Estoppel Certificates

By

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§ 33.13 Estoppel Certificates

The estoppel certificate is a status report on the lease that confirms its effectiveness and terms, and the absence of defenses to it or claims under it. It is usually presented by the landlord to its prospective lenders and purchasers with the intention that they rely on its contents. Generally, estoppel certificates can be requested only by the landlord, however, tenants should demand the right to require them for the benefit of their prospective assignees or subtenants, or the purchasers of their assets or stock. Although the tenant's possession of the premises or recordation of its lease provides notice of its rights, the estoppel certificate is still necessary to confirm matters that are otherwise unknowable, such as the exercise of a renewal option, the pendency of a default by the landlord, the waiver or satisfaction of contingencies, and the commencement and expiration dates.

The failure to provide an estoppel certificate from an important tenant (or to an assignee) can frustrate a financing or sale or assignment. An estoppel certificate delayed will have the effect of an estoppel certificate denied: An opportunity will be lost. In order to avoid the consequences of a delayed certificate, the estoppel certificate provision should state that a proffered certificate will be presumed to be correct if a response is not received within a short period. Such a self-proving certificate requires that the offer or complete the information it desires, otherwise, there will be no presumptively correct information.

Another way in which a landlord tries to protect itself against unresponsive tenants is to provide that it is empowered to act as the tenant's attorney-in-fact in executing the certificate if the tenant fails to do so. Most tenants resist this suggestion because they fear their landlords will improperly submit estoppel certificates on their behalf. A lender relying on an important lease will probably not be satisfied with either a presumptively correct certificate or a certificate signed by the landlord as the tenant's attorney-in-fact. Thus, some leases go so far as to make a failure to deliver an estoppel certificate a default under the lease.

A provision in a lease for estoppel certificates often states:

**FORM 33-16**

**MISCELLANEOUS — ESTOPPEL CERTIFICATES**

Within no more than _____ (____) days after written request by Landlord, Tenant will execute, acknowledge, and deliver to Landlord a certificate stating: (a) that this Lease is unmodified and in full force and effect, or, if the Lease is modified, the way

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1 See Shaffer, "Using Tenant Estoppel Letters to Cut to the Chase," Prob. & Prop. at 38 (Nov./Dec. 2001), for a thorough discussion of the landlord's, tenant's, and lender's perspectives, as well as a helpful checklist. One commentator has recommended landlord estoppel letters in the nature of a concise statement of the representations that the tenant would like the landlord to make. The idea is admittedly novel. Ruschman, "Protecting the Commercial Tenant with a Landlord Estoppel Letter (with Form)," Prac. Real Est. Law. at 15 (Sept. 1989).

2 This discussion has benefited greatly from Herz, "The Use and Abuse of Estoppel Certificates," (unpublished).