



Insuring Leases: Valuation, Endorsements, and Other Considerations

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Takeaway Goals

- Necessity for a policy with leasehold endorsement because a lease is the purchase of an interest in real estate.
- Leasehold endorsement coverage for all leases.

Takeaway Goals

- Estimating potential future damages to determine amount of policy.
- The Fund will accept reasonable estimates of future damages for purposes of determining the amount of coverage of leasehold coverage to purchase.
- Evaluating the commitment and closing the lease transaction.

Florida Law on Leasehold Estates

“During the life of a lease, the lessee holds an outstanding leasehold estate in the premises, which for all practical purposes is equivalent to absolute ownership. The estate of the lessor during such time is limited to his reversionary interest, which ripens into perfect title at the expiration of the lease.”

Trump Enterprises, Inc. v. Publix Supermarkets, Inc., 682 So. 2d 168, 169 (Fla. 4th DCA 1996), citing headnote in Rogers v. Martin, 87 Fla. 204, 99 So. 551 (1924).

Mortgaging Leaseholds

“The Supreme Court of Florida has specifically recognized the mortgaging or pledging of leasehold interests in realty.” *Oliver v. Mercaldi*, 102 So.2d 665, 667 (1958).

Property Interests In Leases: Good and Fixtures

Florida Uniform Commercial Code Chapter 680:

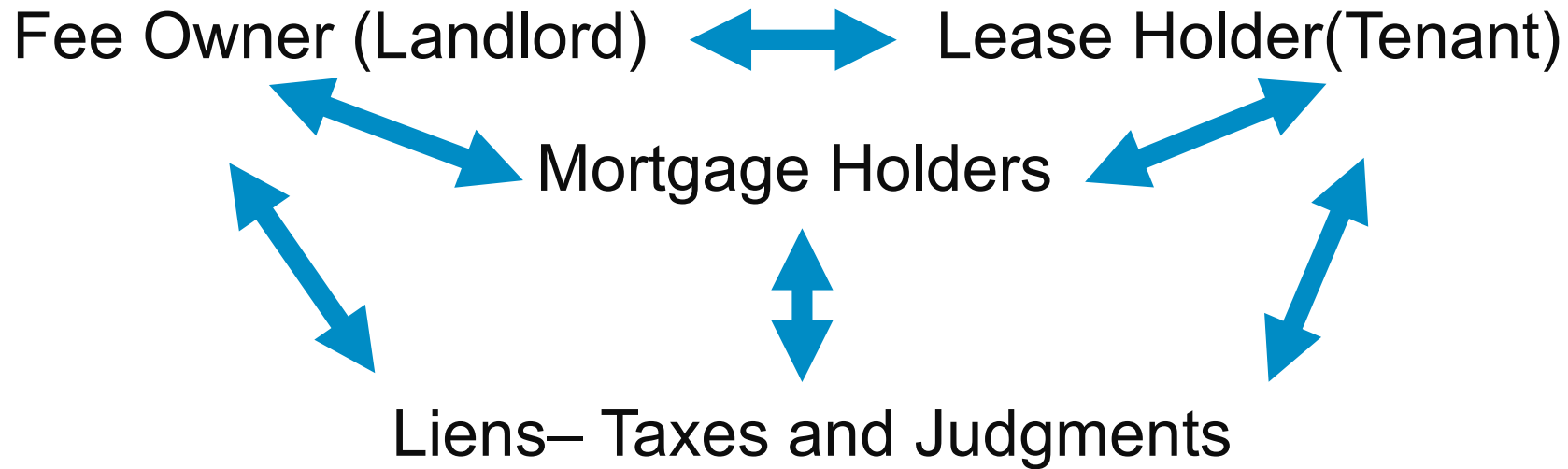
“Goods” means all things that are movable at the time of identification to the lease contract, or are fixtures
(Sec. 680.309, F.S.) . . .” Sec. 680.1031, F.S.,

-and-

“Goods are “fixtures” when they become so related to particular real estate that an interest in them arises under real estate law.” Sec. 680.309, F.S.

Parties in Interest

Parties in Interest to the Leasehold Estate



The Fee Holder – Landlord

Lease clauses that limit tenant's rights:

- Limit the right to mortgage the leasehold.
- Remove improvements upon the termination.
- Automatically subordinates the lease to all future lenders of the landlord.
- Subject the lease to Declarations of Conditions, Covenants, and Restrictions (CCRs).
- Prohibit assignments and subleases.
- Impact tenant's rights if evicted.

The Landlord's Mortgage Holder

- Mortgages on the fee.
- Recorded before the lease: priority.
- Recorded after the lease: subordinate.
- Automatic subordination of lease to future mortgages.
- The Subordination, Non-Disturbance, and Attornment Agreement – the “SNDA.”

Liens Against Landlord

- Judgment liens.
- Unpaid property taxes.
- Tax liens – IRS and state.
- Municipal liens, development orders, environmental liens.

Liens Against Tenant

- Judgment liens.
- Commercial landlord's lien for unpaid rent – Sec. 83.08, F.S.
- Unpaid property taxes.
- Tax liens – IRS and state.
- Municipal liens and environmental liens.
- Subordination of leasehold collateral.

Need for Title Policy with Leasehold Endorsement

- Risks of entering leasehold are the same as purchasing any real estate in fee simple.
- The commitment gives you the roadmap of the prior recorded interests.
- The policy with Leasehold Endorsement provides insurance coverage for the leasehold owner and the leasehold lender.
- Potential damages dictate need for the title insurance
- Available for all leases- residential, commercial, vacant land, ground leases, cooperatives (co-op).

The Leasehold Endorsement

- History of the product pre-2001 “Leasehold Policy.”
- Present:
 - ALTA 13-06: Owner’s Policy with Leasehold Endorsement.
 - ALTA 13.1-06: Lender’s Policy with Leasehold Endorsement.

The Jacket Coverage

- Same jacket coverage as the owner's and lender's policy – same jacket.
- Same ten covered risks in any policy.
- Same five exclusions in any policy.
- The ALTA owner's jacket defines "Land" as an interest that by law constitutes real property.
- The Leasehold Endorsement adds provisions to apply the standard owner's and lender's policies to leaseholds.

The Leasehold Endorsements – “Eviction”

- Definition of “Evicted” or “Eviction.”
- "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this policy.

The Leasehold Endorsements – “Claims”

- Paragraph 2: The value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction.

Plus, Without Duplication:

- Paragraph 3: Specific Items of Loss Lists Seven Specific Types of Damages that are Recoverable in Subparagraphs (a), (b), (c), (d), (e), (f), and (g).

The Leasehold Endorsements – “Claims”

- **Endorsement Paragraph 3 (a):**

The reasonable cost of (i) removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, (ii) transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, (iii) repairing the Personal Property damaged by reason of the removal and relocation, and (iv) restoring the Land to the extent damaged as a result of the removal and relocation of the Personal Property and required of the Insured solely because of the Eviction.

The Leasehold Endorsements – “Claims”

- **Endorsement Paragraph 3 (b):**

Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.

The Leasehold Endorsements – “Claims”

- **Endorsement Paragraph 3 (c):**

The amount of rent that, by the terms of the Lease, the Insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the Insured has been Evicted.

The Leasehold Endorsements – “Claims”

- **Endorsement Paragraph 3 (d):**

The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease or sublease permitted by the Lease and made by the Insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

The Leasehold Endorsements – “Claims”

- **Endorsement Paragraph 3 (e):**

Damages caused by the Eviction that the Insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease permitted by the Lease and made by the Insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

The Leasehold Endorsements – “Claims”

- **Endorsement Paragraph 3 (f):**

The reasonable cost to obtain land use, zoning, building and occupancy permits, architectural and engineering services and environmental testing and reviews for a replacement leasehold reasonably equivalent to the Leasehold Estate.

The Leasehold Endorsements – “Claims”

- **Endorsement Paragraph 3 (g):**

If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering services, construction management services, environmental testing and reviews, and landscaping.

The Leasehold Endorsements – “Claims”

Remember:

The losses covered are capped by the coverage amount.

Valuing the Leasehold

- Valuing the leasehold.
- Locating comparable space.
- Remaining term of lease.
- Relocating improvements.
- Replacing improvements.

Valuing the Leasehold

“It may not be an easy task to definitely determine the amount of insurance, but The Fund does not question any reasonable estimate.”
TN 19.03.03.

Valuing the Leasehold

Valuation of leasehold – definition:

“The value of the leasehold estate is the difference between the fair market rental value for the remainder of the lease term and the amount to be paid under the lease for the same period.” TN 19.03.03.

Valuing the Leasehold

- Cost of removing and relocating personal property.

Valuing the Leasehold

- Cost to secure replacement leaseholds; real estate commissions, expenses.

Sample Estimation of Value

- 5-year lease.
- \$100,000 annual rent CPI escalators.
- \$150,000 in tenant improvements.
- What is coverage amount?

Sample Estimation of Value

- First estimate: value of the remaining lease term:
- The tenant estimates that replacing the space will cost an additional \$10,000.00 per year over CPI escalators.
- 5 years @ \$10,000.00 per year = \$50,000 for rising rental rates in excess of CPI.

Sample Estimation of Value

- Second estimate: tenant improvements.
- \$150,000 tenant improvements – cost to replace or move - \$150,000.00.

Sample Estimation of Value

- Additional costs:
- Realtor fees/permits/licenses/relocation costs.

Sample Estimation of Value

- \$50,000 (Increase in market value of rent over life of lease).
- \$150,000.00 (Purchasing or moving tenant improvements).
- \$100,000.00 (Realtor, licensing and permitting fees).
- \$50,000 (Unidentified recoverable damage).
- \$350,000.00 Coverage.

The Commitment

- Commitment is a standard:
 - Owner's commitment.
 - Lender's commitment.

The Commitment - Requirements

- Execution and Recordation of a Lease, Memorandum of Lease, or Assignment of Lease.
- Lease must have description of land.
- Persons signing for Landlord and Lessor must have authority.
- If for more than one year, Lease must have two witnesses (See Skylake Case, 23 So.3d 175 (Fla. 3rd DCA 2009)).
- Notices of Commencement.
- Estoppel letters, Satisfactions of Prior Mortgages, Affidavits of No Lien, Co-op Transfer Documents.

The Commitment - Requirements

Exceptions

- Plat.
- Rights of Fee Simple Owner and Prior Mortgages.
- Conditions, Covenants, Restrictions.
- Other leases.
- Terms and Conditions of the Lease.
- Mortgages.
- SNDAs.
- Taxes – Personal and Real Estate.
- Easements.
- Survey issues.
- Tax Liens.
- Judgments.
- NOCs.

The Commitment - Exceptions

- CCRs – Use Restrictions?
- Other Leases – Protected Territories or Types of Businesses?
- Prior mortgages – Does Tenant need an SNDA?
- Access?

The Commitment – Cover Letter and Schedule A

- Cover letter refers to federal tax lien search when insuring a leasehold:

When the interest you are insuring is a personal property interest (such as a mortgage, a leasehold or cooperative interest), a federal tax lien search of the Secretary of State's records may be required. See Fund Title Note 30.02.08.

- Proposed Insured:

The estate or interest in the Land described or referred to in this Commitment is **LEASEHOLD** (Identify estate covered, i.e., fee, leasehold, etc.).

The Commitment - Requirements

Instrument to be insured: Lease

4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.
 - A. Execution, delivery, and recording of assignment of lease from ABC, Inc., a North Carolina corporation in favor of the proposed insured lessee(s) of the existing lease evidenced by Memorandum of Lease recorded in O.R. Book 2532, Page 1799, as affected by Assignment and Assumption of Lease recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida, with respect to the subject property together with consent to assignment from the lessor or ground lease lessee.

The Commitment - Requirements

Instrument to be insured: Leasehold Mortgage

4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.
- B. Leasehold Mortgage from ABC Edges Partners, LLC, a Delaware limited liability company to the proposed insured mortgagee(s).

The Commitment - Requirements

Recordation of any necessary extensions by exercise of options on lease:

6. Record evidence that the term of that certain lease evidenced by the Memorandum of Lease recorded in O.R. Book 2532, Page 1799, as affected by Assignment and Assumption of Lease recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida, has been extended by exercise of extension options pursuant to the Lease.

The Commitment - Requirements

Recordation of affidavit that lease is current:

7. Affidavit, contemporaneous with the transaction to be insured, from the lessor and the lessee to the effect that: (i) there are no unrecorded amendments, modifications, or transfers affecting the lease; and (ii) there has been no breach of any covenants, conditions, stipulations or other provisions of the lease on either side thereof and that said lease is in full force and effect.

The Commitment - Requirements

Required endorsements for leasehold endorsements:

21. FOR INFORMATIONAL PURPOSES ONLY: The following endorsements will be issued with the loan policy upon compliance with all underwriting requirements:
Leasehold – Owners ALTA 13 -06.
22. FOR INFORMATIONAL PURPOSES ONLY: The following endorsements will be issued with the loan policy upon compliance with all underwriting requirements:
Leasehold – Loan ALTA 13.1 -06.

The Commitment - Exceptions

Terms and Conditions of the lease are excepted from coverage:

5. Terms and conditions contained on unrecorded Lease from Food Brothers Limited Partnership, a Florida limited partnership, and Healthy Foods, Inc., a Florida corporation, as evidenced by Memorandum of Lease recorded in O.R. Book 2882, Page 1799, as affected by Assignment and Assumption of Lease from Fast Food of America, LLC, a Delaware limited liability company, successor by conversion to Fast Food of America, Inc., a Delaware corporation, successor by merger to Poco, Inc., a Florida corporation, successor by merger to New Food, Inc., a Florida corporation, successor by merger to Way Good Foods Inc., a Florida corporation in favor of ABC, Inc., a North Carolina corporation recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida.

The Commitment - Exceptions

Interest of fee simple holder and disclaimer on search of tenant's name of recorded lease:

8. Interest of fee simple owner and any encumbrances affecting the fee simple as follows: Warranty Deed in favor of Busy Realty Corporation Inc. recorded in O.R. Book 7256, Page 2265, Public Records of Volusia County, Florida.
10. Unless affirmatively indicated to the contrary, no search was made of the tenant's name as disclosed in a recorded lease or memorandum of lease included as an exception herein.

Review of Takeaway Goals

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Thank You!
for attending