

LEASE CLAUSES: MAINTENANCE AND REPAIR

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Scope of Presentation

1. Review basis for the common law's treatment of maintenance obligations and allocations of responsibility for damage occurring in leaseholds.
2. Considerations when drafting these provisions.

Maintenance and Repair Clauses

One general observation:

- There is no perfect clause.
- You need to understand the policy and goals of your client and how it wants to allocate responsibility for maintenance between itself and the tenant.

Maintenance and Repair Clauses

Examples:

The tenant takes on as much responsibility as possible to carry out maintenance on the premises.

Reasons for such an approach:

Save on costs to the port.

The tenant may be better equipped and more cost effective at carrying out maintenance and repairs.

Maintenance and Repair Clauses

Another example:

The port takes on some or all of the maintenance obligations.

Reasons to do it:

- The port has union labor that prefers to keep the work in-house.
- The port wants to make sure certain work is done properly in order to protect an asset (such as a roof under warranty).
- In a multi-tenant site, the port wants to ensure the maintenance is carried out uniformly and in a timely manner (such as in office or retail situations).

Maintenance and Repair Clauses

Common law rule for M&R:

The tenant has full responsibility—the landlord has no obligations.

The policy behind this was based on the notion that the lease was technically a conveyance and so since the tenant took the estate “as-is,” the tenant took all responsibility for the estate, including maintenance.

Maintenance and Repair Clauses

Common law rule (cont.)

Because, however, the landlord had a reversionary interest in the estate, the tenant's obligations for maintenance were limited only to ordinary maintenance.

The tenant could also return the property to the landlord at the end of the lease in the same condition as received, except for normal "wear and tear."

Maintenance and Repair Clauses

Statutory limitations

Some states have passed laws modifying the common law burden on the tenant.

While this is seen most commonly in all states affecting residential rentals, some states have statutes affecting commercial leases as well.

In representing a landlord, the lawyer must know what those limitations are and to figure out if the parties can opt out of the statute per the terms of the lease.

M&R: Drafting Considerations

1. Note that there is technically a difference between “maintaining/repairing” and “replacing.”
2. The common law rule is that, absent an express requirement, the tenant wasn’t required to “repair” something that was worn out with a new replacement.

But assuming a tenant has full M&R responsibility, is the tenant on the hook for replacing underground pipes that deteriorate to the point that they have to be replaced?

M&R: Drafting Considerations

Even where a lease says that a tenant is obligated to do ordinary and extraordinary repairs, including those that are unforeseen, courts have been reluctant to impose an obligation on a tenant to replace an expensive asset that can't be repaired. A key factor seems to be the length of time on the lease and whether the tenant can amortize the cost over the remaining lease term.

M&R: Drafting Considerations

When drafting exceptions to a tenant's M&R obligations, be careful how you use the term “structural repairs.”

Predicting what is or is not a structural repair is very challenging.

Court cases from around the country draw different conclusions on similar facts.

M&R: Drafting Considerations

Examples illustrating the difficulty of defining structural repairs:

Exterior walls

Structural

Floors

Structural and nonstructural

Fireproofing light shafts and dumbwaiters

Structural

Flooring

Structural and nonstructural

Maintenance and Repair Clauses

Examples (cont.)

Fire escapes

Structural and nonstructural

Sprinklers

Structural and nonstructural

Handrails

Structural

Roofs

Structural and nonstructural

M&R: Drafting Considerations

The lesson is: be very careful when throwing out terms such as “structural.” If you feel you need to use it, define it in the lease the way you want it and don’t rely on case law.

M&R: Drafting Considerations

A tenant is usually required to return the premises to the landlord in the same condition received, except for “normal wear and tear.”

Wear and tear defined as the usual deterioration of property by time and use. It covers deterioration by time and use despite ordinary preservation efforts.

Determining if something is the result of normal wear and tear will be a jury question if it goes to trial. If a landlord can prove damage or waste, the burden falls to the tenant to show it occurred through normal wear and tear.

M&R: Drafting Considerations

Landlord repair obligations

Unless it's a gross lease (where the landlord does everything), the landlord generally doesn't have repair obligations.

If the landlord is willing to accept some responsibility, the list should be exclusive and not open-ended.

“Expressio unius est exclusio alterius”

(when a list of a class of things is described, all else in the class is excluded)

M&R: Drafting Considerations

The landlord's repair obligations needs to be stated in a way so that it's clear that the landlord will only take on repairs for what's listed. If it's not on the list, it's not a landlord obligation.

M&R: Best Practices

Inspections.

Carry out an inspection at lease inception.

Store what is recorded in a place where it won't get lost or be forgotten.

This is especially helpful for things such as storm water drain lines.

M&R: Best Practices

Landlord right to do repairs if tenant doesn't, with right to bill tenant.

Note there are two timing issues on repairs. The “wear and tear” provisions are typically relevant only at the end of the lease.

If you want a remedy in the middle of a lease for a tenant's failure to make necessary repairs, you should have several provisions: a tenant covenant not to commit waste; a covenant not to create a nuisance; and a landlord's right to make repairs and bill the tenant.

M&R: Best Practices

Setting up a repair fund

In retail leases, a landlord requires tenants to pay into a capital fund to be used for capital improvements to refresh the retail space after some period of time.

It's possible to establish such a fund in an industrial lease, designating the money be used after some period of time for things like a new roof.

If no separate fund, make sure your lease security is available to cover landlord's expenses for necessary repairs.