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COMMERCIAL REAL ESTATE

TENANT'S PERSPECTIVE

## *The ABCs of SNDAs*

If Subordination, Non-Disturbance and Attornment Agreements (SNDA) were called something more exciting, perhaps lenders, landlords and tenants would have given them greater attention during the real estate bubble.

Instead, SNDAs suffer from such a tedious name that there should be no surprise that many commercial tenants sign them without much thought.

Landlords typically include subordination provisions in their commercial leases to reserve the possibility of using their properties as collateral for financing. These provisions generally place the priority of the lease behind any mortgages, and provide that, if requested by the landlord, the tenant will sign a separate agreement known as an SNDA.

An SNDA consists of three basic components. First, the tenant agrees that the lender's mortgage lien has priority over the lease and that if the lender forecloses its mortgage lien, the lease may be wiped out. Second, the lender agrees to not disturb the tenant's possessions if the lender forecloses. Third, the tenant agrees to recognize the lender, or any successful purchaser at a foreclosure sale, as the tenant's new landlord.



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An SNDA survives foreclosure, so the lender (or successful purchaser), is bound by its terms.

Five years ago, during real estate's heady days, SNDAs were often overlooked as a form that dealt with unlikely issues. As a result, tenants frequently accepted SNDAs without much consideration.

Today, foreclosures are an everyday occurrence and must be considered a possibility when a tenant commences lease negotiations. Although an SNDA seemingly gives protection to both the lender and tenant in a foreclosure context, the terms of an SNDA often do not go far enough in protecting a tenant's interests, and a tenant should be prepared to be active during the negotiations concerning an SNDA.

Since the lease is subordinate to the mortgage, the tenant should consider asking the lender to expressly honor the terms of the lease. Most often, the lender will not want to accept complete responsibility for the landlord's past actions, and will want to carve out certain exceptions from the terms of the existing lease.

By way of example, tenants may request the right under an SNDA to offset rent to remedy certain landlord defaults. But lenders may reject such requests if such offset rights don't currently exist under the lease.

Large tenants often insist upon using their own form of an SNDA, and tenants in general should request the lender's SNDA for their review during the lease negotiations.

A tenant should spend the necessary time negotiating the form of an SNDA to minimize the risk that a lender foreclosure will result in a fatal interruption to the tenant's lease.

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