THE PROBLEM-SOLVING TOOL FOR RETAIL LAW

RETAIL LAW STRATEGIST

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Creative Solutions

Creative Solutions is a bi-monthly feature. Send your creative solutions to the Editor-In-Chief at smcevily@icsc.org.

Read Your Lease Before You Send a Letter Exercising Important Rights

Mark Morfopoulos
Meislik & Meislik
Montclair, NJ

It is so easy to do. You are told by your client that you should prepare a letter to the landlord exercising a lease extension option. Or, you are notifying a landlord that you are exercising a purchase option. Or, if you are a landlord, you are asserting some other important right contained in your lease. You check the lease, as a good practitioner always does, to see what the particular clause says, and you mention it in your letter to the landlord. You even send it via a recognized national

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Strategies to Reduce Litigation Risk Arising From Retail Loss-Prevention Activities

Alan M. Freeman
Blank Rome LLP
Washington, DC

Imagine the following scenario: You are in-house counsel for a retailer. You arrive at work on Monday morning, only to be served with a summons and complaint filed by a customer who alleges that her civil rights were violated when, five months ago, she was detained and humiliated by your security personnel, who had falsely accused her of shoplifting a package of batteries. The customer alleges that she was singled out for scrutiny and detention and was treated roughly by security personnel who were focused on the color of her skin and a desire to meet a monthly quota for shoplifting detentions. When you ask the store manager for the detention file, you learn that the only record is a one-page fill-in-the-blank form that identifies the security officer, the detainee, the date and time of the detention, the item allegedly stolen, and a notation that the customer was released and no charges were filed. The security officer who made the detention no longer is with the company, and there is no forwarding address. To make matters worse, you have two voicemail messages that came in over the weekend: one from a national civil rights organization and one from a local TV news station. Both reference this lawsuit. How did this happen?

* * * * *

Prudent business owners always are on the lookout for opportunities to trim expenses, and retailers often focus their resources on efforts to minimize shrinkage due to external theft. In the months ahead, retailers will step up their loss-prevention efforts in an attempt to preserve profits despite increasing expenses and declining sales. At the same time, shoppers who are confronted with a sharply increased cost of living, and perhaps declining wages, may succumb to the temptation to shoplift. This combination of heightened vigilance by retailers and the potentially increasing economic desperation by consumers will increase the average retailer's exposure to claims of improper loss-prevention practices. The risk is heightened for larger retailers, who interact with customers thousands of times each day and who necessarily must delegate that interaction to salespeople, store managers and the like.

Of course, the threat of external theft is not new, and retailers are entitled to implement loss-prevention programs. However, customers and employees have a right to be free from inappropriate contact and unlawful discrimination.

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overnight carrier to make sure it gets there. You are very confident you have done all you can do to protect your client's interests.

One problem: You forgot to check the notice clause contained in the lease. You also did not look at any amendments to the lease that may have modified the notice requirements. If you send the notice and it is not delivered exactly as the lease requires, you run the risk that the receiving party—the landlord or tenant—could claim that the notice is ineffective.

If the leasehold estate has some value to it, either because the negotiated rent is lower than market rent or the improvements are costly, a tenant must be very careful to send all notices to the landlord in accordance with the lease requirements. The same holds true for a landlord who sent a notice to a tenant. Even if a party is successful in defending a claim that it has complied with the lease with respect to the notice requirements, you may have wasted money on legal fees to contest the other party's contention that it was improperly notified. You are not helping your client by incurring such costs. In addition, why give the other party needless leverage to renegotiate a provision that is beneficial to you if it can be easily avoided?

The first clue that you may have a problem with the notice requirements is if the lease is old and there are successor parties to the agreement. Look to see if there are any amendments to the lease that change the notice address. Unfortunately, they may sometimes be contained in documents that are not entitled "Lease Amendments." They could also be in assignment and assumption agreements and other documents. Carefully review each of these documents to see if the notice provisions have been amended. In addition, look in SNDAs (subordination, non-disturbance and attornment) and recognition agreements to see if copies need to be sent to lenders or ground landlords.

Also check to see if multiple parties are named for a landlord or tenant in a notice provision. If that is the case, make sure that the notice is sent to each party so named in the lease. If multiple notices are required, make sure they are sent in the same manner to each such party unless the lease provides otherwise. *READ THE LEASE!* In addition, review any lease amendments. If the landlord or tenant tells you it is acceptable to send notice in a manner that is not mentioned in the lease, send it as required in the lease anyway. If in doubt as to how a notice should be sent, send it by multiple delivery methods—i.e., first class mail and a nationally recognized overnight delivery carrier.

Often the parties neglect to update the notice provision and the notice addresses are obviously (or not so obviously) incorrect. The provision could also require that notice be sent to

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Editor-In-Chief: Stephanie McEvily, Esq.

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Reduce Litigation

These rights sometimes conflict, and that conflict often leads to accusations that the store employees engaged in racial profiling or used excessive force in apprehending a suspected shoplifter. Whether filed in court or announced from a soapbox, these sorts of allegations are susceptible to heavy publicity, which can result in stigma and additional financial loss. This begs the question: How can retailers implement effective loss-prevention strategies without unnecessarily increasing their exposure to litigation?

Managing Sources of Litigation Risk

Every business is different, but there are certain common denominators relevant to this discussion. A retailer's exposure to litigation risk increases with each contact between an employee and a customer. While each customer presents an opportunity to make a sale, so too is each customer a potential plaintiff. Claims can be brought by individuals suing on behalf of themselves, or by individuals suing on behalf of a "class" of similarly situated persons. The exposure can be significant.

While the goal of any loss-prevention program must be to prevent loss, a well-crafted program will be designed to minimize the risk of collateral litigation, which can arise under both state and federal law. What follows is a discussion of ways in which retailers can limit their exposure to several prominent sources of litigation risk. However, readers should be careful to note that there is no one-size-fits-all solution. While most of these suggestions will be broadly applicable in one form or another, many will not be suitable for all circumstances. Store owners should consult their attorneys for specific advice, as the protections offered to retailers can vary from state to state.

Policies and Procedures

Policies and procedures are at the core of any loss-prevention program. Properly drafted, they will articulate the purpose of the program, define the manner in which it is to be implemented, and set minimum and maximum parameters for employee conduct. Though necessary, they are a prime source of litigation risk. Loss-prevention policies and procedures often are the first place an enterprising plaintiff's attorney will look for evidence that a company improperly targets specific groups for disparate treatment, encourages excessive force or acquiesces in bad behavior by its employees.

No matter how well thought out they may be, a collection of policies and procedures that sits on a shelf in a back office will do little to protect a company that fails to monitor its implementation.

Loss-prevention policies and procedures must be adapted to the needs and circumstances of particular companies and store locations—particularly, as the protections afforded to retailers can vary state-by-state—but there are steps that all stores can take to mitigate the suggestion that their policies and procedures institutionalize, or tacitly condone, misconduct.

Initially, store owners should think strategically about who will develop their loss-prevention policies and procedures, and upon what models they will be based. Programs that are developed by outside expert consultants, based on best practices and industry standards, are more likely to withstand judicial scrutiny than are programs developed by company insiders who lack particularized expertise and a broader understanding of industry practice, or who may have a personal or corporate profit motive to encourage inappropriately aggressive techniques. When policies and procedures are developed in-house (which often will be the case), they should be "scrubbed" by a neutral expert, or at least developed mindful of industry best practices. In all cases, store owners must periodically review their loss-prevention policies and procedures to ensure that they remain consistent with prevailing law, evolving best practices and changed retail conditions.

But preparation of world-class policies and procedures is not enough. No matter how well thought out they may be, a collection of policies and procedures that sits on a shelf in a back office will do little to protect a company that fails to monitor its implementation. Companies must ensure that their loss-prevention policies and procedures are adhered to in practice, and that they are consistently enforced. Periodic surprise audits can be very effective tools to ensure compliance, identify gaps in training, weed out problem employees and defend against suggestions that the company acquiesces in bad behavior.

In short, to reduce litigation risk effectively, a company's loss-prevention policies and procedures must be well-thought out, consistent with industry best practices, actually enforced, and routinely reviewed and revised to remain current.

Training

Even the best loss-prevention programs will do little to insulate a company from liability if its employees are

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Crime and Shopping Centers: Security Factors for Landlords to Consider

Marcia Owens
Susan Kim
Wildman, Harrold, Allen & Dixon LLP
Chicago, IL

Security issues at retail establishments have garnered heightened awareness in the aftermath of recent high-profile acts of violence at shopping centers across the country, such as the tragic shooting deaths at the Lane Bryant store in a Chicago suburb in early 2008. One ramification is that an increasing number of communities are considering whether to require owners to install security cameras to monitor their shopping centers. While local ordinances governing the issue vary by municipality, some call for a level of magnification that would essentially require owners to install one camera for every two to three parking stalls, in addition to detailed surveillance of areas such as loading docks and entrances and exits to each business.

In numerous jurisdictions across the United States, such regulations are taking shape. The City of El Cerrito, CA, passed an ordinance in 2007 requiring certain businesses, including banks, take-out food and drink establishments, and shopping centers that include banks and take-out food and drink establishments, to install video surveillance systems. The Village of Tinley Park, IL—where the Lane Bryant shooting occurred—and the City of Bethlehem, PA, are also considering proposals that would require owners of shopping centers to install video cameras. In the Southeast, efforts to pass security camera ordinances in Broward County, FL, and in the Town of Cutler Bay, FL, have been met with widespread resistance from the business community; but both initiatives are set to be revisited this year.

While the safety of the customer is of utmost importance, these proposals have been criticized by landlords and retailers alike, who must weigh the high costs of installing such video surveillance systems against the potential results. Retailers have argued that the cost of such systems would be passed on by the landlord to the retailers, and ultimately to consumers, through higher prices. Given the current economic climate, it may be difficult for retailers to pass on or to support these additional expenses. Opponents also argue that security cameras do not necessarily deter crime, but instead merely document it.

Conversely, proponents of increased security at shopping centers argue that security systems save lives, and have accused retailers of putting profits ahead of safety. Regardless of whether the installation of security cameras is required by a municipality, a key issue often overlooked in this debate is the liability of an owner or landlord with respect to the installation or use of such cameras.

A Landlord's Duty and Foreseeability

In general, there is no duty requiring a landlord to protect its tenants or the tenants' invitees from criminal activity by third persons on its property *unless* such criminal activity is "foreseeable." A landlord is not required to guarantee the safety of its tenants and their invitees. However, if criminal activity is foreseeable, a landlord has a duty to take reasonable measures to protect against such crimes.

It must be noted that jurisdictions differ in their approach to determine whether a crime is foreseeable. Some jurisdictions have adopted the "prior incidents rule," which means that they look to whether there have been prior incidents of a similar nature at or near the subject property. This approach has been criticized as being arbitrary, and it is unclear how similar the prior acts must be or how close in time and location the prior acts must occur in order to qualify as prior incidents. The rule also equates foreseeability of a particular act with previous occurrences of similar acts, causing critics to argue that the approach is simply unfair because the first victim always loses, while subsequent victims are permitted recovery.

Other jurisdictions have adopted a "totality of the circumstances" approach, under which a court will examine various circumstances to determine foreseeability, including all prior criminal incidents on the property and adjacent properties (whether similar or not). This approach is similar to the prior incidents rule, but also examines other types of evidence, such as the location and condition of the property, the type of business operated at the property, the nature and circumstances of nearby businesses, the absence or presence of security, the size of the parking lot, and the architectural design of the landlord's property in relation to the location where the crime occurred. While this approach may seem more fair than the prior incidents rule, the totality of the circumstances approach has been criticized as being too broad and even less predictable than the prior incidents rule. Critics argue that this approach imposes an unqualified and unreasonable duty to protect customers in areas with any significant level of criminal activity.

Finally, some jurisdictions have adopted a "balancing test" approach to determine foreseeability. The balancing test incorporates components of both the prior incidents rule and the totality of the circumstances approach, but avoids some of the problems inherent in both approaches. This test balances the degree of foreseeability against the burden that is imposed on the landlord, in an attempt to balance the economic concerns of landlords against the safety concerns of their customers. Courts will consider the location of the property, the nature and extent of previous criminal activity at the property, as well as the similarity, proximity or other relationship to the crime giving rise to the cause of action. As a result, areas with a high foreseeability of harm would justify a greater burden on the landlord than an area with a limited foreseeability of harm. The balancing test is seen as more flexible than the prior incidents rule and not as far reaching as the totality of the circumstances approach.

Guidelines for Voluntarily Enacted Security Measures

It is important to realize that even if criminal activity is not necessarily foreseeable, a landlord may be held liable for the criminal acts of third parties if a landlord voluntarily elects to provide security services. Once a landlord voluntarily undertakes a duty to provide additional security services, the landlord must perform those additional services with reasonable care. However, in such event, the landlord's duty of care will be limited to the extent of the security services provided. For example, if a landlord elects to install security cameras, the landlord will be required to maintain and repair the cameras properly. Thus, the landlord should have sufficient staff to monitor the cameras routinely and should not give such staff duties that would interfere with this responsibility.

In the event a landlord hires security personnel, the landlord must not act negligently in selecting and hiring such personnel. And, the services provided by the security personnel must be reasonable, given the size and location of the shopping center. For example, hiring one security guard to patrol the parking lot of a large shopping center may not be considered reasonable, given the circumstances.

Finally, in the event that a landlord provides security services at the commencement of the lease, the landlord may have a continuing obligation to provide such security measures, or at least the same relative degree of security, throughout the term of the lease. It may be argued that by providing security services, the landlord has set a standard of care for the property; the failure to continue to offer such services would be unreasonable.

Weighing the Associated Costs

Compliance with enhanced security requirements does not come without a cost. Depending on the size of the shopping center and the type of system installed, the initial installation costs could run into the tens of thousands of dollars. This estimate does not include the ongoing cost of personnel needed to monitor the cameras or the cost of maintaining the cameras and maintaining and storing the actual recordings. Some municipalities may offer loan programs to help defray a portion of the costs of installing the security system, making it a potential option worth investigating.

For tenants with triple net leases, landlords may be able to pass through these additional security expenses to the tenants as operating expenses. The landlord should realize, however, that tenants will likely agree only to pay for the repair and monitoring of the security cameras, and not for the actual purchase and installation of the systems. While the benefits of surveillance cameras should outweigh any objections that the tenants may have, keep in mind that an increase in operating expenses reduces the profitability of tenants and can make a difference in the survival of a tenant with only marginal profitability.

Some tenants elect to implement their own security measures. In the event a tenant elects to install its own surveillance system, the landlord should make sure that the lease specifically states that the tenant will be responsible for the security of its premises and also addresses the allocation of risk between the parties. Since the security cameras will be under the tenant's exclusive use and control, the tenant—not the landlord—should be liable for any risk as a result of criminal acts of third parties.

Privacy Issues

To avoid privacy concerns, a landlord may be required to post signs in the interior and exterior of the shopping center, notifying the public of the presence of security cameras and that the cameras may be monitoring and taping activity. These signs should specifically state that by entering onto the premises or the shopping center, the parties consent to being videotaped and acknowledge that the recordings may be used in the investigation and prosecution of criminal activity.

The landlord should implement formal policies and procedures regarding the monitoring of the security cameras, as well as the retention of the recordings made from such cameras. It is important to include in that policy the manner in which those recordings should be maintained, and for how long. The policies and procedures should also address the ownership of such recordings, which parties have access to the recordings, and the sharing of any recordings with law enforcement.

Other Considerations

In addition to becoming educated on related costs and privacy issues, the landlord should be apprised of the security measures implemented by other shopping centers in its area. This will help to establish a standard of care for the area. The failure to adopt similar measures may cause a landlord to fall below the

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How Your Lease Can Make or Break a Sale—Part 2

Ann Peldo Cargile
Boult, Cummings, Conners & Berry, PLC
Nashville, TN

The first part of this article covered protecting the income stream and confirmation of lease status. This conclusion will address the landmines that landlords may create.

Many rights that landlords commonly grant to tenants can create landmines for the sale or financing of a piece of commercial property. Generally, problems arise because the lease neither defines these rights clearly nor provides a complete process for their exercise.

Purchase Options

Purchase options can pose a major dilemma in selling a piece of property. For instance, if a tenant has the option to purchase the property for a fixed price, no buyer will purchase the property for more than that amount. Even if the fixed price purchase option is for more than the current value of the property, it caps the potential profit that a purchaser can realize. Thus, if a purchase option for a fixed purchase does not have a sunset date, the landlord may not be able to sell the property while the lease is in place. A market price purchase option can eliminate this problem, however.

The lease should specify how the parties will determine "market value" and the time frame for this process. Otherwise, the property could be tied up in a lawsuit for years while the parties argue about the option price.

Rights of First Offer and First Refusal

A right of first offer requires the landlord to offer the property to the tenant before putting the property on the market. If the tenant does not elect to buy the property, the landlord is free to entertain offers from others. A right of first refusal requires the landlord to obtain an offer from a third party, and to offer the tenant the right to buy the property on the same terms. Ambiguous rights of first offer and first refusal can make a deal unworkable for a potential buyer or lender. Problem areas include:

1. ***Price Adjustments.*** Once the landlord offers the property to the tenant, what happens if there is a price adjustment? Must the landlord offer the property to the tenant once again? Generally, the best resolution is to provide, in the lease, that the price can vary by some percentage from the initial price offered to the tenant—usually between five and ten percent.
2. ***Time to Close.*** If the landlord offers the property to the tenant, but the landlord cannot sell the property for a long period of time, does the tenant have the right to look at the property again? The lease should provide that the landlord has at least one year to sell the property without having to offer it to the tenant.
3. ***One Time or Evergreen?*** If the tenant does not elect to purchase the property the first time the landlord offers it, and the landlord thereafter sells the property, may the tenant have another look at the property when the next landlord is ready to sell? If the lease does not address this point, the tenant's rights will continue for as long as the lease is in place.
4. ***Do the Rights of First Offer and First Refusal Apply to a Foreclosing Lender?*** A lender will want to know that if it forecloses on a property (or if it sells the property after it has foreclosed), it does not need to offer the property to the tenant on a preferred basis, since this chills the lender's ability to realize upon its collateral. A right of first refusal or a right of first offer that does not exempt foreclosures and sales by foreclosing lenders can make a property unfinanceable. This will narrow the potential pool of purchasers and, consequently, lower the market value of the property.

Problem Areas in Lease Documentation

Incorrect or incomplete lease documentation, especially for credit tenants, can impede a sale. Often leases will not reflect the correct legal entity that is the tenant—e.g., by naming a corporation that was never formed as the tenant. Gaps such as these can go to the heart of whether the lease constitutes an enforceable document. All landlords should perform some due diligence on the tenant's existence as a condition of executing the lease, even if this just includes checking the entity on the secretary of state's website, which is easy and free.

Other "holes" that can arise are missing signatures, missing exhibits and uncertain dates, such as when the commencement date occurs. Some of these items can be addressed with an estoppel certificate, as long as the lease obligates the tenant to deliver one. However, if the gap is serious enough, the tenant may use the estoppel certificate as a means of extracting concessions from the landlord—or even worse, terminating the lease.

Landlord Indemnities

Extensive or unlimited landlord indemnities can reduce a party's willingness to purchase a property, especially in the case of a risk-averse purchaser, such as a pension fund. Some areas of concern are:

1. ***Environmental.*** Most buyers do not like ongoing indemnities for contamination that may be beyond their control. Lease provisions that require a landlord to indemnify a tenant against contamination caused by third parties can present a problem for investors. Unfortunately, most anchor tenants require such indemnities. The only protection that a landlord can realistically obtain in this instance is to own the property in a single asset entity or to add a limitation of liability provision to the lease (described below).
2. ***Limitation of Liability.*** The lease should always limit the liability of the landlord to its interest in the property. That way, indemnities in the lease will not imperil other assets of a potential purchaser. Such limitations are particularly important in Tennessee, where limited liability entities are subject to franchise and excise taxes. Such taxes do not apply to individuals and general partnerships. Thus, Tennessee property owners have an incentive to own property in this fashion. However, this can expose other assets to the risk posed by extensive lease indemnities, unless the lease contains a limitation of liability provision.

Exclusive Uses/Restrictions on Leasing

Tenants often insist upon leasing restrictions to protect their businesses. However, too many restrictions can be so burdensome that viable tenants may not be interested in leasing the property. For example, many anchor tenants restrict restaurant uses near their stores because restaurants can produce odors and are heavy parking-lot users. However, restaurants provide one of the most profitable ways for landlords to fill the small "mom and pop" space in centers. If there are anchor tenants scattered throughout the center and all of them prohibit restaurants nearby, the landlord may find itself foreclosed from this profitable leasing alternative.

Conclusion

Leases provide the financial backbone for commercial real property sales. The income they generate (plus associated tax advantages such as depreciation) can provide an investment that produces a better return than other alternatives.

However, the value of a lease is only as good as its guaranteed income stream. It is, therefore, essential for landlords to consider how seemingly innocuous lease provisions can turn into roadblocks that prevent a landlord from selling its property and realizing its investment down the road. ■

ANN PELDO CARGILE is a Member of Nashville's Boult, Cummings, Conners & Berry, PLC.

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Security Factors

standard of care for the area. This also means that the landlord should be aware of any criminal activity at or near its property and should document any incidents of crime at its property. Furthermore, the landlord should also document any steps that are taken with regard to security at the property. Such documentation should include the reason that specific security measures were, or were not, implemented. For owners of multiple shopping centers, a landlord should document why certain security measures were adopted at one center, but perhaps not at the other center. The landlord's failure to adopt consistent security measures may increase its exposure in the event there is a criminal incident at one of its properties.

In the event that a lawsuit is eventually filed, any documentation maintained by the landlord will most likely be subpoenaed by the victim's attorney. In addition, the victim's attorney will have thoroughly researched whether any criminal acts have occurred at or near the property. Having documentation already compiled regarding the types of incidents at the center, and detailed records explaining why certain security measures were implemented over others, is advantageous to having no documentation at all. By being proactive and arming itself with this information upfront, a landlord will be better able to assess the security risks at its shopping center and better able to defend itself in future lawsuits.

While the implementation of ordinances requiring owners to install security cameras may seem benign on its face and relatively minor in the scope of obtaining other approvals for a project (i.e., zoning)—owners or landlords of retail centers need to fully assess the security risks in the area, regardless of whether or not they are required to do so by a local ordinance. If, however, a landlord is required to install security cameras by a municipality, it should also be aware of the related issues, both with respect to planning for the additional cost and for the potential liability concerns surrounding their use, maintenance and monitoring. ■

MARCIA OWENS is a Partner in the Real Estate Practice Group of Wildman, Harrold, Allen & Dixon LLP in Chicago. She has extensive experience in representing and counseling retail developers, investors and brokers, and can be reached at mowens@wildman.com.

SUSAN KIM is an Associate in the Real Estate Practice Group of Wildman Harrold, Allen & Dixon LLP in Chicago. She can be reached at skim@wildman.com.

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not adequately trained. As with development of the policies and procedures themselves, what constitutes an appropriate training program will vary with a retailer's particular circumstances (e.g., physical size and layout, number of locations, number of employees, nature of goods sold). What is appropriate for a "mom and pop" shop with one location likely will not be appropriate for a national department store. However, certain fundamental principles should be considered. For example:

- Is the training curriculum developed in-house, or by outside consultants who are "trainers" by profession? If the curriculum is developed in-house, is it reviewed by an outside consultant, or at least modeled on industry best practices?
- How is the training curriculum implemented? Is it entirely in lecture format, or does it involve explicit, scenario-based training and role-playing exercises? Does it include specific instruction on the subject of racial profiling?
- Who is required to undergo training—just loss-prevention personnel, or sales employees as well?
- What are the standards to "graduate" from loss-prevention training, and are there mandatory periodic refresher courses? What is done to ensure that the training "sinks in"?
- What steps are taken to periodically review and update training procedures to adapt to new laws, circumstances and industry best practices?

As with policies and procedures, the training curriculum must be a living document that is subject to regular review and evaluation. The store owner who gives careful thought to training employees will be a step ahead in defending their conduct.

Loss Prevention and Sales Employees

The constitution and supervision of a company's loss prevention and sales staffs can be sources of substantial litigation risk. For example, a staff that is demographically homogenous, in a store located in a community that is relatively diverse, may suggest to a jury that the company's hiring and promotion practices are tainted by discrimination. A minimally creative plaintiff's attorney will use racial disparity in a store's staff to suggest that the store enforces a culture of discrimination that extends to racial profiling in shoplifting detentions. Accordingly, retailers should ensure that their hiring and promotion policies are non-discriminatory and reflect best practices. Similarly, employee discipline must be consistent and non-discriminatory in all respects.

Careful thought should be given to the extent to which body and bag searches are necessary, and how they should be conducted.

Vigilance is essential. Supervisors and store managers must keep on top of the staff, including hiring, promotion, disciplinary and loss-prevention statistics, so that problem situations can be identified and resolved at an early stage. And when customers complain of mistreatment, staff at all levels should be instructed to take those complaints seriously, to document them as they are received and to promptly forward them for supervisory attention.

Surveillance, Apprehension and Detention

Despite the introduction of new and sophisticated technologies for video surveillance, product tracking and the like, there continues to be a necessarily human element to customer surveillance, apprehension and detention. Even when an alarm is sounded, a store employee must decide whether and how to detain a customer. That human element invites litigation risk, and loss-prevention policies and procedures must take great care to define the bounds of appropriate employee conduct.

Careful thought should be given to the criteria that are employed to determine whether to monitor a particular customer or a particular department, and whether to focus surveillance on particular days of the week, or at particular times of day. Where possible, loss-prevention resources should be dedicated based on verifiable shortage statistics (rather than "hunches"), and surveillance decisions should be based on objective, race-neutral criteria.

Similar caution should be exercised in developing policies and procedures for whether and where to apprehend a shoplifter, and whether to use force or handcuffs. There are several useful models in popular circulation. Generally speaking, apprehension decisions should be made based upon objective, race-neutral criteria, and uninterrupted observation. Apprehensions should be carried out on-site, but away from large crowds. Use of force should be minimized, and handcuffs should be employed only based upon an individualized and race-neutral assessment of need. On a broader level, stores should emphasize preventing the loss over making the apprehension. Detentions and recovery quotas should be de-emphasized.

How a person is treated during the course of a detention can have a significant impact on whether that person feels sufficiently aggrieved to file a lawsuit for discrimination or mistreatment. Accordingly, detention processing should be "humane" and efficient, while still being safe and secure for employees, detainees and others. Particular care should be given to the treatment of juveniles. Careful thought should be given to the extent to which

body and bag searches are necessary, and how they should be conducted. In most cases, they should be limited to searches for weapons based on an individualized and race-neutral assessment of risk. Where possible, searches should be "same sex" and witnessed.

Collections and Referral for Prosecution

Collections and referrals for prosecution can be a source of litigation risk because of the lingering impact they can have on the shoplifter. One who is caught, but allowed to "get away," is far less likely to pursue litigation than one who is caught and thereafter pursued for monetary relief or a criminal sanction.

Whether to collect a civil penalty and refer a shoplifter for prosecution are decisions that should be de-linked and based on objective, race-neutral criteria, preferably by a supervisor. Companies that attempt to collect civil penalties should do so only *after* the decision to prosecute has been made and communicated to the detainee, and the situation (including a statement that the decisions are not linked) should be explained in the detainee's native tongue. Bilingual forms should be available. Generally, stores should not attempt to collect civil penalties from juveniles.

Record-keeping and Review

As with all facets of business, adequate record-keeping can be a powerful tool to reduce litigation risk. In the loss-prevention context, retailers should give careful thought to the type of paperwork that is prepared when a customer is detained. Generally, employees should be required to make a contemporaneous written record of each detention, and they should be required to provide a narrative description of the process by which they came to observe and detain the customer. Those reports should be stored in a central location, and reviewed by supervisors for sufficiency and identification of deliberate or inadvertent employee misconduct.

A company that takes care to document its loss-prevention activities, and to review and evaluate that documentation on a periodic basis, will be well-positioned to defend against a suggestion that it tolerates bad behavior.

Summary

Race discrimination claims related to loss-prevention activities are a growth industry for plaintiffs' lawyers and civil rights agencies, which are eager to grab headlines and substantial monetary awards or settlements. The foregoing is neither an all-inclusive nor a universally applicable blueprint for reducing exposure to such claims, and the need for case-by-case analysis should be obvious. Store owners should consult their attorneys and security professionals for store-specific recommendations. ■

ALAN M. FREEMAN is a Partner in the Washington, D.C., office of Blank Rome LLP. His commercial litigation and risk reduction practice is national in scope. He can be reached at Freeman@BlankRome.com.

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parties that are no longer holding an interest in the lease. If you have a current address, send it there too; however, send it to the addresses in the lease as well—even if you know they are out of date. In those circumstances, it also may be prudent to state in the notice letter:

> "Notwithstanding anything contained in the lease to the contrary, the lease will be amended to require that all notices will be hereinafter directed only to the parties and to the addresses set forth in this notice."

This should help eliminate any confusion the parties may have as to whom to send notice to in the future. Remember, however, that if the receiving party does not agree to such changes, unilateral revisions pertaining solely to that party will not have any legal significance.

A landlord might also want the notice to provide a statement indicating that the revision to the notice clause does not impact

- The tenant's obligation to provide notice to the landlord's mortgagee pursuant to any SNDA agreement, or to any other agreement between the tenant and such mortgagee;
- The landlord's right to direct in writing that a mortgagee or other party receive duplicate notices from time to time; or
- Either party's right to designate, in writing, a substitute notice address.

So long as an authorized representative of the landlord "accepts and agrees" to the terms of the notice, any modification of the lease's notice provision included in your notice letter will be effective.

Never send a notice by fax or e-mail unless the lease specifically provides that this form of notice is permitted. Especially in a world where letters are not generally thought of as legal documents and where parties informally communicate with each other via e-mail or fax messages, do not rationalize that "the other party will get the notice, so it is ok." With just a modicum of effort, you can ensure that not only will the message be transmitted, but also that there will be no question that the method of transmitting the notice is improper, defeating the entire purpose of the notice. That could be a very costly mistake. ■

MARK MORFOPOULOS is a Real Estate Attorney at Meislik & Meislik. He can be reached at www. meislik.com.

Case Briefs

Statute of Frauds

Oral assignment of a lease was unenforceable under the Statute of Frauds. *La Belle Epoque, LLC v. Old Europe Antique Manor, LLC*, No. 127, September Term, 2007, Court of Appeals of Maryland, Oct. 8, 2008.

The court was asked to determine, for purposes of its review of a grant of summary judgment, whether on the record, the respondent tenant held a legally cognizable property interest in the premises at issue at the time of the flood. First, the court needed to determine whether the lessee made a valid assignment of the original lease. This required the court to determine if the alleged assignment was enforceable in accordance with the written lease between a petitioner and the lessee and in accordance with the Maryland Statute of Frauds. The court concluded that a reasonable trier of fact could find that the attempt to assign the leasehold estate orally to the respondent was a departure from the terms of the written lease and constituted a transfer within the Statute of Frauds. The court disagreed with the Court of Special Appeals's conclusion that the circuit court correctly determined that the respondent, as a matter of law, could not assert the rights of an assignee under the lease. Finally, the court affirmed the judgment, agreeing with the Court of Special Appeals that the circuit court erred in concluding that the respondent was a bare licensee or a trespasser as to the negligence counts against the petitioners.

Force Majeure

Summary judgment will not be granted where issues of fact surround the force majeure clause in a contract. *IPF/ULTRA Limited Partnership v. UP Improvements, LLC, and Royal Abstract of New York LLC*, No. 2:08-CV-21, United States District Court for the Northern District of Indiana, Hammond Division, Aug. 19, 2008.

On May 23, 2007, ULTRA (the "Seller"/"Landlord") and UP (the "Buyer") entered into a Purchase and Sale Agreement (the "Agreement") whereby ULTRA agreed to sell to UP the ULTRA Plaza Shopping Center. At the time the parties entered into the agreement, ULTRA had a pre-existing lease with its primary tenant, the Strack and Van Til grocery store ("SVT"). The pre-existing lease provided that SVT was required to reimburse ULTRA for one-half of the costs of replacing the roof at the shopping center. The contract between ULTRA and UP specifically contemplated the roof repairs. The contract provided that ULTRA would deposit with an escrow agent a sum equal to one-half the cost of the roof replacement (i.e., its obligation, had it continued as Landlord). After replacement of the roof, UP would bill SVT for its share of the cost of the roof replacement, and within two (2) days of the Buyer's receipt of funds from SVT, the Buyer would authorize the escrow agent to release the roof escrow plus all interest thereon, to the Seller. The contract further provided that if the Buyer failed to replace the roof and invoice SVT by Dec. 31, 2007, subject to extensions for force majeure or other events, matters or delays beyond the reasonable control of the Buyer, the Seller could deliver a written notice to the escrow agent, requesting a release of the roof escrow. UP did not complete the roof replacement by Dec. 31, 2007. The sources of the delay were a dispute between the Buyer and Seller regarding the use of union versus non-union contractors. Once the issue regarding the use of the contractors was settled, unusually harsh weather conditions prevented timely completion of the project. Thereafter, on Jan. 2, 2008, ULTRA provided written notice to UP and the escrow agent, demanding release of the roof escrow. UP objected to the release of the roof escrow. ULTRA filed a complaint on Jan. 18, 2008, alleging breach of the contract. On April 23, 2008, UP filed an answer denying that ULTRA was entitled to the escrow funds or that it breached the agreement. ULTRA then filed a motion for summary judgment, arguing that there was no dispute of material fact regarding UP's interference with the release of the escrow funds. UP argued that summary judgment was inappropriate because there were genuine issues of fact regarding whether it was possible for the roof repairs to have been competed by Dec. 31, 2007. (The roof replacement was eventually completed on May 20, 2008, and the escrow funds were ordered by the court to be transferred to the clerk of the court on or before May 18, 2008.) The court denied the motion, holding that UP set forth sufficient evidence to establish a material issue of fact. It considered that during contract negotiations, the use of union versus non-union labor was never discussed, and that sufficient evidence was produced demonstrating that there were poor weather conditions at the end of the 2007 year. The court did, however, order the release of the roof escrow funds because the roof was completed, but noted that release of the funds did not imply that UP had satisfied its entire obligation under the contract.

Legislative News

Around the Nation...

New Jersey

On Dec. 16, 2008, Gov. Jon Corzine (D-NJ) signed into law S-4/A-3377. The legislation appropriates $50 million from the Long Term Obligation and Capital Expenditure Fund to the Economic Recovery Fund in order to establish the "Main Street Business Assistance Program," a component of the "New Jersey Economic Assistance and Recovery Plan." This program is intended to stimulate the state's economy and spur community reinvestment at a time of national economic crisis by providing loans and guarantees to small and mid-size businesses as well as to not-for-profit corporations on an expedited basis for a period of two years following the bill's enactment.

On Dec. 4, 2008, Gov. Corzine also signed into law A-2231/S-1337. This legislation establishes an Organized Retail Theft Task Force to focus on organized retail theft and to examine the advantages and the drawbacks of instituting various measures to counter losses from such theft in New Jersey. The nine-member task force includes a representative from the International Council of Shopping Centers; a representative of the New Jersey Food Council; a representative from the New Jersey Retail Merchants Association; a representative from the New Jersey State Association of Chiefs of Police; a member with experience as a flea market vendor; a member representing an e-commerce website; a county prosecutor; and the State's attorney general and director of consumer affairs (to be appointed within three months of the date of enactment).

On Dec. 8, 2008, A-3495 was introduced. This legislation provides that a gift certificate, prepaid bank card or gift card sold after the effective date of the bill will retail full unused value until it is presented in exchange for merchandise. Thus, the bill would create a gift certificate, prepaid bank card or gift card that neither expires nor has a dormancy fee charged against it. As currently provided by law, a gift card or gift certificate may contain certain conditions and limitations that are disclosed to the purchaser at the time of purchase. Those conditions and limitations are: (1) in no case shall a gift certificate or gift card expire within the 24 months immediately following the date of sale; (2) no dormancy fee shall be charged against a gift certificate or a gift card within the 24 months immediately following the date of sale, nor shall one be charged within the 24 months immediately following the most recent activity or transaction in which the certificate or card was used; and (3) a dormancy fee charged against a gift certificate or gift card shall not exceed $2.00 per month.

Texas

A number of bills dealing with eminent domain have been pre-filed in the state for the 2009 Legislative Session:

- H.B. 37 would require municipalities, prior to developing a community development program, to identify areas of the municipality that have the characteristics of blight or a slum. It also prohibits the municipality from exercising the right of eminent domain to acquire property unless the condition of the property is an immediate threat to public health and safety.
- H.J.R. 14 proposes a constitutional amendment to require the state or political subdivision of the state that takes, damages, or destroys property to prove by clear and convincing evidence that the contemplated use of the property is public and necessary at the time an attempt is make to take, damage or destroy the property, and the "contemplated use" would be a judicial question.
- H.B. 402 would prohibit a governmental or private entity from taking private property through eminent domain if the taking is not for a public use. Also, it would authorize a private property owner whose property is acquired through eminent domain for the purpose of creating an easement through that owner's property to construct streets or roads at any location the property owner chooses. In addition, the bill would enact the Truth in Condemnation Procedures Act, requiring public notice and hearings, a *bona fide* offer to acquire the property voluntarily, and an opportunity for the property owner to repurchase the property if the project is not started within 10 years of the condemnation.
- H.J.R. 31 proposes a constitutional amendment prohibiting the state or a political subdivision from taking private property through eminent domain if the primary purpose of the taking is for economic development or to benefit a particular private party.
- S.B. 219 would prohibit a governmental or private entity from taking private property through eminent domain if the taking is for a recreational purpose.

Georgia

The State General Assembly convened the 2009 Session on January 12. A constitutional amendment is expected to be proposed to provide for a statewide referendum for a 1 percent sales tax to be imposed within locally approved regions dedicated to transportation infrastructure. The measure is largely being promoted to alleviate congestion in the more urban areas although rural areas can create regions as well. A second expected issue is property assessment freezes or caps on assessment increases. One proposal also places such limitations on residential properties but not commercial. The 2009 Session will likely conclude by the first week of April.

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LEGISLATIVE NEWS

International Council of Shopping Centers
1221 Avenue of the Americas
New York, NY 10020-1099