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Looking Ahead

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Now's Not the Time for Secrets: Evaluating Confidentiality Provisions in Your Leases

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A real estate finance attorney representing borrowers is forced to wear many hats through the course of a transaction. You are tasked with negotiating the debt documents, drafting legal opinions, and reorganizing your corporate structure for "special purpose entity" or "bankruptcy remoteness" purposes, among countless other tasks. However, one of the items that is often lost in the weeds in the early stages of the transaction is an analysis of potential confidentiality provisions in your client's leases.

As part of the lender's underwriting process, the client will need to be able to disclose lease terms and often provide copies of the leases to the financing party. Additionally, depending on the lender's exit strategy for the loan, the lender may need to make disclosures of those lease terms to potential investors and other third parties. Understanding the nuances of the confidentiality provisions contained in your leases will be critical to a smooth closing for your client and a successful execution by your lender.

A few key points to consider:

Who is the restricted party? This may seem obvious, but oftentimes the confidentiality obligation is unidirectional and binds only the tenant, particularly if the landlord has offered concessions under this specific lease that it does not want publicly known.

What is the duration of the confidentiality restriction? Is disclosure prohibited in perpetuity, just for a number of years or until the tenant is actually in occupancy, or until the fact of the tenant's occupancy becomes otherwise publicly known?

What is the content that is deemed confidential? The broadest confidentiality restrictions would prevent the disclosure of the existence of the lease. Others may restrict the disclosure of any material lease terms. In other instances, the restriction may be crafted to address a very specific concern of one of the parties. For instance, if part of the landlord work includes the construction of certain proprietary systems utilized by the tenant, perhaps the restriction prohibits only disclosure of those systems. Perhaps the tenant has agreed to deliver financial statements to the landlord, but only if those financial statements are kept confidential.

What is the tenant's remedy if the provisions are breached? A tenant's typical remedy would include injunctive relief to enjoin the disclosure. However, the lease may entitle the tenant to very specific remedies, such as a rent abatement for each identifiable breach of confidentiality restrictions or a right of early termination.

Once you understand the nuances of the related confidentiality provisions, the next step is to analyze whether or not the provisions apply to your client and the information that they may need to disclose. Assuming that they do, what are the next steps and potential pitfalls?

First, you must ensure your client complies with the provisions themselves. You should consider if there are certain permitted recipients of the confidential information. It is common for leases to permit disclosure to the landlord's agents, mortgagees, attorneys, accountants and other professionals. However, permissive disclosure may be

conditioned upon receipt of a confidentiality agreement from the recipient, and the lease most likely does not provides guidance on the form of confidentiality agreement.

Second, you should consider whether your lender's planned exit for the financing will make it difficult, or in some circumstances impossible, to comply with the provisions as drafted. While disclosure is often permitted to lenders or mortgagees, the lease may not contemplate disclosure to *potential or prospective* lenders. If your lender plans to syndicate the loan, they will likely need to disclose lease information to potential lenders. What if the lease permits disclosures to mortgagees, but your client is also obtaining mezzanine financing secured by a pledge of equity interests in the property owner? Another pitfall involves loans intended to be sold in publicly offered securitizations. The offering documents for those loans will require disclosure of certain lease terms for material tenants of large loans in the collateral pool in order to comply with securities laws, which typically includes the identity of the tenant, occupied square footage, lease expiration dates, rental rates and renewal options. Those offering documents will be publicly filed with the Securities and Exchange Commission and available in the EDGAR database, so any disclosure that your lender needs to make will need to be unrestricted by the lease terms or such restrictions otherwise waived by the tenant.

If your client is unable to comply with the confidentiality provisions as drafted, you will need to negotiate a separate agreement with the tenant. As this may prove to be time-consuming, we would suggest starting this process as early in the deal as possible.