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Access agreements: landlord, tenant and tenant's lender rights

Lease agreements, particularly for industrial companies, can leave the tenants' lenders in the lurch if important rights to collateral are left unaddressed. Companies often obtain financing to acquire expensive equipment or fund their business operations. Equipment lenders obtain security interests in the financed equipment and credit facility lenders usually acquire security interests in most of the companies' assets as collaeral for the loans, including equipment, inventory and other personal property. A company that leases its manufacturing, distribution or warehouse facilities is sometimes required by its lender to obtain certain rights from its landlord to further protect the lender's collateral. These rights are commonly set forth in a separate, tri-party agreement among the landlord, tenant and tenant's lender. This article discusses the rights that may be demanded by a lender with respect to its collateral and the protections and limitations a landlord should seek in exchange for granting those rights.

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■ **Rights to collateral.** The tenant's lender may ask the landlord to waive any rights, security interests and other claims the landlord may have against the lender's collateral, in order to confirm that the lender has the senior or only lien. In addition, the lender will want an agreement that the collateral will not become part of the leased premises, even if it is attached or affixed to the premises, as is the case with some trade fixtures. The landlord should consider subordinating, rather than waiving, any valid claims it has against the collateral in the event that the value of the collateral exceeds the amount of the tenant's loan. Further, the landlord should require that the collateral will become part of the premises as provided in the lease, to the extent that the premises would be materially damaged or altered by the removal thereof, or if it has been integrated into any building system, structural elements or roof of the property. The lender also may require the landlord to consent to its filing of financing statements under the Uniform Commercial Code or a leasehold mortgage against the tenant's property. The landlord should be cautious of any such filings that could result in a lien on the landlord's interests or conflict with any financing the landlord has or in the future may place on the property.

■ **Access to and removal of collateral.** The tenant's lender may seek the right to inspect and remove the collateral from the leased premises at any time without being required to abide by the terms of the lease. The landlord should limit the lender's access to normal business hours, after prior written notice to the landlord and only while accompanied by the landlord or its designated agent. Further, the landlord should require the lender to restore and repair any damage it causes to the property resulting from its entry upon the premises and removal of the collateral. The landlord should not insist on the lender complying with all the lease terms in order to enter the premises, but instead should require proof of insurance in the same coverages as required by the tenant under the lease, including naming the landlord and other designated parties as additional insureds, and an indemnity from the lender for any damages incurred by the landlord that arise from the entry upon and use of the premises or removal of the collateral by the lender or its agents. Additionally, the landlord should consider whether it will give the lender the right to sell the collateral from the premises, whether by public or private sale, and the parameters applicable to such sales.

■ **Rights at end of lease.** The tenant's lender may request that the landlord provide it with a copy of any notice of default the landlord delivers to the tenant under the lease and allow it to cure any defaults on behalf of the tenant, without the obligation to do so. Upon the expiration or earlier termination of the lease or the termination of the tenant's right to possess the premises, the lender will want the right to enter upon or even occupy the premises in order to protect and recover its collateral. The landlord should require the lender to provide it with notice of the lender's intention to exercise this right within a short period of time after the occurrence of the event and to prepay rent and other charges due under the lease for a specific occupancy period, with holdover rent due for any period thereafter. It also should get the lender's express agreement that any collateral that has not been removed within a certain time period will be deemed abandoned by the lender and the lender's security interests waived or released.

A tenant will be in a better position to secure an agreement of this type for its lender if the agreement is negotiated with the landlord concurrently with the lease. In addition, because a tenant's lender may change during the term of a lease, a tenant is often well served by a provision in the agreement that says the agreement is for the benefit of the tenant's lender's successors or assigns and any replacement lender. If the negotiations are properly directed, both the landlord and lender can be satisfied that its respective interests are adequately protected.▲