

Title Searches for Commercial Leases: Know Before You Sign

December 14, 2022

Companies entering into a commercial lease of real property often minimize the importance of completing a title search. While there may be valid reasons, beyond simply the cost, why a prospective tenant may choose to forego a title search, skipping this step comes with serious risks, whether the transaction is a purchase or lease.

Raising Cane's and the Surprise Noncompete

Recently in Indiana, Raising Cane's, a Baton Rouge-based chain of chicken finger fast food restaurants, signed a 15-year lease at the Crossings of Hobart mall center located in Merrillville, IN. After an eight-month period in which Raising Cane's incurred over \$1 million dollars developing its new restaurant at the Crossings of Hobart, it received notice from the property owner/landlord, Ohio-based Schottenstein Property Group, that Raising Cane's would not be allowed sell any boneless chicken products at this particular location. Here, the landlord allegedly produced a noncompete that a previous property owner had granted to McDonald's, which should have been shown in the county's public records, allowing McDonald's the exclusive right to sell chicken products at the shopping center across from the Southlake Mall in Hobart, just down the street from the new Raising Cane's restaurant location. Now Raising Cane's is suing the Crossings of Hobart and Schottenstein Property Group in Texas Eastern District Court, alleging fraudulent inducement and claiming the landlord tricked it into signing a long-term lease after failing to disclose this noncompete.

Know Before You Sign

While the facts of the case are unclear and still being revealed, this problem may have been avoided or resolved before the signing of the lease and the enforcement of the restriction if prospective tenants had obtained a title insurance commitment and reviewed the underlying exception documents before entering into the lease agreement. This review should have revealed any restriction similar to the one at issue in the Raising Cane's case before the tenant became bound by the lease.

Title insurance is a standard requirement in most real estate transactions and properly underwritten title insurance is crucial to both lenders and property owners. A tenant may also order a title commitment and purchase a leasehold title insurance policy if the tenant's lease is of great value to the tenant, or if the added indemnity insurance is necessary to protect the tenant's leasehold title to the real property against any third-party claims.

How Title Insurance Works

The title insurance process typically begins with the title company ordering and reviewing a title search or an abstract covering the property to be leased or purchased. This search or abstract should reveal all matters affecting title to the property, including mortgages, easements, rights of way, etc.

Second, the title company issues a title commitment to a proposed buyer, lender, or tenant, preliminary to the issuance of a policy of title insurance (Commitment). The Commitment is an agreement by the insurer to issue its policy on certain terms agreed to therein. The Commitment will contain certain requirements necessary to issue a title policy, such as a cancellation of preexisting mortgages granted by the seller, lessor, or other prior owners, as well as certain exceptions, such as easements, rights of way, covenants, and restrictions affecting the property. The title company should provide the copies of the requirement and exception documents to the proposed insured. The potential purchaser or lessee needs to engage an experienced real estate attorney to review the commitment and underlying documents to determine if there are any requirements, easements, covenants, restrictions, or other matters that would affect the potential purchaser or tenant's proposed construction on or use of the property. A real estate attorney will also advise whether any other steps need to be taken, such as releases, waivers, or subordinations of rights regarding such covenants easements or restrictions. Counsel will also advise on whether, mainly in the case of a lease, any subordination, non-disturbance, and attornment agreements are necessary.

Finally, at the closing of the purchase or the signing of the lease, the title insurance policy is written and issued. Title insurance protects the soon-to-be property owner (or others with an interest in the property) against loss by encumbrances, defective titles, or adverse claims to title, and services in connection therewith. (La. Rev. Stat. Ann. § 22:6(9)).

Is Title Insurance Necessary?

Although in every transaction, a purchaser should obtain a title insurance policy, not every commercial lease situation warrants a tenant getting a leasehold policy, particularly where the tenant investment is minimal and the premises may be well established (e.g. a line store in a mall). The tenant, however, should at least order a title insurance commitment and have an experienced real estate attorney review it along with the underlying documents. On the other hand, where the tenant's initial build-out investment is significant, the protections afforded by a leasehold title insurance policy are well worth considering.

McGlinchey's [real estate](#) group stands ready to review title insurance commitments and exception documents, as well as give advice regarding the underlying lease or purchase transaction in many other states to avoid issues such as the one above. Our team is equipped to work with potential buyers and tenants regarding commercial real estate transactions, including title insurance matters.

McGlinchey also operates a wholly-owned title insurance agency, [MACSTAM Title Company LLC](#), to provide exceptional legal counsel and title insurance agent services in Louisiana and Mississippi. In those states, MACSTAM can issue title commitments and title insurance policies in both the commercial purchase and lease arenas. We can also render legal advice regarding these commitments and policies to buyers and tenants requesting a commitment or policy.

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R. Marshall Grodner