There was no requirement of notice to the tenant.

Prior to the landlord’s draw under the letter of credit, the tenant had informed the landlord that it intended to reject the lease. It entered into an agreement with the landlord, which was reported to the court, that the lease would be rejected no
later than Oct. 23, 2001, and no earlier than Oct. 1, 2001. The court did not sign an order rejecting the lease until Nov. 8, 2001, but when it did so the rejection was effective as of Oct. 1, 2001. While it is not clear from the court’s opinion, it is apparent that the tenant “negotiated” the retroactive rejection to minimize its administrative rent obligations. The landlord drew under the letter of credit after the agreement was announced to the court but before the order was signed. At the time of filing its bankruptcy petition in September 2001, Stonebridge had not paid its September rent.

Stonebridge’s liquidating trustee sued the landlord to recover the excess of the letter of credit proceeds over the capped claim and, as assignee of the bank’s claims, sued for misrepresentation in connection with the draw under the letter of credit. The court found that the landlord had breached the lease by seeking more than the capped damages in its draw under the letter of credit. It awarded the excess to the trustee as damages. Further, the court awarded the trustee, as assignee of the bank, damages as a result of initiating the draw before the court signed the order rejecting the lease. These damages were determined to be the difference between the amount of the draw and the value of the collateral that the bank was able to recover on its secured claim. What is unusual about this aspect of the decision is that it appears the bank would have been required to properly pay the landlord just two weeks later upon the court signing the rejection order.

Like the PPI court, Stonebridge looked to the lease provisions that allowed the delivery of the letter of credit to be part of the security deposit. This decision severely undermines the independence principle. Under the court’s analysis, any property, guaranty or other contract denominated as security would be subject to the §502(b)(6) cap. This would include a pledge or guaranty by a third party, which was never intended to be so limited.9 The court stated it was not abandoning the independence principle; rather, it distinguished the principle by holding that it was merely addressing the manner in which the proceeds of the letter of credit would be applied—not how they would be distributed.

Despite this statement, it is clear the Stonebridge court did more. It was the distribution of the proceeds by the landlord in an amount in excess of the cap that the court found to constitute a breach of the lease. There does not appear to be authority in the Code, legislative history or any existing case law for the court’s limiting a landlord’s draw under a standby letter of credit or its application of such proceeds to the landlord’s capped claim amount. This decision is presently being appealed.10

Conclusion

As a result of these recent decisions, care should be taken in drafting lease provisions that require delivery of any type of third-party instrument such as credit enhancement. It has been suggested that the language in a lease requiring delivery of a letter of credit be separated from the security provisions of the lease. Another interesting question that becomes apparent from a reading of the Stonebridge opinion is the characterization of letter of credit proceeds if a landlord draws under a letter of credit based on an issuing bank’s failure to renew. Certainly, in either case, a tenant would argue that these proceeds would now be transformed into a mere security deposit for cap purposes. While careful drafting may have eliminated the problems encountered by the landlords in these cases, it is clear that courts are attempting to graft limitations on the ability of landlords to use third-party instruments to avoid the limitations of §502(b)(6). If this trend continues, it may have the unintended consequence of lessening a tenant’s ability to secure monetary inducements from prospective landlords. The less confident a landlord is that it can recoup its entire investment, the more cautious it will be in making such advances.

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1The damage claim is capped at (a) the rent reserved by such lease, without acceleration, for the greater of one year or 15 percent, not to exceed three years of the remaining term of the lease, following the earlier of the date of filing of the petition or the date on which the lessor regained possession or the lessee surrendered the premises; plus (b) any unpaid rent due under such lease at such time.
2Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.) 831 F.2d, 586 (5th Cir. 1988).
3Kellogg at 590.
5In Kellogg, at 590, the court held “Under the independence principle, an issuer’s obligation to the letter of credit’s beneficiary is independent from any obligation between the beneficiary and the issuer’s customer. All a beneficiary has to do to receive payment under a letter of credit is to show that it has performed all the duties required by the letter of credit. Any disputes between the beneficiary and the customer do not affect the issuer’s obligation to the beneficiary to pay under the letter of credit.”
6See *PPI* at 209 where the court analyzed the independence principal in light of case law holding that a security deposit must be applied to the capped damages.
7In one case the insurance is security put up by the tenant himself, while in the other it is the credit standing of a third party procured by the tenant; this difference is insufficient to justify divergent rule as to the respective allowable claims. If the total damages are limited in one instance, they should be limited in the other instance.” *PPI* at 210.
8In lieu of the cash security deposit provided for in Article 33A, Tenant may deliver to Landlord as security pursuant to Article 33A, an irrevocable, clean, commercial letter of credit in the amount of $650,000 issued by a bank… “
9See *Young v. Condor Systems Inc.* (In re Condor Systems, Inc.) 296 B. R. 5 (9th Cir. BAP 2003) dealing with the cap imposed on employment claims under §502(b)(7).
10The decision has been appealed to the United States District Court for Northern District of Texas.
Lease Auditing for a Contingency Fee: Is It Unlawful or Contrary to Public Policy?

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Introduction
On March 28, 2003, the U.S. Supreme Court denied plaintiff’s petition for a writ of certiorari in Accrued Financial Services, Inc. v. Prime Retail, Inc., leaving undisturbed the opinion in that case by the U.S. Court of Appeals for the Fourth Circuit.1 In a 2 to 1 decision, the Fourth Circuit held that plaintiff (“AFS”), a lease auditing firm—working for a contingent fee—lacked standing to sue on the claims of its audit clients to recover alleged overcharges by their landlords discovered by audits AFS had performed.2 While the decision did not expressly ban contingent fee audits, it may do so by necessary implication. At the very least, the case raises serious doubts about such arrangements.

The Audit Contracts in Question
AFS is located in Long Beach, Calif. When the litigation began, AFS employed six commercial real estate professionals offering various services, including audits of “common area maintenance,” or “CAM” charges, and assessments for “reserves” under leases of commercial space. Typically, such leases permit audits of CAM and reserve charges, and do not restrict the tenants in the use of outside auditors.

Prime Retail, Inc., and its affiliates (“Prime”) own and operate factory outlet malls throughout the United States. Like managers of most commercial space, Prime incurs, each month, hundreds of expenses for a facility and allocates them to relatively few broad accounting categories. Prime also routinely makes charges for reserve accounts for everything from real estate taxes to mall advertising. Periodically, the landlord divides the total charges in each category among the tenants in the mall, usually on a square-footage basis, and invoices them accordingly. The tenants seldom, if ever, see specifically what they are paying for. Even in year-end “reconciliation statements,” the tenants do not learn the specifics of most charges. Absent audits, tenants cannot be certain that the charges are proper.

In the usual case, an audit will reveal some errors or discrepancies and occasionally overly aggressive interpretations of lease terms; but usually overcharges are relatively small. Thus, most tenants do not find it economical to conduct their own audits. Companies like AFS, contracting to audit for several tenants in the same facility and conducting a single audit for the facility, offer a practicable alternative to separate audits by each tenant.

Also, given that overcharges found in audits are usually relatively small, many tenants are unwilling to hire auditors on an hourly basis. AFS and other auditing companies offer their services for compensation contingent on the amount actually recovered as a result of the audit. Moreover, because the auditor’s compensation is contingent upon actual recovery, the auditor commonly takes greater control over the recovery effort. Many take an assignment of the tenants’ claims for overcharges. Some tenants favor such assignments because they are in ongoing business relationships with their landlords, and if suit should become necessary, they would prefer that the suit be prosecuted by the auditor. In this case, AFS not only took such assignments of its clients’ claims, but also agreed to bear all expense incurred in any litigation it might bring.
required AFS’s employees to provide testimony in support of their audit results in exchange for a contingent fee. This, Prime argued, was contrary to public policy.

As part of its opposition to Prime’s motions to dismiss, AFS secured from its audit clients a “ratification” of the audit contracts they had executed before the litigation began. In pertinent part, the ratifications provided that:

[Tenant] hereby confirms that it has conveyed to AFS title to the claims, in order to allow AFS to prosecute same solely in AFS’ own name—without the [Tenant] joining in the Litigation or otherwise acting to recover on such claims—and without any expense or liability whatsoever on the [Tenant’s] part. If and to the extent necessary to effectuate the [Tenant’s] purpose and assign to AFS the Assigned Claims, the [Tenant] hereby ratifies and consents to AFS’ assertion and continued prosecution of those Assigned Claims in AFS’ name, in accordance with the terms of the Assignments. The [Tenant] also advises that it is bound to the rules of procedure of discovery which govern the Litigation and that the [Tenant] is and will be bound to the final outcome and adjudication of the Assigned Claims.

Also, in opposition to the motions, AFS contended that there were no federal or California laws or public policies prohibiting the audit arrangements or claims assignments for which AFS and its clients had contracted. Indeed, California law has long-recognized the enforceability of assignments of choses-in-action. Moreover, AFS argued, to the extent its audit contracts might encourage the assertion of meritless claims supported by fabricated testimony from audit personnel, the rights of cross-examination, arguments against the weight of self-interested testimony, and the law of sanctions afforded the proper and recognized remedies for such ills—not the dismissal of AFS’s case before its merits could be determined. In the end, AFS argued that no basis existed to interfere with the rights of it and its clients to enter into otherwise lawful contracts.

After full briefing, oral argument and post-argument briefing, the district court held that the assignments and subsequent ratification by the clients sufficed to make AFS the legal owner and real party in interest of the assigned claims. The court nonetheless dismissed the claims on grounds that the audit contracts were “champertous” under California law and constituted “witness contingency fee agreements.” The court reasoned:

[In] my judgment, . . . [financial arrangements that provide incentives for the falsification or exaggeration of testimony threaten the very integrity of the judicial process which depends upon the truthfulness of the witnesses.

The district court offered the following elaboration of its holding—significant here:

I recognize, as AFS argues, that firms providing auditing services to tenants in factory malls may provide an effective (and wholesome) deterrent to fraudulent billing practices by mall managers. However, they can do so without entering into a contingency fee agreement. Moreover, procedural devices, such as class actions and rules permitting joinder of claims, can assist in providing protection of the defrauded tenants.

Except as just quoted, the district court did not say expressly that auditing for a contingent fee is contrary to any federal or state public policy, but instead held that allowing an assignee of claims to use the testimony of its own employees in prosecuting the claims amounted to a “witness contingency fee agreement”—which the court characterized as “champertous” under California law.

The Fourth Circuit Majority Decision

On appeal, Prime confronted two fundamental problems resulting from the district court’s rulings. First, the district court had honored the choice-of-law clauses in the audit contracts AFS had executed with its tenants and held that California law and public policy governed the issues before it; however, California has affirmatively rejected the medieval prohibition against champerty and its various doctrinal cousins. Second, the client ratifications of the audit contracts, including the claims assignments in those contracts, had led the lower court to hold that AFS was the legal owner and real party in interest on the assigned claims. If that were the case, then presumably AFS should be treated like any other plaintiff (or at least no precedent was cited to the contrary), and employees of plaintiffs typically testify in their employer’s case at trial, even though the employer has a financial stake in the outcome of the case. Again, arguments as to the weight of testimony and effective cross-examination were the presumed protections of the judicial process.

Prime sought to overcome the first of those problems by contending that the district court’s reference to “champerty” did not limit the basis of its holding to the technical, common law doctrine, but rather was intended merely to identify a general category of public policy prohibitions against all contracts that encourage false testimony. As to the second problem, Prime essentially ignored the lower court’s holding on the real-party-in-interest issue and continued to characterize AFS as a legal stranger to the claims, an “intermeddler” who was providing self-serving testimony in exchange for compensation contingent on the outcome of the case. Both of Prime’s strategies proved successful in the Fourth Circuit.

After the usual round of briefing in the appeals court, oral argument was held in Richmond, Virginia, on October 30, 2001. Comments and questions during the argument suggested that some of the judges on the appeals panel viewed the audit contracts as “unsavory” or worse, but were not certain what the precise legal defect in the contracts might be. The panel ordered supplemental briefing after oral argument.

Nine months later, the appeals court issued its decision, affirming the district court’s dismissal of AFS’s case. In doing so, however, the panel divided 2 to 1, with the dissent arguing strenuously for reversal, and with the panel majority’s paying
little more than “lip service” to the district court’s “witness contingency fee” rationale.\textsuperscript{12} The panel also rejected outright the lower court’s application of California law and public policy.\textsuperscript{13} Indeed, while the district court had applied California law and neither side argued on appeal against its application, the panel held \textit{sua sponte} that Maryland public policy trumped the contracting parties’ choice of California law to govern their contracts\textsuperscript{14} and that, unlike California and “despite the law’s metamorphoses, Maryland continues to reserve a policy against some of the originally prohibited conduct [i.e., conduct once prohibited in England as champerty and maintenance].”\textsuperscript{15} Specifically, the panel concluded that Maryland still prohibits “officious meddling” to cause others to assert claims “which they have no right to make.”\textsuperscript{16}

The majority pointed to a 1908 Maryland statute, which makes it a misdemeanor to engage in certain forms of “barratry.”\textsuperscript{17} Although the statute, on its face, did not apply to AFS’s audit contracts (and the majority did not hold that it did) and though the statute had apparently never been invoked to invalidate a contract before, the panel reasoned that the statute still reflects a general policy in Maryland against contracts encouraging specious or at least dubious litigation and that “[a]ny contract violating this policy is void in Maryland and will not be enforced by its courts.”\textsuperscript{18} The majority further reasoned that this public policy of the forum was so “strong” and “fundamental” that a Maryland court would disregard the parties’ choice of California law to govern their audit contracts and would, therefore, refuse to recognize the claims assignments the parties made under that law:

The essence of the contractual relationship between AFS and the tenants leaves AFS as a solicitor, for personal gain, of unknown litigation, for the business of stirring up litigation for the sake of its fees. If its real purpose was to provide consulting services within its expertise, as it insists, they can continue that business without the assignments. By concluding that the assignments in this case are against fundamental public policy, we in no way undermine or devalue any claims AFS has discovered and that the tenants may have. If those claims are viable, the tenants retain the right to prosecute them with the assistance of AFS. Our holding focuses only on the promotional efforts of AFS in stirring up litigation primarily at its own initiative and for its own benefit.

We thus agree with the District Court that, whether under the label of maintenance, champerty, or barratry, the Assignments in this case violate Maryland’s strong public policy against the stirring up of litigation or promoting litigation for the benefit of the promoter rather than for the benefit of the litigant or the public.\textsuperscript{19}

As was the case in the district court, the panel majority stopped short of ruling that a contract for the provision of auditing services for a contingency fee is unlawful or contrary to public policy. To the contrary, the panel majority’s language focuses on the claims assignments. But, as seen below, there are strong indicia—in the panel majority’s own opinion—pointing to the audit arrangement as the primary culprit.

The dissent attacked the majority’s reasoning on each point addressed in the panel’s opinion. Yet it too does not directly
On appeal, AFS argued, *inter alia*, that dismissal of its case was not a permissible remedy for the ill perceived by the district court. In fact, AFS had offered in the district court to use “independent” expert witnesses, i.e., those paid an hourly rather than a contingent fee for their testimony and who were not regular employees of AFS. In any event, as mentioned above, there was no basis in law to treat AFS or its employees differently from other plaintiffs or their employees, given the tenants’ ratification of the claims assignments and AFS’s ownership of the assigned claims. Cross-examination, counter-expert testimony and, in an extreme case, sanctions were available to protect the “integrity of the judicial process” about which the district court was concerned.

The panel majority of the appeals court arguably, though tacitly, accepted some of those points. The majority expresses agreement with the district court’s holding about contingency fees for expert testimony, but it does so in one paragraph and without addressing any of AFS’s arguments on the issue.23 And the dissent recognizes that since AFS was the real-party-in-interest on the assigned claims, “it may offer the testimony of its own people without violating any public policy against supplying expert testimony for a contingent fee.”24 The panel majority does not address that point at all. Moreover, in this connection, the bankruptcy court for the Northern District of Illinois in *In re Joy Recovery Tech. Corp.*,25 has expressly discussed and rejected the contingent-fee expert holding in the AFS case:

There is nothing in the rules of evidence that bars testimony from contingent fee experts. However, under Fed. R. Evid. 601 the fact finder may discount the credibility of such witnesses. . . . The notion that [the experts’] testimony is inherently unreliable confuses an ethical rule with [an] evidentiary rule, and is contrary to the authority in [the Seventh] Circuit.26

The court in *In re Joy Recovery* would not preclude the lease auditor from testifying at trial—either to his audit findings or his opinions about those findings—even if his compensation were dependent on the outcome of the case. Then *a fortiori*, that court (and most others, we submit) would not dismiss a plaintiff’s case because he might offer testimony from a contingently paid expert. Much more than the possibility of such testimony dictated the result in the AFS case.

The evil to which the panel majority of the Fourth Circuit was responding was also not that a “stranger” to claims for relief would prosecute them in exchange for a percentage of the recovery. Collection agents do exactly that every day, and the validity of such arrangements has long been accepted. Instead, it seems likely that it is the “trumping up” of claims, i.e., meritless or potentially meritless claims, and the “stirring up of litigation” to which the panel majority responded so viscerally, and those concerns have little to do with whether claims are assigned or whether the assignor and assignee share in the proceeds of the claims after they are assigned. Indeed, the mischief which the panel condemned would be possible, even if AFS had taken no assignment of the claims but was compensated contingently from what the tenants recovered by their own “collection” efforts, with or without AFS’s testimony at trial. No, the root of the evil perceived by the panel here logically and
Conclusion

There is one final counterpoint to the notion that the panel majority’s opinion spells doom for contingency fee auditing: If AFS had been held to the ethical standards of a certified public accounting firm, its mode of business would appear to have been proper. Since 1990, as a result of action by the Federal Trade Commission, the standards of the American Institute of Certified Public Accountants have expressly recognized the propriety of conducting forensic audits for a contingent fee.28 Those standards, of course, do not contemplate assignments of the audit clients’ claims to the auditor; however, as this article tries to show, the assignment of the client’s claims is not really the heart of the issue, at least not in the apparent reasoning of the Fourth Circuit. While the presence of an assignment may color the analysis and the perspective of those who undertake it, the root of the evil to be found here, if any, is the agreement to audit for contingent compensation. That is where the incentive to falsify and to exaggerate arises.

What remains to be seen is how the Fourth Circuit’s opinions in the AFS case will be construed, and whether freedom of contract and confidence in the truth-seeking processes of our courts will prevail or whether we will respect less the former and insist on more protection for the latter. In that event, lease auditing for a contingency fee will continue to present problematic issues: Are such arrangements nonetheless enforceable as between auditor and client? To what extent and in what ways can the lessor “defend” against claims based on an audit solely because it was conducted on a contingent basis? Specifically, will the lessor have to defend its charges and assessments under the lease on their merits, or will the contingent nature of the audit obviate such defense?

Beyond argument, the decisions in this case are less than definitive on the narrow question this article raises, and some may doubt the validity and persuasive force outside the Fourth Circuit of the decision in the AFS case. However, to date, the decision comes closer than any other reported opinion in answering the question, and the answer it offers casts considerable doubt on the efficacy of lease auditing for a contingent fee.

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2See Accrued Fin. Servs., Inc. v. Prime Retail, Inc., 298 F.3d 291 (4th Cir. 2002).
4Accrued Fin. Servs., 2000 WL 976800, at *1 n.2.
5Id. at *1-2.
6Id. at *3.
7Id. at *3 n.3 (emphasis added).
8Id. at *1.
9Id. at *2.
10See, e.g., Abbott Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 885 n.26, 741 P.2d 124, 142 n.26 (1987) (observing that “California, however, has never adopted the common law doctrine of champerty and maintenance”).
11See 298 F.3d at 300-07.
12See id. at 298.
13Id. at 297.
14Id.
15Id. at 298.
16See id. at 299.
18Id.
19Id. at 300-01.
20Id. at 305-06 (citations omitted).
23See, 298 F.3d at 298.
24Id. at 307.
26Id. at 69.
27Id. at 297-98.
Of Interest

Cases

Assessment/Sublet
A shopping center ("Deer Creek") appealed the assessment of a storage facility adjoining a supermarket in the center. It argued that it had erroneously been assessed as "finished open" under the General Commercial Mercantile (GCM) Supermarket model. The court held that the storage area should have been assessed as "unfinished." It remanded the case to the Indiana Board of Tax Review (Board) and ordered that the area be so assessed. On remand, the Assessor lowered the base rate by $2.64 per square foot under the GCM Supermarket model. Because the GCM Supermarket model does not provide for "unfinished" finish type, Deer Creek again appealed the assessment to the Board on the grounds that the Assessor should have changed the model to that of the GCM Utility/Storage, which does provide for the "unfinished" finish type. The Board denied Deer Creek’s relief, and Deer Creek appealed. The Assessor argued that the court’s order only required the storage area to be assessed as "unfinished" and did not require him to use a different model. The court reviewed the relevant sections of the tax code. It acknowledged that the GCM Supermarket model does not allow for "unfinished" finish types and that the Assessor had changed the finish type to "unfinished" but still used the GCM Supermarket model, reducing the base rate with no explanation to support his calculation. Consequently, there was no way for the court to determine whether there was a reasonable basis for the reduction. The court, therefore, reversed the Board’s determination and instructed the Assessor to assess Deer Creek’s storage area as “unfinished” using the GCM Storage/Utility model. *Deer Creek Developers, Ltd. v. Harrison Township Assessor*, Cause No. 49T10-0209-TA-115, Ind. Tax Ct., June 3, 2003.

The tenant, Paradise, made considerable expenditures to improve the leased premises. Paradise then defaulted and was evicted from the premises. Under the stipulation that terminated the eviction proceedings, Paradise’s assignee, Fordham, was given an option to purchase the premises, but failed to exercise it in a timely fashion. It then filed an action for a judgment, declaring it could exercise the option to purchase the leased premises. The trial court granted the landlord’s motion to dismiss the action, and Fordham appealed. The appellate court noted that equity would relieve a tenant or mortgagor that inadvertently or negligently failed to exercise an option on time if the default would not prejudice the landlord or the seller. Fordham, however, was neither a tenant nor a mortgagor and had made no expenditures in the leased premises. It was only a potential purchaser who was unable to raise the funds it needed to buy the property in time to exercise the option. The landlord had made a good-faith commitment to sell the property after Fordham’s default and would be prejudiced if Fordham were now allowed to exercise the option. Therefore, the appellate court affirmed the trial court’s dismissal of the action. *Fordham Paradise, LLC v. ABI Property Partners*, 306 A.D.2d 178; 763 N.Y.S.2d 547 (N.Y. App. Div. 1st Dept., 2003).

A shopping center landlord objected to the proposed assignment of a lease and simultaneous sublease of the space. The court held that the debtor established adequate assurance of future performance with respect to the assignee’s financial condition and operating performance, use restrictions and tenant mix. Furthermore, the court found no valid business justification for the landlord to withhold consent to the proposed sublease, and the “going dark” provision in the lease would not begin to run until the assignment to the proposed assignee. *In re Service Merchandise Co., Inc.*, 297 B.R. 675 (Bkrtcy. M.D. Tenn., 2003).

Pollack Levitt & Partners leased space at Piedmont Center under a lease that required the landlord’s written consent for assignment. Pollack sent a letter to Piedmont saying he was pursuing a merger with Multi-Media and requesting permission to assign the lease. After investigating Multi-Media, Piedmont signed the letter assenting to the assignment. Later, Pollack Levitt merged with Multi-Media’s subsidiary, MHI. The merger stated that consent had been obtained from Piedmont; however, no one informed Piedmont that the merger was with MHI instead of Multi-Media. MHI paid rent for three months and then defaulted. Piedmont sued Multi-Media for the rent due, claiming that Pollack had the authority to bind Multi-Media to the lease, that Multi-Media had ratified the request to assign the lease, and that Multi-Media’s business dealings with its subsidiaries warranted piercing the corporate veil and holding it liable for their debts. The jury decided in favor of Piedmont, and Multi-Media appealed. The appellate court found that there was evidence that Pollack was acting for Multi-Media when he asked to assign the lease and that Multi-Media ratified the assignment. Piedmont also presented evidence supporting the theory that Multi-Media’s corporate veil should be pierced. The appellate court found that Georgia law, rather than the law of Delaware, the state of Multi-Media’s incorporation, applied. It concluded that under either the Restatement (Second) Conflict of Laws or traditional choice of law rules, Georgia law applied. Under Georgia law, a court may pierce the corporate veil to remedy injustices without a showing of fraud, which was required under Delaware law. The appellate court affirmed the trial court’s finding in favor of Piedmont. *Multi-Media Holdings, Inc. v. Piedmont Center*, 262 Ga. App. 283, 583 S.E.2d 262 (Ga. Ct. App., 1st Div., 2003).

A retail furniture store located across the street from a shopping center used about 35,000 square feet (sf) as a showroom for new furniture; the balance was used for clearance items that were sent to the store from other stores in the chain. A mezzanine area, with rooms for machinery, restrooms, a showroom and an employee lounge, had a recently installed an elevator that complied with ADA regulations. The store contested a tax assessment by the county. Both the store and the county’s
experts used the three traditional approaches to determine market value: cost, income and sales. The store’s expert, Mardell, placed more weight on the sales approach; the county’s expert, Sankey, emphasized the income approach. Their valuations on the building were $1.7 million apart. After making adjustments for location, age, condition, building size, quality of construction, functionality and land-to-building ratio, Mardell came to an s/e value of $45 and Sankey came to a value of $80. Mardell’s valuation accorded minimal value to the mezzanine because it was obsolete. The court disagreed, noting that if it was so obsolete, the store owner would not have invested $250,000 to install an ADA-compliant elevator. It concluded that the mezzanine, as well as the sunken floor directly below it, added valuable space. In addition, the court found that the loading dock, the uneven ceiling heights and the parking ratios did not diminish the value of the property. Furthermore, it supported Sankey’s utilizing reserves for expenditures rather than deducting them as capital expenditures from the final value in the income approach. The court also rejected Mardell’s claim that the building’s size warranted splitting the rental income for the main floor into primary and secondary space on the grounds that secondary space warranted less rental income because it was used to show clearance furniture. The court valued the space in the front of the store, the rear and the mezzanine equally. However, it acknowledged that the property was unequally assessed as compared to 10 sales of commercial/industrial real estate during the relevant period. The court, therefore, reduced the assessed value by 8.2% to equalize the assessment. *Wickes Furniture Co., Inc. v. County of Hennepin,* File No. 28635, Minn. Tax Ct., May 22, 2003.

Prior to 1999, the Utah State Tax Commission taxed leasehold improvements as personal property of the lessee. It also provided that any value of leasehold improvements not taxed as personal property shall be included in the value of the real property on which the landlord paid real property taxes. In practice, the County Assessor’s office would collect affidavits and taxes from tenants regarding the leasehold improvements under their control; and the real property division would assess real property taxes independently of the leasehold improvements. In 1999, a group of property owners and landlords filed a complaint in district court, claiming they were “double-taxed” on tenant-owned improvements and sought property tax refunds. The landlords alleged that the county erroneously assessed a double tax on tenant-owned improvements to the landlord’s property by imposing a personal property tax on the tenants for these leasehold improvements, while also imposing real property taxes on the landlords for the entire value of their property, including the value of the leasehold improvements. The trial court denied the landlords’ claim, finding that it actually involved incorrect valuation rather than an illegal “double tax.” The issue on appeal was the validity of the landlords’ assertion that the County Assessor’s appraisal practices resulted in double taxation of leasehold improvements. In affirming the trial court, the Supreme Court of Utah held that in order for a taxpayer to receive a refund due to an illegal tax or double payment, the error must be “readily apparent” from county record. The court found that the landlords failed to point to any place in the record that indicates an erroneous or illegal assessment of their property. In addition, neither party alleged an error of fact or law that would be readily apparent from county records. The court concluded that the landlords’ quarrel was with the appraisal methodology that the county assessors may, or may not, have used when assessing the value of their property. The Supreme Court of Utah stated that it was not entitled to make a “blanket decision” regarding the valuation method because the statute under which the landlords brought their claim was not intended to serve that function. *Woodbury Amsource, Inc. v. Salt Lake County,* 73 P.3d 362, 476 Utah Adv. Rep. 17 (Utah Sup. Ct., 2003).

Bankruptcy

After a shopping center tenant filed for bankruptcy and assigned its interest in the lease, the landlord objected to the assignee’s attempt to exercise the option to renew the lease, claiming that the right to renew was personal to the original tenant. The landlord sought a declaration that the assignee could not exercise the option and an injunction preventing the assignee from remaining on the premises after the expiration of the lease. The lease was for a term of 10 years with a right to extend the term for two successive periods of 5 years each. The lease specifically stated that the right to extend the term was a “personal right of Tenant and shall not inure to the benefit of Tenant’s ... assignee...” The assignee conceded it had no rights under the express provisions of the lease, but argued that the Bankruptcy Code (Code) renders the “personal right” limitation unenforceable. The court found that the Code not only specifically invalidates anti-assignment clauses, but it also invalidates any lease provision that “burdens the debtor’s ability to make an effective assignment by modifying... [the lease] so that the assignee receives a different agreement than the debtor had.” The court found that the personal right to extend was such a burden and did create a different agreement from the one originally signed. Finding also that the assignee did not waive its ability to assert its rights under the Code by failing to ask the bankruptcy court to adjudicate this issue at the time of sale, the court granted summary judgment in favor of the assignee. *Double K Properties, LLC v. Aaron Rents, Inc.*, Case No. 1:03CV00044 (W.D. Va., July 14, 2003).

Ha-Lo rented an office building from CenterPoint for a period of 15 years, commencing April 1, 2001. On July 30, 2001, Ha-Lo filed a voluntary Chapter 11 petition for reorganization and sought authority from the bankruptcy court to reject the lease under §365(a) of the Bankruptcy Code, effective upon 30 days’ written notice to CenterPoint. The bankruptcy court granted Ha-Lo authorization to reject the lease on Sept. 6, 2003, but Ha-Lo did not send written notice until Oct. 3, 2001, and notified CenterPoint that it would vacate the premises effective Nov. 2, 2001. On Nov. 1, 2001, Ha-Lo paid CenterPoint pro-rated rent for the three days it intended to occupy the building. CenterPoint accepted the check as partial payment but demanded the balance of the November 2001 rent under the terms of the parties’ lease. CenterPoint filed an administrative
rent claim against Ha-Lo in the bankruptcy court. The bankruptcy court ordered Ha-Lo to pay the balance of the November 2001 rent. It considered that §365(a) required Ha-Lo to be responsible for all the rent obligations under the lease as they became due until the lease was rejected. It reasoned that because Ha-Lo had rejected the lease as of Nov. 2, 2001, and did not vacate the premises until Nov. 4, 2001, it was responsible for the entire November 2001 rent under the parties’ lease, which required that rent was due on the 1st of each month. It noted that Ha-Lo was not entitled to prorated rent for the month of November 2001 because the terms of the parties’ lease were unambiguous regarding proration. Even though other provisions of the parties’ lease contemplated situations where prorated rent would be appropriate, the voluntary bankruptcy of Ha-Lo was not among them. *Ha-Lo Industries v. Center Point Property*, 342 F.3d 794 (7th Cir., 2003).

Summary judgment was denied where a debtor moved to assume its lease independently of other contracts executed with the lessor. The court found questions of fact as to the parties’ intent at the time they entered into asset purchase, lease-back and other contracts. *In re Apache Products Co.*, 293 B.R. 545 (Bkrtcy.M.D.Fla., Tampa Div., 2003).

The bankruptcy court had authority to make a debtor’s rejection of its leases retroactive at least until the date that the debtor filed the motion to reject. However, the lessor did not have to show a benefit to the estate in order to prevail on its motion to compel the debtor-in-possession to pay postpetition rent. *In re CCI Wireless, LLC*, 297 B.R. 133 (D.Colo., 2003).

The business judgment test was properly applied to determine whether a debtor in possession (DIP) was entitled to assume its lease. However, the bankruptcy court abused its discretion by failing to amend the judgment to allow the DIP to assume the lease or, in the alternative exceptional circumstances, justified relieving the debtor from the judgment. *In re Crystalin, LLC*, 293 B.R. 455 (8th Cir. BAP, 2003).

Once a stay has been lifted due to a debtor’s postpetition default, it cannot be reinstated absent proof that the stay was terminated as the result of fraud or a mistake. However, the parties are free to negotiate a forbearance agreement, providing that the debtor maintains its postpetition payments. *In re Flores*, 293 B.R. 251 (Bkrtcy.E.D.Cal., 2003).

Despite the entry of a final decree, the court had jurisdiction to determine that a Chapter 11 debtor’s settlement payments to a claimant did not constitute “rent”; and the claimant, who was a co-owner of the real property occupied by the debtor under a lease with the claimant’s co-owner, had established the three conditions required by the court’s conditional confirmation order for the debtor’s monthly payments to the claimant. *In re Health American Medical Group, Inc.*, 297 B.R. 843 (Bkrtcy.M.D. Fla., 2003).

A lessor objected to the sale of a shopping center lease to a business that competed with one of the other tenants in the shopping center. The court held that where one tenant had an exclusive covenant granting the right to operate a fabric store in the shopping center and the debtor/tenant’s lease contained an assignment provision prohibiting an assignment that violated any noncompete agreements in the center, the assignment to a competing business could not be approved. *In re Heilig-Meyers Co.*, 294 B.R. 660 (Bkrtcy. E.D.Va., 2003).

A debtor-president of a corporation objected to a proof of claim offered by the lessor of the building leased by the corporation, based on the debtor’s personal guarantee of the commercial lease. The court held that the lessor was neither entitled to recover commissions paid to a broker to re-lease the premises nor to recover legal expenses. However, the landlord could assert as unpaid rent the amount it would have earned if the debtor’s company had performed under the lease. *In re Henderson*, 297 B.R. 870 (Bkrtcy.M.D. Fla., 2003).

A real estate developer was granted specific performance of a postpetition agreement to buy a Chapter 11 debtor’s real property, which had more than doubled in value since the execution of the agreement. Even though the debtor had no authority to enter into the contract after the trustee was appointed, the trustee, who did have the authority, had adopted the agreement by retaining the earnest money and facilitating fulfillment of several contingencies. *In re Kreger*, 296 B.R.202 (Bkrtcy.D. Minn., 2003).

A lessor’s claim against the lessee for increased tax liability due to a disputed lease assignment was reasonably contemplated by the parties before the lessee’s bankruptcy filing. Therefore, it was considered prepetition and barred by a general claims bar order and confirmation order, even though the tax reassessment was not completed until after the lessee filed for bankruptcy. The lease contained detailed provisions relating to payment of taxes, and reassessment was not an essential element of the lessor’s contract claims. *In re R.H. Macy & Co., Inc.*, 67 Fed.Appx. 30 (2nd Cir., 2003).

A landlord breached its contract with the tenant/debtor’s bank when it did not notify the bank that the debtor had defaulted on its lease by failing to pay the real property taxes. Instead, the landlord itself paid the taxes. The court held that the landlord had thus failed to mitigate its damages and was not entitled to reimbursement for this tax payment as part of the cure amount the debtor would have to pay to assume and assign the lease. *In re Rowland*, 292 B.R. 815 (Bkrtcy.E.D.Pa., 2003).

Section 365 (d)(3), which requires the trustee to timely perform a debtor’s obligations under an unexpired nonresidential real property lease, gave a commercial lessor an administrative expense, but not a super-priority claim, for rent that had accrued postpetition and before the debtor rejected the lease. *In re Schmitz*, 293 B.R. 7 (Bkrtcy. W.D. Mo., 2003).

Under state law, a wind-down sale conducted by the tenant did not constitute removal of the goods from the leased premises out of the ordinary course of business so as to trigger the landlord’s right to terminate the lease. Furthermore, the “going out of business” sales provisions of the lease provided for a remedy other than termination. *In re T.A.C. Group, Inc.*, d/b/a Frugal Fannie’s Fashion Warehouse, 294 B.R. 199 (Bkrtcy.D. Mass., 2003).
The tenant and landlord entered into a commercial lease. The parties’ lease provided that the landlord could immediately terminate the Lease if “Tenant shall at any time during the continuance of this Lease remove, attempt to remove, or manifest, in the judgment of the Landlord, an intention to remove Tenant’s goods or property out of or from the Demised Premises except in the ordinary course of business.” That section was the only provision in the lease giving the landlord immediate termination rights without an opportunity and time to cure defaults. The tenant’s representative notified the landlord that it intended to retain a liquidating agent to conduct wind-down sales of all of its inventory at its four different locations, as it intended to close all its stores and cease operating at the conclusion of the sales. Thereafter, the landlord’s attorney sent the tenant a letter terminating the lease. The grounds for the immediate termination were the debtor’s announcement of its intention to conduct “going out of business sales” at all of its locations, including the leased premises, which, in the landlord’s view, constituted an intention to remove its goods or property from the leased premises outside the ordinary course of business. Subsequently, the tenant advertised a sale at its store. It did not indicate the sale was a “going out of business sale,” although the tenant concedes that it intended to close the store at the end of the sale. About two weeks after the landlord sent the letter purportedly terminating the lease, the tenant/debtor filed its voluntary Chapter 11 petition and continued to conduct its sale at the premises. The landlord moved to lift the automatic stay, claiming the lease had been terminated before the tenant filed its petition. The court held that the “termination” letter prepared by the landlord’s attorney was not an effective prepetition termination of the lease. It also held that the tenant’s “sale” did not entitle the landlord to terminate the lease prior to the date of the Chapter 11 petition. Therefore, the lease existed at the time the tenant filed its Chapter 11 petition, and the lease was assumable and assignable by the tenant under the Bankruptcy Code. The landlord was not entitled to a return of the premises to re-let them to a tenant of its choice. In re T.A.C. Group, Inc., d/b/a Frugal Fannie’s Fashion Warehouse, 294 B.R. 199 (Bkrtcy.D. Mass., 2003).

A lease provision allowing the lessor to purchase a tenant’s leasehold interest if the tenant tried to assign the lease over the lessor’s objection was unenforceable against a debtor/tenant. In addition, for purposes of determining whether the assignment would disrupt tenant mix, two configurations of retail stores separated by a public road constituted two separate shopping centers. Ramco-Gershenson Properties v. Service Merchandise Co., Inc., 293 B.R. 169 (M.D.Tenn., 2003).

Condemnation/Eminent Domain
The denial of a wetlands fill permit was a final decision and deprived the owner of economically viable use, but was not a categorical taking. Cooley v. United States, 324 F.3d 1297 (Fed.Cir., 2003).

When a portion of a shopping center was condemned, the shopping center owners entered into a settlement agreement with the condemning authority. The trial court held that a grocery store tenant was not a party to the agreement and was entitled to pursue a separate claim for the taking of its leasehold interest. The tenant appealed and the appellate court reversed, finding that the lease did not clearly express the lessor’s intent to bar the lessee’s right to be compensated for a taking. It held that the tenant’s leasehold interest entitled it to apportionment of the condemnation proceeds. Winn-Dixie Stores, Inc. v. Department of Transportation, 839 So. 2d 727 (Fla. Dist.Ct.App., 2003).

Constitutional Law
A county board’s refusal to remove a privately owned nativity creche displayed on the courthouse lawn did not violate the constitution’s free speech, due process or establishment clauses. Joacham v. Tuscola County, 239 F.Supp. 2d 714 (E.D.Mich., 2003).

Contracts
Frenchtown Square Partnership (“Frenchtown”) owned a mall in which Lemstone Books (“Lemstone”) leased space to operate a bookstore. The lease was for a period of 10 years. After entering into the lease with Lemstone, Frenchtown leased space to another retailer, Alpha Gifts, which sold similar items to those sold by Lemstone. Approximately six months prior to the expiration of its lease, Lemstone ceased operating its business and abandoned its store space. For the final six months of the lease term, Lemstone did not pay rent to Frenchtown and Frenchtown did not lease the Lemstone space to another retailer. Thereafter, Frenchtown commenced an action against Lemstone for rent due, fees and taxes. In its answer, Lemstone argued that Frenchtown failed to mitigate its damages, and filed counterclaims, including a counterclaim for tortious interference with its business relationship with its franchisees. It argued that the competition from Alpha Gifts reduced its profitability to the point where it could no longer meet its rent obligations under the lease. The trial court granted summary judgment in Frenchtown’s favor on all issues. Lemstone appealed to the Ohio Court of Appeals, which affirmed the summary judgment in part and reversed in part. The court of appeals held that Frenchtown had a duty to mitigate its damages after Lemstone breached its lease, and remanded the matter to the trial court to determine whether Frenchtown had properly mitigated its damages. Frenchtown appealed the order from the court of appeals. The Ohio Supreme Court held that the only issue before it was whether a landlord has a duty to mitigate damages caused by a tenant who breaches a commercial lease and abandons the leasehold. It held that the trend in modern real property law is that a landlord is required to mitigate its damages, despite common law to the contrary. It held that there is a duty to mitigate in all commercial leases, as is the rule under contract law, because a modern lease is actually a contracted, “bargained-for” relationship that encompasses covenants and
duties. It is not merely the transfer of a property interest. The Supreme Court noted that unless the parties specifically agree to the contrary, there is a duty to mitigate damages under all leases, including commercial leases. The court noted that the landlord’s effort to mitigate need only be reasonable, and that “reasonableness” is determined by the trier of fact. It also noted that the failure to mitigate damages is an affirmative defense. Frenchtown Square Partnership v. Lemstone, Inc. D.B.A. Lenstone Books, 99 Ohio St. 3d 254, 791 N.E.2d 417 (Ohio S.Ct., 2003).

A landlord and tenant executed a termination agreement providing that if the tenant defaulted on any of the payments of the termination fee, the balance of the remainder of the rent would be due and payable immediately. The tenant failed to make a payment and the landlord sent a letter demanding payment of the remainder of the lease, as specified in the termination agreement. The tenant tendered the defaulted payment 13 days past the grace period; the landlord rejected it and sued for breach of contract. The trial court rendered judgment only for the past-due payments under the termination agreement because the agreement did not state that time was of the essence. The landlord appealed and the appellate court reversed. It found that although the contract did not expressly state that time was of the essence, it did specifically state that the remainder of the lease payments would be “immediately” due and payable upon default. Thus, because the contract contained an express provision for payment of a sum certain on a specific date, the parties essentially agreed that time was of the essence. Sublime, Inc. v. Boardman’s Inc., 849 So. 2d 470 (Fla.Ct.App., 2003).

Covenants/Clauses

Nash entered into lease agreements with a commercial property developer to operate a grocery and liquor store in the Imperial Mall Shopping Center (Imperial Mall). The grocery store and liquor store’s leases each provided that Nash would be the only seller of grocery and liquor products in the locations specified in the lease. It was the understanding and intent of both Nash and the original lessor that Nash would be the only seller of groceries and liquor in the entire Imperial Mall. The original lessor abided by this intent. Thereafter, Rubloff took assignment of all of the Imperial Mall leases and entered into a lease with Kmart to open a Big K store at the Imperial Mall location. Nash sued Rubloff, claiming Rubloff’s leasing of space to Kmart violated the terms of his lease because Kmart sold groceries and liquor. Rubloff argued that the exclusivity provisions in Nash’s lease did not apply to the area where Kmart leased its space because the legal description in Nash’s leases did not include the space leased to Kmart. The trial court granted summary judgment to Rubloff, and the appellate court affirmed. The appellate court concluded that a mutual mistake of fact existed between Nash and the original lessor regarding the legal description of the area covering the exclusivity agreement. It further concluded that Nash established that he was entitled to a reformation of the lease as to the original lessor. However, the appellate court held that Rubloff, as an assignee of the lease, was not subject to the reformation remedy. It held that Rubloff was a bona fide purchaser for value, even though he was “assigned” the leases: Rubloff entered into a purchase agreement in connection with the assignment for $12 million. It further considered that at the time Rubloff acquired the Imperial Mall property, Nash certified the validity of the agreement and that any mistake regarding the exclusivity provisions in Nash’s leases could have been corrected at that time. Nash Finch Company v. Rubloff Hastings LLC, 341 F.3d 846 (8th Cir., 2003).

Summit leased a retail space in its shopping center to Shoe Show under a lease containing a percentage rent clause and a use provision, stating that the tenant would use the space for the sale of shoes and related accessories and that no other entity would occupy the premises except with the written consent of the landlord. Shoe Show began to operate under a different name and eventually attempted to negotiate a termination agreement with Summit. It continued to lose money and notified Summit that it was vacating the premises, while promising to continue to pay base rent. Summit advised Shoe Show that it was obligated to continue to operate, but Shoe Show ceased operations. Summit filed a petition for an injunction seeking an order that Shoe Show reopen its store; its sole witness testified to the interdependence of the stores in the shopping center and the “domino effect” of the closing. Shoe Show countered that Summit’s claim could be remedied at law by money damages and that the balance of harms favored Shoe Show because of its losses. The trial court denied Summit’s preliminary injunction; the appellate court reversed and Shoe Show appealed. The Pennsylvania Supreme Court reversed, agreeing with Shoe Show’s argument that the appellate court had conducted an improper de novo review of the record and erroneously credited the testimony of a witness that the trial had rejected. The trial court had found that Summit failed to prove immediate and irreparable harm, that it had an adequate remedy at law and that the injunctive relief would disproportionately harm Shoe Show. Summit failed to substantiate, through business records or expert testimony, its claim that damages would not provide an adequate remedy. Nor did Summit contest the losses proved by Shoe Show. The high court, therefore, reversed the appellate court’s decision, concluding there were “apparently reasonable grounds” supporting the trial court’s refusal of the preliminary injunction. Summit Towne Centre, Inc. v. The Shoe Show of Rocky Mount, Inc., 828 A.2d 995 (Pa. Sup.Ct., 2003).

Ingles leased space in the Stanly County Shopping Plaza to operate a grocery store. Ingles and Horne, the owner of the center, executed a lease containing a radius restriction prohibiting the landlord from occupying, renting or selling property for use as a grocery store. Subsequently, Wal-Mart bought a piece of the parking lot that did not include any of the property Ingles rented for the grocery store. The deed contained a covenant requiring Wal-Mart to comply with the terms in the memorandum of lease, including the radius restriction. About 10 years later, Wal-Mart bought land on which to build a supercenter that would contain a grocery department. Ingles’ original lease did not identify the property bought by Wal-Mart; the proposed supercenter property was not located in the shopping center, but was within 5 miles of the center. Wal-Mart wrote...
Ingles and Horne to assure them that the restrictions in the deed for the parking lot tract would not restrict its supercenter. Ingles and Horne would not agree, and Wal-Mart filed a declaratory action. The trial court granted Wal-Mart’s motion for summary judgment, finding that the covenants in the deed from Horne to Wal-Mart created a valid, enforceable covenant running with the land, which prohibited the use of any portion of the land conveyed in that deed for the sale of groceries. The covenants in the deed did not create a valid enforceable covenant that would prohibit Wal-Mart from operating a super-center containing a grocery department on a tract of land (other than the property conveyed in the deed) located within 5 miles of the center. Ingles and Horne appealed. The appellate court interpreted the clause according to ordinary contract law. It concluded that, under the covenant, the landlord made a personal promise that it would not lease to or permit occupancy by any grocery store on land it owned or acquired within 5 miles of the center and that any property conveyed by the landlord within 5 miles of the center would be conveyed subject to a restriction barring its use as a grocery store. The restrictive covenant in the parking lot tract deed created a real covenant running with the land that bars its use as a grocery store, but did not impose upon Wal-Mart the landlord’s personal covenant not to operate a grocery store anywhere within 5 miles of the center. The original purpose of the restriction was to establish the landlord’s obligation not to allow another grocery store within 5 miles in exchange for the rent. The court further refused to imply equitable servitude upon the land subsequently purchased by Wal-Mart, and affirmed the trial court’s determination. *Wal-Mart Stores, Inc. v. Ingles Markets, Inc.*, 581 S.E.2d 111 (N.C.Ct.App., 2003).

**Fees**

A developer cannot claim a taking based on a required street dedication and impact fees where it proposed constructing the street in its application and did not challenge the calculation of fees or pay them under protest. *KMST, LLC v. County of Ada*, 138 Idaho 577, 67 P.3d 56 (Idaho S.Ct., 2003).

**Guarantees**

Professional Male and McIntyre Square signed a five-year lease with no options for space in a shopping center. The lease was signed for McIntyre Square by its management agent, First City. A few months after execution, the officers and owners of Professional Male signed a Guaranty Agreement, personally guaranteeing Professional Male’s leasehold obligations. Five years later, the president of Professional Male signed an amendment extending the lease for another five years and significantly increasing the rent. Two years later, Professional Male defaulted on its lease and vacated the store. First City took a confession of judgment against Professional Male. First City and McIntyre Square sued the individual Guarantors under the Guaranty Agreement; the suits were consolidated. All the parties moved for summary judgment. The issue was whether the Guaranty Agreement signed in conjunction with the original lease applied to the lease extension. The Guarantors moved to preclude introduction of the confessed judgment as evidence of damages, and First City moved to prohibit the Guarantors from re-litigating the same issue. The trial court ruled against First City on both motions, ruled, *sua sponte*, that the Guaranty Agreement applied to the lease extension and ordered a trial on the damages. After a bench trial, again *sua sponte*, the trial court substituted McIntyre Square for First City as the real party in interest and rendered a verdict in favor of McIntyre Square in an amount less than the confessed judgment. The Guarantors appealed, and First City cross-appealed. The appellate court found that the Guarantors’ due process rights were not violated when the trial court granted judgment as to liability to First City. The court determined that the Guarantors were compensated sureties, and concluded that there was a material modification of the original lease, which substantially increased their risk. The court closely examined the language of the Guaranty Agreement and found that the Guarantors had not clearly consented to be bound by the changes in the lease. The appellate court remanded the case for consideration of that issue. The final issues raised on appeal were the trial court’s substitution of McIntyre Square for First City and the use of the confessed judgment to prove damages. The appellate court held that, even though McIntyre Square was the real party in interest and would be bound by the outcome of the litigation, First City had a right to sue on its behalf. With regard to the confessed judgment, the court found that it was not binding on the Guarantors in First City’s suit against them—it is only proof of the rendition of the judgment and does not create a rebuttable presumption of the principal’s liability in an action between a creditor and a surety. A concurring and dissenting opinion wrote that the Guarantors were not discharged by the material modification of the lease. *McIntyre Square Associates v. Evans*, 827 A.2d 446 (Pa.Super.Ct., 2003).

A five-year lease for space in a shopping center was signed by the president and owner of the corporate tenant with the individual’s name “for” the tenant. A guaranty was signed the same way. When the tenant left the space, the landlord sued both the tenant and the president individually based on the purported guaranty. The landlord moved for summary judgment, and the president cross-moved to dismiss the complaint as against her individually. The trial court granted the landlord’s motion against the tenant and the president’s cross-motion for dismissal of the action against her. The appellate court affirmed the judgment, observing that this was not “a case of an individual merely adding his or her corporate title while signing a document that contains language in the body of the agreement identifying such person as an individual guarantor.” The court had to consider extrinsic evidence to determine who the guarantor of the lease was. There were affidavits and a letter stating that the president signed the lease for the corporation, which would be “solely responsible for the lease.” The
Landlord & Tenant

A lease for office space provided that the landlord was responsible for maintaining the “exterior” of the leased space. Outside the tenant’s office space, there was a wooden deck that an employee of the landlord would inspect; repair nails were protruding from the deck. The tenant injured his back when his foot went through a board in the deck and he fell. The tenant sued the landlord for breach of contract and negligence. The landlord moved for summary judgment, arguing there was no duty to repair or maintain the deck. The court granted the landlord’s motion, and the tenant appealed. On appeal, the motion for summary judgment was reversed. The court held that summary judgment could only be granted if there were no triable issues of fact. Even though a landlord is protected by a general rule of non-liability, here, the court held that the language in the parties’ lease regarding maintenance of the “exterior” of the property was vague and ambiguous. Moreover, because the landlord arranged for an employee to inspect and repair the deck, he may have removed himself from the protection of the general rule of non-liability. Denton v. Pennington, CA02-1033, Ct. of App. of Ark., Div. 4, May 14, 2003.

The parties entered into a one-year commercial lease in October 1983. The form lease had certain provisions deleted, including a section regarding the tenant’s obligation to pay real estate taxes. In addition, the lease contained an option to purchase the premises, for which the tenant paid a deposit. The tenant also supplied funds toward the construction of an access road from the building to a state road. The tenant made one payment of real estate taxes on the property and thereafter ceased the payments. The tenant discontinued rent payments after April 1990. The landlord served a Notice to Quit for failure to pay rent in May 1992, and the tenant vacated the premises on Oct. 15, 1992. Thereafter, the landlord sued the tenant in district court, and the tenant answered and counterclaimed for monies the landlord allegedly owed the tenant. The landlord was awarded $8,100, for rent due, less the monies paid by the tenant for the real estate taxes, the deposit for the option to purchase and the cost of the road improvement. The landlord appealed to the superior court, and the superior court reversed and awarded the landlord $82,741.41 without any reduction to the tenant for the monies claimed in the tenant’s counterclaim. The tenant appealed the decision of the superior court, and the appellate court affirmed the decision of the superior court. It held that, under Massachusetts law, the tenant was not procedurally entitled to counterclaim in a commercial summary process action. It held that the proper procedure was for the tenant to commence his own action and then move to consolidate the actions based upon the same subject matter. Fafard v. Lincoln Pharmacy of Milford, 439 Mass. 512, 789 N.E.2d 147 (Sup. Judicial Ct. of Mass., 2003).

On Aug. 25, 1997, the parties entered into a commercial lease. On Nov. 5, 1998, the parties amended the lease. In November 2001, the tenant ceased making rent payments due. The landlord commenced an action to pay rent due and received a money judgment award that was subsequently paid by the tenant. The tenant then paid February 2002 rent and a portion of the March 2002 rent. Thereafter, the tenant ceased its rent payments and also failed to pay real estate taxes and other financial responsibilities under the lease. The landlord then commenced an action to recover damages from the tenant’s breach of contract. The court granted the landlord’s motion for summary judgment with respect to the tenant’s breach of contract. However, with respect to damages, the court stated that the evidence indicated that the landlord failed to mitigate its damages once it was clear that the tenant was in breach of the contract. Because there was no proof that the landlord attempted to mitigate its damages, the landlord could not be granted summary judgment on this issue and it was remanded for trial. Manufacturers Life Ins. Co. v. Mascon Information Technologies, 270 F. Supp. 2d 1009 (U.S. Dist. Ct. N. Dist. Ill., 2003).

The tenant and landlord entered into a 10-year lease agreement in January 1980. In 1981, the parties extended the lease for another 10 years. In the 1981 lease, the parties provided that the landlord was entitled to demolish the leased premises by giving the tenant one year’s notice and a payment of $300,000. In 1988, the parties extended the lease to the year 2010. They also amended the demolition clause to provide that if the landlord terminated the lease after Aug. 1, 1991, but before Jan. 30, 2000, the tenant was entitled to a payment of $300,000; but if the landlord terminated the lease after Jan. 30, 2000, the plaintiff would not receive the payment. On March 2, 2001, the landlord served the tenant with a Notice of Termination of Lease, stating that the landlord intended to terminate the lease as of March 7, 2002. The Notice of Termination did not state that the landlord intended to demolish the premises. The tenant then commenced an action seeking a declaration that the Notice was void because it contained no notice that the building was to be demolished. The tenant moved for a stay of the Notice. Even though the landlord never answered the tenant’s complaint or cross-moved for summary judgment, the trial court issued a judgment and order disposing of the tenant’s claims. The tenant appealed, and the appellate court reversed. It held that issues of fact existed regarding whether the Notice was sufficient to terminate the tenancy. It considered that no proof was offered that termination of the building was imminent; furthermore, certain facts presented by the tenant indicated that demolition was prohibited until at least the year 2007. The tenant was entitled to a stay of the running of the Notice because it showed a probability of success and a danger of irreparable injury if the injunction was not granted. Oribus, Inc. v. B.W.H.N.V. Associates, 305 A.D.2d 275, 760 N.Y.S.2d 44 (N.Y. Sup. Ct. App. Div. 1st Dept., 2003).
Kurtti and Martinez executed a three-year lease with plaintiff-landlord P.E.V. Management. A third party, Emerald City Investment and Management, by leasing agent Gordon Boone, was the real estate leasing agent for the property. Prior to executing the final lease, Boone sent a draft lease of the premises to Kurtti and Martinez. A cover letter attached to the draft lease warned Kurtti and Martinez that although P.E.V. usually “went along” with Emerald City and Boone, Boone could not commit P.E.V. to all of the provisions of the draft lease. When the final lease was sent to each party for signature, Emerald City and Boone notified each party that it was not making any representation or recommendation to either party, and that each party was responsible for consulting its own attorney or tax advisor regarding the provisions of the lease. Thereafter, Kurtti and Martinez approached Boone regarding their desire to vacate the premises and advised him that they found a potential subtenant for the leased space. Boone indicated that he would handle the entire negotiation of the sublease for Kurtti and Martinez, but made no indication regarding the final termination of Kurtti and Martinez’s original lease. However, rather than negotiate a sublease for Kurtti and Martinez, Boone offered the potential subtenant a new lease, which the potential subtenant rejected. Nevertheless, Kurtti and Martinez vacated the premises prior to the expiration of the lease term and without a sublessor or a new tenant for the premises. P.E.V. sued Kurtti and Martinez for breach of the lease and for the balance of rent due; Kurtti and Martinez brought in Boone and Emerald City as third-party defendants. They claimed that they vacated the premises based upon Boone’s representations that he would “handle” the subtenant for the premises and on Boone’s apparent authority as an agent for P.E.V. to release them from the lease. Both P.E.V. and Boone/Emerald City were granted summary judgment against Kurtti and Martinez, and the appellate court affirmed. The appellate court held that Boone could not be considered an actual or apparent agent of P.E.V. Kurtti and Martinez were aware prior to the inception of the lease that Boone had no authority to bind P.E.V., only to negotiate on its behalf. The record gave no indication that Boone had any authority to create or terminate a lease on behalf of P.E.V. P.E.V. v. Kurtti and Martinez, No. 50452-5-I, Ct. of Appeals of Wash., Div. 1, Sept. 22, 2003.

In September 2000, Paschal and Voicestream entered into a long-term lease agreement for rooftop space for Voicestream’s cellular telephone communications system atop Paschal’s building. Installation of the equipment occurred in 2001. After the installation, leaks developed in the roof, causing damage to the property of the building’s occupants. Paschal sent a letter to Voicestream and its in-house counsel on Feb. 1, 2002, regarding the problems with the roof. Another letter was sent on March 6, 2002. Paschal later argued that these two letters provided sufficient notice of default to Voicestream under the Washington unlawful detainer statute. Although neither letter contained the word “waste,” Paschal argued that the letters were adequate notification to vacate for waste under the unlawful detainer statute. Paschal then moved to require Voicestream to show cause as to why an unlawful detainer trial date should not be set. On the return date at the hearing, the trial judge determined that the court did not have jurisdiction under Washington’s unlawful detainer statute because Voicestream never received legally sufficient notice from Paschal and the complaint was dismissed without prejudice. Paschal appealed the determination of the trial court rather than filing a new notice under the statute. The appellate court affirmed, holding that the letters of Feb. 1 and March 6, 2002, contained insufficient notice under the unlawful detainer statute. It considered that the letters did not contain the notice of default language or a demand to correct the default or surrender the premises. Furthermore, the letters never claimed that Voicestream was committing waste under the statute. Paschal v. Voicestream PCS III Corp., No. 50978-1-1, Wash. Ct. App., Div. 1, Sept. 22, 2003.

S&J leased a space in a shopping center (Space D) under a lease that defined the rent, square footage and cost per square foot. The lease also required S&J to pay its pro rata share of common costs. The original landlord died, and his son, McCloud, became the landlord. The lease was amended and extended several times, making reference to the original lease, and S&J continued to pay its rent and common costs. Before vacating the space, S&J measured it and discovered it was actually 220 square feet less than the amount stated in the original lease. S&J filed suit against the landlord for breach of contract, fraud and unjust enrichment. The trial court found in favor of McCloud on the claims of breach of contract and fraud and in favor of S&J on the claim of unjust enrichment. McCloud appealed, arguing that S&J had waived any objection to variation in square footage and that S&J failed to show that McCloud had received any benefit by retaining the rents. The appellate court found merit in the second argument: S&J did not prove that it was inequitable for McCloud to keep the rent for Space D. It quoted a recent case holding that “Mere receipt of benefits is not enough when there is no showing that it would be unjust for defendant to retain the benefit received.” The record contained no evidence that McCloud engaged in any wrongful conduct or that the rent for Space D was unreasonable. Thus, the appellate court reversed the part of the judgment finding that McCloud had been unjustly enriched by retaining the rent. S&J, Inc. v. McCloud & Co., LLC, 108 S.W.3d 765 (Mo.Ct.App., Southern District, Div. 2, 2003).

Saul Subsidiary II Limited Partnership (Saul) and Venator Group Specialty, Inc. (formerly Woolworth), entered into a 40-year lease in 1949. In 1989, the parties extended the lease until Jan. 31, 2000. The lease provided that Woolworth would pay Saul a minimum annual rent payable in monthly installments. Woolworth would also pay additional rent in any calendar year in which its sales exceeded $1.2 million (percentage rent). If Woolworth vacated the premises, additional rent would be paid as an annual sum equal to one-third of the total additional rent that Woolworth paid for the three calendar years immediately preceding the vacating of the premises. The parties referred to this type of additional rent as “One of Three” rent. By mid-October 1997, Woolworth had removed all of its inventory and fixtures from the premises and removed all of its employees. It delivered the key to the premises to Saul on Oct. 23, 1997. Thereafter, Woolworth considered, but abandoned, in May 1998, the concept of opening a temporary outlet store at the premises. Meanwhile, in November 1997, Saul formally
notified Woolworth that it had abandoned the premises under the lease and owed additional rent for the period Jan. 1, 1997, to Jan. 31, 2000. Woolworth instead tendered a check to Saul in the sum of $88,866.48, representing percentage rent for the period January 1997 through December 1997 based upon its sales for that year. In February 1998, Saul sued Woolworth for breach of contract. It claimed the premises were vacated in October 1997 and that Woolworth was liable for One of Three rent for calendar year 1997 and all succeeding years until the expiration of the lease on Jan. 31, 2000. Woolworth argued it did not vacate the premises until 1998 and that it was obligated to pay the One of Three rent only from the date it vacated the premises. It also argued it was not liable for One of Three rent for the calendar year 1997 because, under the doctrine of accord and satisfaction, Saul had accepted Woolworth’s check in the sum of $88,866.48 in payment of Woolworth’s percentage rent for the year 1997. The trial court held that Woolworth owed One of Three rent for the entire year it vacated the premises (without proration). The trial court also concluded that Woolworth did not vacate the premises until 1998, and determined that Woolworth did not owe One of Three rent for calendar year 1997. The trial court never reached the issue of accord and satisfaction because it found for Woolworth on the merits. Saul appealed, and the appellate court reversed and remanded the matter to the trial court. It held that Woolworth vacated the premises in October 1997 when it handed the keys to the premises to Saul. It held that Woolworth’s closing of the premises and removing all inventory, fixtures and employees in 1997 fell within the plain meaning of “vacate.” It did not consider Woolworth’s small attempts to open a temporary outlet store at the premises in early 1998 sufficient to find that it did not vacate the premises until 1998. Furthermore, Woolworth’s payment of $88,866.48 was not an accord and satisfaction because Woolworth did not clearly express its intent that the payment be treated as a settlement of all rents due for the year 1997. Moreover, Saul did not accept the check as a full payment but only a payment toward Woolworth’s account. Therefore, there was never a mutual agreement that the tendered check was intended to represent payment in full for the year 1997. Saul Subsidiary II v. Venator Group Inc., 830 A.2d 854 (D.C. Ct. App., 2003).

The tenant sold shoes on the landlord’s property commencing in 1994. In 1998, the building from which the tenant operated its business was destroyed in a fire and the tenant lost its entire business. In the years between the commencement of the tenant’s business and the fire, the tenant operated at a loss for the first three years. In 1997, the year before the fire, the tenant claimed a profit of $31,000 on its tax return. After the fire, the tenant reopened in a new location but closed its business in the summer of 2000. The tenant sued the landlord for damages, including “future lost profits.” The landlord’s neglect was found to be the cause of the fire and the tenant was awarded $1.3 million in damages, including “future lost profits.” On appeal, the court affirmed the finding that the landlord’s negligence was the cause of the fire. However, it disagreed with the tenant’s accounting expert regarding the actual losses suffered by the tenant. It noted that the expert failed to utilize the tenant’s net profits when calculating the tenant’s losses. The expert also failed to consider officer compensation as part of its calculation. The appellate court remanded the issue of damages to the trial court, ordering that the tenant was required to provide reasonable proof regarding its actual losses sustained as a result of the fire. Sostchin v. Doll Enterprises, Inc., 847 So. 2d 1123 (Fla. Ct. App., 3rd Dist., 2003).

A tenant leased Pier 49 in New York City from the City of New York under a 49-year lease in 1997. The City’s plan was to create a commercial attraction for visitors and residents, including a visitors’ center. Under a sublease from the tenant, the City would operate a visitors’ center at Pier 49 with minimal rent charged in exchange for the City’s payment of a portion of the costs of renovating the building intended for the visitors’ center. As of May 2002, the tenant had spent over $22 million to conduct the renovations necessary to complete approximately 70% of the project. Thereafter, unanticipated circumstances involving funding for the project changed, and the parties drafted an amendment to the lease—which the City never executed—regarding the tenant’s entitlement to reduced rent. In August 2001, the tenant commenced an Article 78 proceeding (a declaratory judgment action) either to compel the City to sign the amendment or to declare the amendment effective notwithstanding the absence of the City’s signature. The tenant also sought a determination of the amount of rent due. During this time, the tenant continued to pay only the amount of rent that would be due under the unexecuted amendment. After Sept. 11, 2001, the tenant was essentially evicted from the premises because of the emergency situation that arose in the aftermath. The tenant continued to pay only the reduced amount of rent. In October 2001, the City commenced a Civil Court non-payment proceeding against the tenant, but the matter was dismissed because the City improperly served the tenant. Thereafter, on July 19, 2002, the City served the tenant a notice of default with a cure period ending Aug. 2, 2002. The tenant moved for a “Yellowstone injunction,” which maintains the status quo and tolls the “cure period” so that, after a determination of the merits, the tenant has the opportunity to cure the default and avoid a forfeiture of the property. The civil court denied the motion, and the appellate court reversed. It held that the denial of the Yellowstone injunction was an improvident exercise of discretion. The appellate court held that the tenant made a sufficient showing to grant the Yellowstone injunction. It considered the valuable leasehold and the amount of funds already expended by the tenant, and concluded that the law does not favor forfeiture and that the tenant need not demonstrate the probability of success on the merits. It also held that the tenant did not have to prove its ability to cure: The tenant only had to show that a basis exists for the motion court to believe that, without vacating the premises, the tenant has the ability to cure after an adjudication on the merits in the tenant’s favor. The appellate court then added that the tenant’s declaratory judgment action showed that the tenant had plausible means to cure the default. WPA/Partners LLC v. Port Imperial Ferry Corp., 307 A.D.2d 234, 763 N.Y.S.2d 266 (N.Y. Sup. Ct., App. Div., 1st Dept., 2003).
Leases

The parties entered into a lease agreement for prime office space. After the plaintiff-tenant moved into the office space, the employees of the tenant began to detect and complain of various problems with the leased space, including water damage and leakage, elevator malfunctions, insects, rodents and odors. The landlord failed to make the necessary repairs in a timely manner, and the tenant filed a lawsuit seeking a declaration that the lease was effectively terminated. The trial court determined that the lease between the parties was effectively terminated because all of the prerequisites for effective termination had been proven. The appellate court affirmed, finding that the problems cited by the tenant were not immaterial breaches of the contract, and that the landlord failed to cure the breaches in a timely fashion and failed to pursue remedies to cure its default diligently. The appellate court also considered that the tenant did not waive its rights under the lease and, in fact, had repeatedly requested that the landlord make all necessary repairs and remedies. In addition, the tenant was not obligated to refer to any specific lease provision in its notice to terminate because the tenant had sufficiently advised the landlord in various letters of its breaches and defaults under the lease. *Glimcher Partners v. The Board of the State Teachers Retirement System of Ohio*, No 02AP1115, Ct. of App. of Ohio, 10th App. Dist., Franklin Co., May 20, 2003.

Jamestown Management Corporation (Jamestown) and International Biochemical Industries, Inc. (Bioshield), entered into a 10-year lease commencing July 9, 1999. The lease provided several remedies in case of a default, including an option to terminate the lease and an accelerated future rent clause. By December 2000, Bioshield had vacated the premises, relocated and refused to pay any rent after December 2000. Jamestown commenced a dispossessory proceeding against Bioshield, which resulted in a default judgment against Bioshield on Jan. 21, 2001, for two months’ past due rent but did not terminate the parties’ lease. Jamestown then attempted, over a 12-month period, to re-let the property, but was unable to do so. In December 2001, Jamestown sued Bioshield for rent, late fees, interest, attorney fees and damages. Bioshield counterclaimed, arguing that Jamestown’s claims were barred by res judicata. It argued that Jamestown’s failure to bring the claim for future rent or accelerated rent in the dispossessory action precluded it from doing so later. The trial court granted summary judgment against Bioshield. It held that the lease between the parties had never been terminated and that the lease permitted Jamestown to seek future rent that had not yet accrued. The appellate court affirmed. It held that the doctrine of res judicata did not apply. It considered that, under the terms of the lease, Jamestown was authorized to repossess the premises without terminating the lease. Jamestown was also authorized under the lease to reserve the right to recover future rent if it was unable to re-let the premises, even if it recovered some of the rent in a prior dispossessory proceeding. *International Biochemical Industries, Inc. v. Jamestown Management Corporation et al.*, 262 Ga. App. 770 (Ga. Ct. App., 3rd Div., 2003).

The landlord owned commercial property upon which a restaurant, Stanford & Sons, was situated. Throughout the 1970s and 1980s, the landlord leased the property to a tenant who operated Stanford & Sons. In 1990, the landlord negotiated a lease with United Restaurants to operate Stanford & Sons. The lease provided for a fixed minimum monthly rental for the property for a period of five years. The lease also provided that United Restaurants would pay the landlord a percentage rent in “a sum equal to six (6) percent of the annual gross receipts, as hereafter provided, in excess of the sum of One Million Dollars ($1,000,000).” Annual gross receipts were defined as “receipts from gross sales of United and all licensees, concessionaires and tenants of United, from all businesses conducted upon or from the leased premises by United.” United was also obligated to provide the landlord with annual financial statements within 30 days after each calendar year, and United had the option to extend the lease for three additional five-year terms. In 1993, United leased additional adjoining space from a different landlord and utilized the space as a dance hall and dining club. In 1994, United leased another adjoining space for a billiard hall, and built an entrance so that patrons could access the billiard hall from the restaurant. In 1996, United leased a third adjoining space and created a comedy club. United failed to provide annual financial statements and also failed to pay the percentage rent to the landlord. The landlord filed a petition against United for failure to pay rent and provide the financial statements, and for making unauthorized alterations to the leased premises. The court found in favor of United. It held that no percentage rent was due because the gross receipts from the restaurant alone did not exceed $1 million. It further held that because the landlord took no action from 1991 to 1996 regarding United’s failure to provide financial statements and because it took no action when United altered the property, the landlord had waived those provisions in the lease. In affirming the decision of the trial court, the appellate court considered that, at the time the lease agreement was drafted, the landlord was aware that Sandford & Sons had been expanded into the other leased spaces and could have included its intention regarding the calculation of percentage rent. The appellate court further considered that the landlord waived the obligation of United to provide financial statements when it continued to accept rent payments, even though United failed to comply with the lease terms regarding the submission of financial statements. *Langdon v. United Restaurants, Inc.*, 105 S.W.3d 882 (Ct. of App. of Mo., 2003).

Robert Samuel and KTVU entered into a 20-year lease agreement wherein KTVU leased an office building with the intent to operate a TV station at that location. The lease provided that Samuel was responsible for providing space in front of the building for satellite dishes and two microwave dishes on the roof. Samuel was also required to maintain the roof and was required to install a new roof by April 1, 1994. On Sept. 10, 1997, KTVU filed a lawsuit against Samuel, alleging breach of contract under the lease and sought (1) a declaratory judgment that under the lease it was permitted to install additional satellite dishes as needed and (2) damages because Samuel failed to install a new roof properly or care for the existing roof. After a jury trial, the jury found that, at the time the lease was signed, both parties did not intend that the tenant was limited
to the number of satellite dishes stated in the lease and assessed damages at $50,000 for Samuel’s failure to comply with the roof-related provisions of the lease. Samuel appealed both issues. With regard to the issue of the number of satellite dishes, Samuel argued that the lease was not ambiguous, and, if it was, the trial court never entered such a ruling. Therefore, Samuel argued that the submission of that question to the jury was improper. The appellate court disagreed and upheld the jury findings. It noted that it would not disturb a jury finding if evidence existed to support that finding, even if it disagreed with the jury’s conclusion. It held that the lease was ambiguous on its face because it only specified the number of satellites to be installed at the initiation of the lease. It was silent on the issue of additional satellites. Moreover, it was established during the trial that, prior to signing the lease, the parties discussed the necessity of satellite dishes to run a TV station and that the constantly changing technology would cause the structure and size of the satellite dishes to change over the course of the 20-year lease. The appellate court further ruled that it was not required of the trial court to make an express finding of ambiguity in the lease. It considered that the interpretation of a contract is a fact question for the jury, and the decision of the trial court to submit a question regarding the interpretation of the contract to the jury was sufficient to infer that the trial court believed the lease to be ambiguous. With regard to the installation of the new roof, the appellate court held that the facts established during the trial were sufficient to support a jury finding that Samuel failed to maintain and install a new roof as provided in the lease, and the sum of $50,000 was also supported by the evidence at trial. Samuel v. KTVU Partnership, No. 08-02-00010-CV, Tex.Ct. App., 8th Dist., El Paso, Aug. 15, 2003, rehearing denied, Oct. 22, 2003.

Sy-Lene leased retail space from Starwood’s in a shopping center to operate a lingerie store under a 10-year lease. The lease provided that the tenant would pay $30 a month for each employee parking space, and gave the landlord the right to limit the number of spaces. Sy-Lene tried unsuccessfully to rent spaces over two-and-a-half years and was charged as much as $85 per month per space. Finally, after being told that the only spaces available for employees would be daily parking at $8 per hour, Sy-Lene sued for a judgment, declaring that it had a right to at least 10 reduced-fee employee parking spaces, and an injunction directing Starwood to provide the spaces, as well as to provide Sy-Lene with detailed information about common area maintenance (CAM) costs. The trial court dismissed the complaint; the appellate court affirmed the dismissal regarding the parking spaces, finding that the lease was unambiguous and did not require Starwood to provide any reduced-fee parking for Sy-Lene’s employees, but finding that Sy-Lene was entitled to an accounting of the CAM costs. The Maryland Supreme Court granted certiorari and concluded that the definitions of the term “limit” incorporate the concept of a boundary or restraint, but do not include the power to eliminate. Starwood did not have the right to reduce the number of spaces to zero, but the lease did not indicate what limit was acceptable. Thus, the court remanded the case to the trial court and directed it to determine the parties’ intentions at the time the lease was executed. Sy-Lene of Washington, Inc. v. Starwood Urban Retail II, LLC, 376 Md. 157; 829 A.2d 540 (Md. Sup. Ct., Sept.Term 2002, decided July 29, 2003).

Pastoria owned and operated a restaurant since 1975. In 2001, Pastoria and Woody’s Steaks, Inc. (Woody’s), entered into a commercial lease and license agreement under which Woody’s would operate the business commencing Sept. 4, 2001. On that day, agents of Woody’s attempted to open and operate the restaurant business, but failed to demonstrate to Pastoria that they had obtained the proper business license, food service permit, sales tax certificate, workers compensation coverage and premises liability insurance required by the parties’ lease and local law. Pastoria refused to allow the agents to operate the business on that day. Thereafter, Pastoria informed Woody’s that it was in default of the agreement and returned Woody’s deposit. Woody’s sued Pastoria for breach of contract. It argued that Pastoria failed to give notice to them of the breaches and an opportunity to cure. Pastoria denied liability. After a period of motion practice and discovery, Woody’s and Pastoria each moved for summary judgment. Pastoria was granted summary judgment by the trial court on the ground that Woody’s failed to fulfill its condition precedent of obtaining the proper permits and licenses under the court’s interpretation of the lease contract. In affirming the trial court, the appellate court held that the contract was ambiguous regarding whether Pastoria was required to give Woody’s notice and an opportunity to cure its defaults. Because it was ambiguous and drafted by Woody’s, the court was entitled to apply a construction that goes most strongly against the drafter. Because the drafter (Woody’s) failed to perform the condition precedent, and the issues of notice and an opportunity to cure were silent in the contract, the court was permitted to interpret the contract to find that Woody’s failed to fulfill its condition precedent and Pastoria was entitled to terminate the contract and return Woody’s deposit. Woody’s Steaks, Inc. v. Pastoria, 261 Ga. App. 815, 584 S.E.2d 41 (Ga. Ct. App., 1st Div., 2003).

Options
L.C. Smull, Robert H. Cowgill and S-C Development (S-C), and the plaintiff’s predecessor in interest entered into a 25-year lease in 1977. The lease was assigned to Martin Gans and Stars Drive-In, Inc.(Gans) in 1998. The lease provided that if Gans wished to exercise the lease option to extend, it was required to notify S-C in writing, 60 days prior to the date of expiration of the lease. The original lease expired on July 31, 2002. The 60th day prior to the expiration date of the lease was Saturday, June 1, 2002. Gans attempted to exercise the option to extend by letter sent via regular mail on Monday, June 3, 2002. S-C admitted that it received service of the letter on Tuesday, June 4, 2002, and had notified Gans by letter dated June 13, 2002, that the attempt to exercise the option was untimely and that S-C wished to terminate the lease as of July 31, 2002. Gans sued for breach of contract, arguing that pursuant to §12a of the California Code of Civil Procedure (the Code), its mailing of the option on Monday, June 3, 2002, was timely because the 60th day prior to the expiration of the lease fell on a Saturday. The
trial court disagreed, and the plaintiffs appealed. The appellate court affirmed. It held that §12a of the Code did not apply in this case because this case was a contractual matter rather than “an act provided by law” as specified in the Code. It considered that the legislature did not intend that §12a of the Code apply to acts governed solely by contractual provisions. It reasoned that other sections of the Code did specify their application toward contracts as well as acts required by law, and, therefore, if the legislature intended that §12a apply to contracts it would have so specified. Gans v. Smull, 111 Cal. App. 4th 985; 4 Cal. Rptr. 3d 353 (Cal. Ct. App., 2d App. Dist., Div. I, 2003).

Retail Theft

James Hart was seen by a salesperson leaving the luggage department of Neiman Marcus, carrying a black leather briefcase. A videotape by the security cameras confirmed this observation. A loss prevention investigator observed Hart and recognized him from a prior shoplifting incident. He and a colleague kept Hart under surveillance and watched Hart pass several cash registers and head for the exit. Before Hart exited, he saw the investigator and went back inside the store. Hart was eventually read his rights and arrested. During his trial, there was testimony about an earlier incident in the same store when he tried to return a coat that was identified as stolen. Hart was convicted of retail theft in the briefcase. He appealed, arguing that the indictment was based on perjured testimony, thus denying him due process, and the evidence of the coat theft should have been excluded. The appellate court found that the testimony was not perjured, but was inaccurate in part. The court found no case holding that a prosecutor’s unintentional presentation of inaccurate evidence violates due process. The court also held that the evidence regarding the prior theft of the coat was admissible to prove intent, as long as it was beyond a mere suspicion—it did not have to be beyond a reasonable doubt. Finally, the court determined that there was no requirement that a defendant exit a store in order to prove intent. State law creates a presumption of intent, even where a person has not left if he conceals and removes unpurchased merchandise beyond the last known station for making payment. The court affirmed Hart’s conviction. People v. Hart, 338 Ill. App. 3d 983, 789 N.E.2d 905 (Ill. App. 2003).

Tort Liability

A patron of a bar and grill was assaulted by another patron and a gang of his associates in the parking lot, was rendered unconscious and was hospitalized for 16 days. The main perpetrator was arrested at the scene and convicted of felony assault, and the victim sued the bar. A jury found that the bar was negligent and awarded economic damages of over $80,000. The bar appealed. Under California law, a duty to take affirmative action to protect against the acts of third parties will be imposed only if the conduct can be reasonably foreseeable. The court reviewed a relevant case involving a shopping center, and determined that “a high degree of foreseeability is required in order to find that the scope of a landlord’s duty of care includes the hiring of security guards.” Furthermore, the court concluded that “the requisite degree of foreseeability would rarely, if ever, be proven in the absence of prior similar incidents of violent crime on the landlord’s premises.” The plaintiff attempted to distinguish the bar from a shopping center, but the court found that the same standard applied in the case before it and that the bar had no duty to prevent the type of crime that occurred. The evidence proved that there had been ordinary bar fights at the bar, both inside and outside the premises. However, there were no incidents of the type of gang attack that had occurred in this case. Moreover, merely because the bar owner had provided some security, the law did not impose a limitless duty upon him to prevent all criminal conduct. Because nothing remotely similar to the incident had ever occurred before, it was, therefore, unforeseeable and the bar owner had no duty to prevent or intervene on the gang attack on its patron. The negligence analysis, therefore, did not reach issues such as whether the bar owner should have hired more security or had a different intervention policy for its security staff. Delgado v. Trax Bar & Grill, 109 Cal. App. 4th 262; 134 Cal. Rptr. 2d 548; (Court of Appeal of California, Fifth Appellate District, May 28, 2003); rehearing denied, Cal. App. 5th Dist., June 18, 2003; Review granted, depublished, Cal. Aug. 27, 2003.

Rita Gauthier fell into a hole in the parking lot of premises owned by Yorkshire Realty. She had exited the first floor of the building leased by Super Hair when she fell into the hole. She sued Yorkshire Realty and Super Hair for negligence. The trial court granted Super Hair’s motion for summary judgment dismissing the premises liability claim against it. Super Hair established its entitlement to judgment as a matter of law on that claim by proving that the driveway/parking lot was not part of the leased premises and that the maintenance of that common area was under the control of Yorkshire. Gauthier appealed. On appeal, the appellate court affirmed the dismissal of the portion of the plaintiff’s claim regarding premises liability against Super Hair. However, the appellate court held that issues of fact existed as to whether Super Hair’s proprietor exposed the plaintiff to increased risk when he directed the plaintiff out the door where the hole existed. He voluntarily assumed a duty to act with reasonable care and may be held liable for breach of that duty if the plaintiff relied on that undertaking, and if the act or failure to act placed the plaintiff in a more vulnerable position than if the obligation had not been undertaken. Gauthier v. Super Hair, 306 A.D.2d 850, 762 N.Y.S.2d 736 (N.Y. App. Div, 4th Dept., 2003).

Steven Bertrand was an employee of Fair Auto and suffered serious injury to his head after he slipped and fell in Fair Auto’s parking lot. Katherine Hurley, as conservatrix of Bertrand, brought an action in negligence against Fair Auto and the owner/lessee of the leased premises, 111 South Main Street, LLC. She alleged that the defendants failed to remove ice to make the premises safe and further failed to warn of the icy conditions. 111 South Main moved for summary judgment, argu-
ing that it owed no duty to Bertrand because the lease between 111 South Main and Fair Auto granted possession and control of the premises to Fair Auto. The trial court denied the motion. It held that the lease between 111 South Main and Fair Auto left a material question of fact at issue, which precluded summary judgment. The court considered that the lease did not accurately describe which portions of the premises were under the exclusive control of Fair Auto. It considered that the description of the property in the lease was left blank. Although Fair Auto attempted to cure this error through affidavits, the court held that such evidence was insufficient to pass summary judgment. Hurley v. 111 South Main Street, LLC., CV020346178S, Superior Court of Conn., Judicial Dist. of Danbury, at Danbury, Sept. 17, 2003.

Robert Pfanz was injured in a Kmart store after he sat on a bench manufactured by Waymar Industries. Pfanz and his insurer sued Kmart and Waymar for Pfanz’s medical expenses. After the accident, the plaintiffs’ attorneys notified Kmart that the bench should be preserved as evidence. However, Kmart kept the bench in use for more than two years after the commencement of the action. The bench was then removed by the store manager to be preserved for litigation, but store employees, who were not aware of the pending litigation, found the bench and threw it away. The store manager then learned of the disposal, and tried to retrieve the bench, but upon removal from the dumpster the bench was found to be substantially destroyed. The co-defendant, Waymar, was then unable to determine the effect of Kmart’s pre-accident repairs to and modifications of the bench. Even though the bench had never been the subject of a discovery order, Waymar sought sanctions against Kmart for destruction of evidence. Without a hearing, the trial court imposed sanctions against Kmart because it considered its actions either intentional or so reckless that it should be held accountable. The court did not make a finding that Kmart’s actions were willful, but did rule that it would instruct the jury that the bench was presumed to be defective and that Kmart was presumed to be the cause of the defect. After a jury trial, the jury found Kmart 100% negligent and awarded damages to the plaintiffs, including $30,000 to Plantz for future medical expenses. Kmart then moved for a judgment notwithstanding the verdict (JNOV), regarding the future medical expense award, which was denied. Kmart appealed that portion of the verdict and the imposition of sanctions against it. On appeal, the Court of Appeals of Colorado affirmed both issues. With regard to the sanctions, the court of appeals held that the trial court did not commit any error in imposing sanctions against Kmart. It considered that it could only overturn a trial court’s imposition of sanctions if there was an abuse of discretion. The appellate court considered that trial courts have broad discretion in imposing sanctions for the destruction or damage to evidence, even if the evidence was not part of a discovery order. The purpose of the imposition of sanctions is not only to punish the spoiling party but also to remedy the injured party. The court of appeals also considered that, even though Kmart’s actions may not have been intentional, imposing sanctions based on reckless and gross negligence is appropriate to deter a party from improper conduct regarding evidence. A hearing was not required under the Colorado Rules of Civil Procedure. With regard to the award of $30,000 to the plaintiff for future medical expenses, the appellate court held that sufficient evidence existed to support the award in the light most favorable to the plaintiff. The jury was presented with extensive testimony regarding the plaintiff’s injuries, surgeries, physical therapy and symptoms, and it was proper of the trial court to refuse to reduce the award. Pfantz v. Kmart, Ct. of Appeals of Colo., Div. 2, No. 01CA0388, July 31, 2003, reharing denied, Colo. Ct. App., Oct. 9, 2003.

Kathleen Reitzell lost her footing and fell as she crossed between the ramp and a walkway (where there were missing tiles) to the parking lot of Pecanland Mall. She sued the mall owner/operator (Southwest) and the mall cleaning service (Southeast), alleging that an unreasonably dangerous condition existed. The trial court granted the defendant’s motions for summary judgment, and Reitzell appealed. The appellate court examined state law regarding premises liability, noting that an owner is liable for damages only upon showing that he knew, or should have known, of the defect that caused the damage. The court also noted that the “trier of fact must decide whether the social value and utility of the hazard outweigh, and thus justify, its potential harm to others.” Other factors to be considered in determining liability, the court stated, include the degree to which a danger is evident to the public and the accident history of the defect. Studying the facts, the appellate court concluded that the surfaces of sidewalks and parking lots are irregular and that the caretaker of these surfaces has no duty to eliminate all variations in elevations. In the case at hand, the appellate court agreed with the trial court’s finding that the patched area and missing tiles did not present an unreasonable risk of harm. A person should know that there will be a change in surfaces and elevations when stepping off a curb or walking down a ramp, and exercise caution. The testimony of the mall’s operation manager, maintenance supervisor and Public Safety Director indicated that the mall was not negligent in its inspection, maintenance and repair of the area, and that no other accidents had occurred in that area. Thus, the appellate court found that no questions of fact existed, and affirmed the grant of summary judgment. Reitzell v. Pecanland Mall Assoc., Ltd., 852 So. 2d 1229 (La.Ct.App., 2nd Cir., 2003).

Zoning
A developer had vested rights in planned development zoning, even though he hadn’t obtained final approvals because he was “the beneficiary of a significant affirmative governmental act ... allowing development of a specific project,” had relied in good faith on that act and had incurred substantial obligations and costs in pursuit of the project. City of Suffolk v. Board of Zoning Appeals, 580 S.E. 2d 796, 266 Va. 137 (2003).

A zoning hearing board denied a landowner’s challenge to a rezoning from a special use district, which permits regional shopping centers, to a business park district, which does not permit them. The appellate court affirmed, rejecting the
landowner’s claim of spotzoning and inverse condemnation, and finding that the change was rationally related to objectives in the comprehensive plan and to bringing higher paying jobs to the area. **Fisher v. Cranberry Twp. Zoning Hearing Board, 819 A.2d 181 (Pa. Comm. Ct., 2003).**

A zoning board had sufficient evidence to support its conclusion that no reasonable use of a property in a wetlands conservation district could be made without a special exception permitting a 56,000 square foot grocery store and a 302-space parking lot. **McKibbin v. City of Lebanon, 816 A.2d 966, 149 N.H. 59 (N.H.S.Ct., 2003).**

A county may prohibit billboards in an area, even if other commercial or non-commercial signs are permitted in that area. **Montana Media, Inc. v. Flathead County, 63 P.3d 1129 (Montana S.Ct., 2003).**

Because zoning and comprehensive plans have different functions, a comprehensive plan’s mixed-use policies cannot be used to evaluate a mixed-use development proposal in the absence of zoning regulations implementing those policies. **Pinecrest Homeowners’ Assoc. v. Glen A. Cloninger Assoc., 62 P. 3d 938, 115 Wn. App. 611 (Wash.Ct.App., 2003).**

**Legislation**

**Arkansas** —2003 New Laws, S.B. No. 620, authorizes municipalities and municipal service agencies to assess development impact fees to offset capital costs reasonably attributable to the development for providing new or expanded public facilities to serve the new development.

—2003 New Laws, S.B. No. 941, called the Arkansas Brownfield Revolving Loan Fund Act, creates a fund and authorizes the Department of Environmental Quality to make loans and grants to owners of abandoned or underused industrial, commercial and agricultural properties to return them to productive use.

—2003 New Laws, H.B. No. 2406, prohibits municipalities from enacting laws that require the elimination, alteration, diminishment or taking of a legally erected outdoor advertising sign without first paying compensation.

**Tennessee** —2003 New Laws, H.B. No. 566, enacts the Inner-City Redevelopment Act of 2003 to encourage municipalities to create self-funding redevelopment districts and designate district management corporations to execute self-help programs to enhance local business climates, with the broadest possible discretion in establishing those programs consistent with local needs.

**Washington** —2003 New Laws, H.B. No. 1707, authorizes municipalities to establish categorical exemptions from the State Environmental Policy Act to infill development that complies with the Growth Management Act.

—2003 New Laws, S.B. No. 5602, H.B. No. 1755, amends the Growth Management Act to require municipalities to ensure that their actions to adopt or amend comprehensive plans or development regulations, taken collectively, provide sufficient suitable land within each of their jurisdictions’ allocated housing and employment growth as adopted in countywide planning policies and as consistent with the 20-year population forecast.
Ownership structures of shopping centres may not always be as they first appear. To a reasonable person driving by, a shopping centre may look like a single centre, under the control of a single owner. In reality, however, the centre may be comprised of two or more parcels of land, each subject to different ownership. The latter scenario formed the subject matter of an injunction hearing in the recent case of CF SY Inc. et al. v. CRE IT Management Limited et al. [2003] O.J. No. 3473 (Ont. S.C.J.).

In CF SY v. CRE IT Management, a dollar store franchisee ("CF SY") and its franchisor sought an interim injunction to restrain the defendants (two adjoining owners/landlords and a competing dollar store operator) from breaching an exclusive contained in CF SY’s lease. The shopping centre in question consisted of two separately owned parcels, even though the two parcels appeared to be one shopping centre: There were shared parking and common areas, and only one main entrance; and, the buildings on each parcel were uniform in appearance. The legal description in CF SY’s lease made it clear, however, that the restrictive covenant only applied to the first parcel. CF SY’s premises were situated on one parcel, and the competing dollar store on the second parcel.

CF SY claimed that it was not aware that its exclusive did not apply to both parcels. It believed that the two parcels formed a single shopping centre, owned and controlled by a single landlord. CF SY argued that, notwithstanding that its lease appeared to limit the scope of its exclusive to the parcel upon which its premises were situated, both landlords (and, hence, both parcels) were bound by the exclusive, as they were joint venturers in the shopping centre and, as such, the lease covenant of one joint venturer bound the other.

Neither CF SY nor its solicitors had performed a title search.

The court dismissed CF SY’s motion on the grounds that it could not rely on its mistaken belief that its landlord owned and controlled both parcels. In the court’s view, if CF SY had conducted a title search, it would have discovered that the centre consisted of two separate parcels and that its exclusive only extended to one of those parcels. Moreover, the court noted that a title search would have revealed a mutual easement and operating agreement that existed between the adjoining landowners—an agreement expressly stating that the two owners were not joint venturers or partners with respect to the centre.

This case brings to light the importance of performing a title search in lease transactions. By performing a title search, a tenant may ensure, inter alia, that any exclusives, restrictions on the landlord’s ability to alter the centre, provisions relating to parking availability, and the landlord’s repair and maintenance obligations apply to those areas intended by the tenant.

Searching title has the added benefit of allowing a tenant to verify that it has contracted with the correct party. Additionally, a title search permits a tenant to identify the mortgagees, ground lessors and other encumbrancers of a centre. This information can be used to request non-disturbance agreements and/or to verify that the landlord has delivered all such agreements as are necessary.

CF SY v. CRE IT Management also serves as a useful reminder to landlords to ensure that the legal description and site plans included in their lease forms are reflective of what they actually own and control. In addition, in order to avoid claims based on misrepresentation, landlords should make a point of informing all prospective tenants of any areas on a site that they do control.

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The New Limitations Act: It’s About Time

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The law of limitations is set to change in Ontario when the new Limitations Act 2002 (“the new Act”) becomes effective on January 1, 2004. The new Act is the result of decades of effort on behalf of the Ontario legislature to simplify the law of limitations in Ontario. The current Limitations Act (the “old Act”) is a collection of provisions taken from English statutes dating back to the 1800s. The new Act is a much-needed and much-awaited change toward modernizing the law in Ontario, as it relates to limitation periods.

Why Are Limitation Periods So Important?
The premise behind limitation periods is that lawsuits should be brought within a reasonable time frame so that people and businesses are not under the indefinite threat of legal action. In addition to peace of mind, limitations exist for practical reasons. Documents may be destroyed and memories will fade as time elapses, thus compromising a party’s ability to defend an action. Furthermore, the ever-increasing costs of storing records and the recent increases in insurance are factors that support the importance of limitation periods. For these reasons, it has generally been accepted that a cessation or limitation of a party’s ability to pursue legal action is important.

The Need for Simplification
Currently, there are various limitation periods in effect in Ontario, ranging from 6 months to 60 years. These various limitation periods are not just found in the Limitations Act, but are also found in numerous other statutes. As a result, determining what time limit applies under the current system is not always an easy process.

The Basic Limitation Period
The most significant change to the Limitations Act is the imposition of a basic limitation period of two years. Under the old Act, the limitation period for general claims arising from breach of contract is six years. Under the new Act, parties will need to move more quickly if they intend to pursue legal action.

The new Act’s basic limitation period of two years applies to almost all claims. There are several (approximately 20) exceptions to the basic limitation period. These exceptions are set out in a schedule attached to the new Act.

The new Act also provides an “ultimate limitation period” of 15 years, after which a person cannot sue.

When Does the Clock Start to Run?
Under the new Act, the two-year timeline starts from the day a wronged party “ought” to have discovered a loss, damage or injury. This “discoverability” principle, as it is commonly referred to, is not a novel concept, but rather a concept that has developed over time by the courts in Ontario under the old Act. The new Act simply codifies what has already developed as an accepted principle under the case law in Ontario.

Some exceptions to the discoverability rule are provided in the new Act for minors and persons under disability. Additional exceptions that restart the clock or delay when the clock starts to run include such things as acknowledgment and part payments of a claim. Also, any attempt to resolve the dispute between the parties will stop the clock from running.

It should be noted that the new Act does not apply to claims that were discovered, or ought to have been discovered, prior to January 1, 2004. In other words, if a person or corporation shows that it discovered the loss prior to the new Act’s effective date, a longer limitation period under the old Act may apply. If the claim is discovered after January 1, 2004, the limitation period prescribed by the new Act will apply.

Varying the Limitation Period
The old Act is silent as to whether parties can contract out of a statutory limitation period. As a result, it was not uncommon for parties to include a term in their contracts that reduced the statutory time limit from six years to a shorter time limit. Under §22 of the new Act, parties can no longer enforce a clause that purports to contract out of the Limitations Act.

Limitation Periods As They Relate to Real Property and Leases
The new Act does not apply to real property. On January 1, 2004, Part I of the old Act, which sets out the various limitation periods for real property claims, will be removed from the new Act and become a separate statute known as the Real Property Limitations Act. The limitation periods under Part I of the old Act are generally longer, ranging from 10 years to 60 years. The
Real Property Limitations Act will otherwise remain unaffected by the new Act and will continue to apply to real property claims. As a result, the two-year limitation period will not apply to claims strictly relating to real property.

However, since the law in Canada has established that a lease is both an interest in real property and a contract, there is some confusion as to which limitation period applies. Some claims, such as claims for the recovery of possession of leased premises after a lease has been terminated, appear to relate strictly to an interest in the land. Consequently, those claims will likely benefit from the 10-year extended limitation period under the Real Property Limitations Act.

Other claims, such as claims for the recovery of rent under a lease, are arguably contractual in nature and will likely be subject to the new Act and the two-year limitation period. One could try to argue that the recovery of rent due under a lease is still a claim relating to an interest in land and, as a result, it should also benefit from the 10-year limitation period under the Real Property Limitations Act. However, it would be prudent to commence the claim within the two-year time period, rather than risk having the claim barred.

The Ontario legislature has not expressly addressed the ambiguities relating to how the new Act and its basic limitation period will specifically apply to commercial leases. As a result, the area remains a gray area and will potentially be the subject of some interesting litigation in the future.

Conclusion
The new Limitations Act is supposed to simplify the law of limitations by instituting a standard two-year limitation period for claims. For people in the real estate and leasing industry, however, the new Act does not necessarily simplify matters. The shorter limitation period imposed by the new Act means that landlords and tenants will have to be more diligent in monitoring and enforcing the leases and contracts into which they enter. It may take a few years before case law clarifies how the new Act and the Real Property Limitations Act interact, and how they apply to leases and other claims arising in the commercial leasing context.

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Judicial/Legislative Developments

Cases

ALBERTA
The tenant under a commercial lease sought protection under the Companies’ Creditors Arrangement Act (“CCA”). The landlord submitted a claim under the CCAA proceedings. The tenant objected, arguing that the landlord’s claim was limited by Alberta’s Landlord’s Rights on Bankruptcy Act. The court concluded that this legislation applies to cases of actual bankruptcy, rather than under the present CCAA proceedings, and that nothing in the CCAA compels the landlord’s claim to be quantified in accordance with this provincial bankruptcy legislation. Re: Alternative Fuel Systems Inc. (Companies’ Creditors Arrangement Act) [2003] A.B.Q.B. 745 (Alberta Court of Queen’s Bench, Sept. 2, 2003, LoVecchio, J.).

At issue was whether an exclusionary clause contained in a lease protected the landlord from a tenant’s claim for damages sustained as a result of the negligence of the landlord and its principal. The court concluded that the exclusionary clause was sufficiently broad to protect the landlord but did not protect the principal. Atlantis Marine Inc. v. Beaudoin Holdings & Management Ltd. [2003] A.B.P.C. 77 (Provincial Court of Alberta, April 17, 2003, Ingram, Prov. J.).

A lease was signed permitting the tenant to exercise its purchase option at any time. However, the landlord intended that such option only be available after the expiration of the five-year term. The tenant exercised its option prior to the end of this term. The court concluded that this was not a case of mutual mistake, but rather one of unilateral mistake, which, based on established criteria, could not be rectified in this case. Goldex Hannus Manufacturing Ltd. v. Goldex International Equipment Inc. [2003] A.B.Q.B. 467 (Alberta Court of Queen’s Bench, May 27, 2003, Acton, J.).

Canada Life granted a leasehold mortgage and took a specific assignment of a sublease. Canada Life entered into a lease recognition agreement with the head landlord and registered this agreement against title by way of caveat. The head landlord brought an application to show cause why this caveat should not be discharged, arguing it did not create an interest in land. As there was no case law directly on point, the court considered the law of restrictive covenants. The court held that the agreement merely imposed contractual obligations on the head landlord and did not give Canada Life any rights against the land or against any transferees of the land and, therefore, could not be registered. Edmonton Regional Airports Authority v. The Canada Life Assurance Company [2003] A.B.Q.B. 754 (Alberta Court of Queen’s Bench, Sept. 3, 2003, Breitkreuz, Master).

The plaintiff-tenant had the exclusive right to sell gasoline from the shopping centre where it leased its gas bar. When the lease was signed, the shopping centre consisted of two lots. New owners purchased the shopping centre and an adjacent lot, but never consolidated it into the original two lots. The new owners then began construction of another gas bar on the adjacent lot. The tenant belatedly sought an interim injunction to enjoin the construction, but failed. The lease was never registered against title to the adjacent lot, was clear on its face that it did not affect this lot, and the restrictive covenant was never intended by the original parties to affect this lot. Moreover, the court held that even if the tenant could establish that the original parties intended the restrictive covenant to apply to the adjacent lot, it could not establish that the current defendants were bound by that restrictive covenant nor could it establish that interim injunctive relief was warranted. Domo Gasoline Corporation Ltd. v. St. Albert Trail Properties Inc. [2003] A.B.Q.B. 649 (Alberta Court of Queen’s Bench, July 25, 2003, Lee, J.).

BRITISH COLUMBIA
The court held that when an alarm is triggered by an anti-theft device, it is reasonable for a store clerk to stop a customer leaving the store and ask him or her for an explanation. Sinclair v. Governor and Co. of Adventurers of England Trading into Hudson’s Bay [2003] B.C.J. No. 1656 (B.C. Prov. Ct.).

An easement granting access to and from a lane implicitly includes such ancillary rights as are reasonably necessary to the exercise and enjoyment of the easement. This, however, does not extend to requiring that the party granting the easement provide snow-removal services. Babine Investments Ltd. v. Prince George Shopping Centre Ltd. [2003] B.C.J. No. 1342 (B.C.S.C.).

MANITOBA
The issue to be resolved was whether the tenant had entered possession for a term of three years with a two-year option, or whether the occupancy was to be a monthly one terminable on one-month’s notice. Schwartz J. concluded that when the tenant entered into possession, there was an oral agreement that the tenancy would be for a three-year period with an option to extend the term for a further two-year period. The agreement was not conditional on a written lease being executed. Schwartz J. held that an oral lease is valid and binding on all parties. Lohr v. Graziano Holdings Corp et al. [2003] M.J. 313 (Man. Q.B.).
This court of appeal decision involved the interpretation of a written lease to determine whether the defendant was entitled to sell home insurance from its location in a Winnipeg shopping centre. The court decided that the lease was not broad enough to include the sale of home insurance and, therefore, granted the permanent injunction sought by the landlord.


NOVA SCOTIA

In the case of Goodman Rosen Inc. v. Sobeys Group Inc. discussed in the last report, the Nova Scotia court of appeal upheld the decision of the trial judge.

ONTARIO

The landlord sought possession of the tenant’s premises on the grounds that the tenant was overholding. The court could not reach a conclusion as to whether the tenant had been granted a 5-year or a 15-year term. Accordingly, the court looked to §70 of the Registry Act (Ontario), which provides that a lease that is not registered on title and that has a term in excess of 7 years is unenforceable as against any subsequent purchaser without actual notice of the lease. 920726 Ontario Ltd. v. Rahil (c.o.b. BK Tailors) [2003] O.J. No. 1093 (Ont. S.C.J.).

The lease contained a right in favour of the landlord to terminate the lease if the tenant’s gross revenue was insufficient. The landlord exercised this right and the tenant sought to void the termination. The lower court ruled in favour of the tenant on the grounds that the landlord had not acted in good faith. The court of appeal disagreed, holding that the absence of good faith (as distinct from the clear presence of bad faith) does not preclude a commercial landlord from exercising its contractual rights. 1397633 Ontario Ltd. v. Oxford Properties Group Inc. [2003] O.J. No. 1212 (Ont. C.A.).

At issue was whether the tenant’s most recent lease contained a valid option to renew and whether the tenant had properly exercised the option. The court of appeal found that the option was not invalid, as the duration of the renewal term was specified in the lease document. The court of appeal also held that the option had been properly exercised by the tenant, as its memorandum expressing an “intention to negotiate a renewal” was sufficient. Holt v. Thunder Bay (City) [2003] O.J. No. 2401 (Ont. C.A.).

This decision addressed whether a landlord was entitled to draw upon a letter of credit in response to a lease disclaimer by the tenant’s court-appointed receiver. The court of appeal held that the landlord was not limited to recovery of its preferential lien under the Bankruptcy and Insolvency Act, as the letter of credit was clearly drafted to indicate that it would be available to the landlord, for all losses, even in the event of the tenant’s bankruptcy. This case suggests that if a letter of credit is properly drafted, the letter of credit may be relied upon in bankruptcy. Bank of Montreal v. Clarica Life Insurance Company, unreported (Ontario S.C.J.)(Court file No. 03-CL-4866).

A dollar store franchisee and its franchisor sought an injunction requiring the defendants (two landlords and a general merchandise store operator that sold dollar store items) to comply with its restrictive covenant. Despite the fact that the general merchandise store was situated on land that was not encumbered by the restrictive covenant, the franchisee argued that its landlord was a joint venturer with the landlord of the adjoining parcel of land. The judge dismissed the motion because the restrictive covenant did not extend to the adjoining parcel of land and the franchisee could not rely on its mistaken impression that its landlord owned and controlled both parcels of land. See Murray F. Tait’s review of the Alberta decision in Domo Gasoline Corporation Ltd. for comparison. CSFY Inc. et al. v. CREIT Management Limited et al., unreported (Ontario Superior Court of Justice, Sept. 10, 2003, Herold J.).

QUEBEC

The court of appeal decided that a building-owning prêt-nom/nominee’s share transfer restriction scheme is not opposable to the trustee of a bankrupt shareholder because, if it were, this would amount to conferring upon the nominee a secured claim to the detriment of the rest of the shareholders creditors. Dans l’Affaire de la faillite de: Montreal Fast Print Ltd., 500-09-010582-013, REJB 2003-43437 (Quebec Court of Appeal, June 16, 2003).

A legal hypothec of construction (construction lien) may be valid, even if registered against the outdated lot number of the property. In addition, in order to preserve this security, one must file, on a timely basis, the required prior notice of the exercise of the secured right—irrespective of a stay of proceeding issued upon the owner’s filing of a notice of intention under the Bankruptcy and Insolvency Act in the interim period. Dans l’affaire de la faillite de: 9092-2535 Quebec inc. et Protection Incendies Trepcio inc., 700-11-004938-017, Quickclaw [2003] J.Q. No. 9431 (Quebec Superior Court, Aug. 8, 2003).

The court decided that a shopping centre’s common parking area may not be used by a tenant in violation of a servitude of passage, irrespective of the fact that the parking area’s capacity was never fully used and of the fact that the plaintiffs did not

SASKATCHEWAN

This court of appeal decision addresses the grounds for granting leave to appeal a real property tax assessment. Regina (City) v. Gordstone Enterprises Ltd., 2003 SKCA 36 (Sask. Court of Appeal, Cameron J.A., March 28, 2003).

The plaintiff, McKay, slipped on a patch of ice. The issues before the court were the liability of the city and the contributory negligence of McKay. McKay v. Prince Albert (City), 2003 SKQB 273 (Sask. Court of Queen’s Bench, Maher J., June 13, 2003).

This decision addresses the grounds for a stay of proceedings in a writ of possession matter based on an apparent agreement between a landlord and tenant to submit disputes to arbitration. Brydan Holdings Inc. v. Gastronomia Enterprises Ltd., 2003 SKQB 121 (Sask. Court of Queen’s Bench, Wimmer, J., March 17, 2003).

This decision addressed an application for injunctive relief in a dispute concerning the renewal of a commercial lease where the costs of occupancy are at issue. Ling v. Portland Properties Ltd., 2003 SKQB 143 (Sask. Court of Queen’s Bench, Koch, J., March 26, 2003).

This court of appeal decision addressed an easement agreement and the indefeasibility of title upon registration. 791787 Alberta Ltd. (c.o.b. as Sherwood Mall) v. Roth, 2003 SKCA 62 (Sask. Court of Appeal, Jackson, J.A., June 27, 2003).

Legislation

ALBERTA

Real Estate Amendment Act, 2003—Amendments were made to the Real Estate Act, R.S.A. 2000, c. R-5, respecting real estate appraisers and the real estate appraisal industry.

Gaming and Liquor Act, R.S.A. 2000, c. G-1—There are anticipated, but not yet promulgated, changes to this legislation, which would allow Albertans to bring their own wine to restaurants and to take unfinished wine home. The Alberta Gaming Minister is on record as being in support of the plan, and the change is expected to be approved later in the year.

BRITISH COLUMBIA

There have been no significant and relevant recent changes to B.C. legislation.

MANITOBA

There have been no significant and relevant recent changes to Manitoba legislation.

NOVA SCOTIA AND THE OTHER MARITIME PROVINCES

There have been no significant and relevant recent changes to legislation in these provinces.

ONTARIO

Bill 73 – Family Restroom Facilities Act, 2003 (Private Member’s Bill)

Bill 41 – The Right Choices Act (Budget Measures), 2003 (Government Bill)

Bill 31 – Democratic Heritage Archaeological Preservation Act, 2003 (Private Member’s Bill)

Bill 124 – Ontario Heritage Amendment Act, 2003 (Government Bill)

Bill 65 – Ontario Heritage Day Act, 2003 (Private Member’s Bill)

Bill 32 – Ontario Water Resources Amendment Act, 2003 (Private Member’s Bill)

Bill 33 – Gas Price Watchdog Act, 2003 (Private Member’s Bill)
Bill 58 – Gasoline Consumer Protection Act, 2003 (Private Member’s Bill)

Bill 126 – Electronic Waste Producer Responsibility Act, 2003 (Private Member’s Bill)

Bill 107 – Abolition of the Ontario Municipal Board Act, 2003 (Private Member’s Bill)

Bill 103 – Consumer Reporting Amendment Act, 2003 (Private Member’s Bill)

Bill 51 – Occupational Health and Safety Amendment Act (Workplace Violence), 2003 (Private Member’s Bill)

Bill 55 – Occupational Health and Safety Amendment Act (Sexual Harassment), 2003 (Private Member’s Bill)

Bill 119 – Employment Standards Amendment Act, 2003 (Private Member’s Bill)

Bill 52 – Labour Relations Amendment Act, 2003 (Private Member’s Bill)

Bill 68 – Mandatory Retirement Elimination Act, 2003 (Government Bill)

Bill 49 – Seniors’ Protection Act, 2003 (Private Member’s Bill)

Bill 117 – Private Investigators and Security Guards Amendment Act, 2003 (Private Member’s Bill)

QUEBEC

Municipal de-mergers—The legislative proposals are currently undergoing parliamentary hearings with the city of Montreal, led by Mayor Gérald Tremblay, urging the government to postpone these procedures until at least 2006, allegedly to enable the larger city to show that it can work to the collective benefit of all participants. At this point, no decisions have been made.

Water and Services Tax – The city of Montreal is considering a restructuring of the water and services tax. This would involve having the water and services tax be a component of real estate taxes, chargeable against the owners, and thus, like the replacement of the business tax, transferring the credit risk of the tenant from the city to the owner or the landlord. ICSC, in coalition with UDI-Québec and BOMA-Québec, is following this process and has already met with City of Montreal officials. The issue will be monitored carefully on the industry’s behalf, and another meeting with City officials is scheduled for Oct. 3, 2003.

Plan d’urbanisme—The Quebec Ministry of Economic and Regional Development issued a first draft of a position paper regarding the development of the Montreal and Quebec City metropolitan areas. This paper expresses concern about the proliferation of big-box retail centres near highways and about their “preferred accessibility” to retail markets, arguing that this phenomenon weakens competition, deteriorates infrastructure and adversely affects urban re-development. There is no doubt this will spur considerable debate within the retail industry in the coming months.

Quebec Taxation Act and sales tax legislation changes—On July 3, 2003, Quebec modified its taxation legislation to harmonize with federal tax legislation. The capital gains inclusion rate was reduced.

SASKATCHEWAN


The Cities Amendment Act, 2003, S.S. 2002, c. 18—This legislation came into effect on June 27, 2003, and, with the addition of §309.1, a city is now obliged to compensate an owner if a by-law prohibits the continued maintenance of a business.

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