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Surviving the Retail Shift

Part 4 of a 5 Part Series:

Whose Property Is It? What to Do with Personal Property After a Tenant Vacates

By Kelly D. Stohs and David P. Vallas

As some retail tenants face failing business – or worse, have already shuttered their stores – shopping center owners and managers must deal with the aftermath. The wreckage of a failed retail business often includes the tenant's personal property remaining in the leased space. Some retail tenants offer this personal property to the shopping center owner in negotiation of full or partial satisfaction of past and future rental and early termination of the lease. Other tenants simply turn off the lights, leave their furniture and equipment in the premises, and disappear. **Critical to evaluating what to do with the personal property left in vacant leased premises is understanding the nature of that property and determining who has rights to it.**

A. Fixtures v. Trade Fixtures

Almost every piece of property fits into one of two categories: real property or personal property. **Real property includes land and items affixed to that land, such as buildings and other improvements. Some items of personal property – for example, the materials needed to erect a building – become part of the real property as soon as they are affixed to that real property.** Courts have defined "fixture" as an "article of the nature of personal property which has been so annexed to the realty that it is regarded as a part of the land and partakes of the legal incidents of the freehold and belongs to the person owning the land." *See State v. Wally Hutter Oil Co.*, 467 S.W.2d 279, 281 (Mo. App. 1971). Simply put, **once an item of personal property is permanently affixed to real property, it is no longer personal property, and instead, it becomes part of the real property that belongs to the landowner.** Legislatures in some states have codified the precise nature of the attachment necessary to transform an item of personal property into a fixture. *See e.g.* Cal. Civ. Code 660 ("A thing is deemed to be affixed to land when it is attached to it by its roots, as in the case of trees, vines, and shrubs; or embedded in it, as in the case of walls; or permanently resting

Authors:

Kelly D. Stohs
913.234.7525
kstohs@polsinelli.com

David P. Vallas
312.873.3620
dvallas@polsinelli.com

upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws . . .”). Personal property is generally everything else. *See e.g.* Cal. Civ. Code 663.

While the difference between personal property and real property is relatively clear in concept, it is murkier in practice. The bricks and mortar used to build a shopping center are clearly fixtures and become part of the real property, but what about the cash wrap, pizza oven, walk in freezer, track lighting, or kitchen equipment installed by a retail tenant in its leased premises? As a tenant and shopping center deal with the fall-out from an early or unplanned exit by the tenant or the natural expiration of a lease, it becomes critical to determine whether the items that a retail tenant purchased and attached to the leased premises belong to the tenant or the shopping center.

Whether personal property that is affixed to the premises belongs to the shopping center or to the tenant is primarily a question of intent. The Ohio Supreme Court established what is perhaps the most important test for determining if an item is a fixture. In *Teaff v Hewitt*, 1 Ohio St. 511 (1853), **the Ohio Court established three elements for determining whether an item affixed to real property remains personal property or becomes a fixture: (1) actual attachment to the real estate; (2) appropriation to the use or purposes of the part of the realty to which it is attached; and (3) the intention of the party who attached the fixture to make the fixture a permanent attachment.** Each of these three elements must be present to some degree, even if only slightly. Most courts agree that the intent element is “of paramount importance, at least in the case of controversies between . . . landlord and tenant, where the controlling question is usually that of whether the intention in annexing the article to the realty was to make it a permanent accession to the land.” *Matz v. Miami Club Restaurant,* 127 S.W.2d 738, 741 (Mo. App. 1939). **The law favors the right of tenant to remove articles furnished or installed by that tenant for the purpose of its occupancy, even though those articles may ordinarily be termed fixtures.** *In re Estate of Horton*, 606 S.W.2d 792-, 795 (Mo. App. S.D. 1980). These types of fixtures – fixtures installed by a tenant for its business and without the intent to make them a permanently annexed to the leased premises – are commonly referred to trade fixtures. *Black's Law Dictionary* 652 (7th ed.1999) defines trade fixtures as “[r] emovable personal property that a tenant attaches to leased land for business purposes.”

Perhaps the best way to ascertain a retail tenant’s intent with respect to personal property affixed to the leased premises is to look at the parties’ lease itself. *Jim Walter Window Components v. Turnpike Dist. Ctr.*, 642 S.W.2d 3, 4 (Tex. App. Dallas 1982) (“The intent of the parties regarding the right to remove additions at the termination of a lease is to be determined from the provisions of the lease agreement”). **A well drafted commercial lease should clearly set forth the tenant’s intention with respect to personal property affixed to the leased premises and define what is or is not a trade fixture.** It is important to note, however, that courts will scrutinize the lease language. Courts have held that lease provisions containing language that the tenant should not remove “any repairs, improvements, additions, or fixtures,” do not apply to trade fixtures. *Cubbins v. Ayres*, 72 Tenn. 329, 331 (1880). The *Cubbins* court explained that, [t]he wording, it will be noticed, is peculiar, and leaves the precise object had in view in some doubt. But it seems very clear that the word ‘fixtures’, in the connection in which it is used, was not intended to embrace trade fixtures. For, if such had been the design the contract would have been more clearly expressed . . . .” *Id*. The more clear and unequivocal the lease language, the better chance that a court will find that a tenant did not intend to remove the fixture at the end of the term.

When dealing with a tenant who vacates prior to the end of the term, a shopping center owner often considers accepting a transfer of the tenant’s personal property and trade fixtures in exchange for a partial or full release of that tenant’s lease obligations. In such circumstances, the shopping center owner must untangle the distinction between fixtures and trade fixtures in order to accurately identify and value which personal property belongs to tenant and may be transferred to the shopping center as part of the resolution. It makes little sense to attribute any meaningful value to the conveyance of a fixture – after all, that fixture belongs to the shopping center owner the moment it is bolted to the floor. Instead, the value

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will be in the items installed by a retail tenant with intent that the tenant would remove the fixture at the end of the term.

B. Abandoned Personal Property

Personal property abandoned in a leased premise presents a separate challenge for retail landlords. While it might be tempting to dispose of this personal property, a landlord should resist that temptation or the landlord could be held liable for conversion of that property. See *Davis v. Odell*, 240 Kan. 261, 271 (D. Kan. 1986). Landlords are not without protections, however. I**n many states, a landlord may dispose of personal property that a tenant leaves behind by selling it after giving notice to the tenant and storing the personal property for a period of time before the sale.** *See e.g.* Cal Civ. Code § 1993 (California); A.R.S. § 33-1370 (Arizona); Fla. Stat. § 715.04 (Florida); Mo. Rev. Stat. § 441.065 (Missouri); Neb. Rev. Stat, §§ 69-2303-231 (Nebraska). Most of the states that allow landlords to dispose of personal property remaining in a leased premises give the landlord discretion to destroy or otherwise dispose of property, although some states, such as California, Florida, Maine, and Nebraska, impose a monetary threshold below which the property may be destroyed or otherwise disposed of without a public sale.

Shopping center owners should consider whether the cost and burden of this process justifies implementing it, particularly because a retail tenant often abandons its personal property in the leased premises only because the tenant does not own the equipment or because it is subject to security interest in favor of a finance company that lent funds to the tenant for the purchase of the equipment. **If a shopping center owner has a reasonable belief that a third party has an interest in this abandoned personal property, the shopping center owner generally must notify that third party of the upcoming sale.** *See e.g.* Cal Civ. Code § 1993. As a result, the shopping center owner might go through the burden and expense of conducting a sale of the tenant's personal property ultimately for the benefit of a third party lien holder.

Generally, a more prudent course of action is to conduct and complete an unlawful detainer action. While the eviction process does not give the shopping center owner title to the leftover personal property, the laws of most states are clear about a landlord's obligations with respect to this property. In most states, landlords are required to store the evicted tenant's personal property for a finite amount of time (generally between 10 and 30 days), after which period the landlord may dispose of or sell that property in its sole discretion. In a few states such as Colorado, a landlord has no obligation with respect to the tenant's person property after an eviction. The unlawful detainer process has the added benefit of ensuring that the landlord has proper and legal possession of the formerly leased premises.

In Summary

As more tenants are closing their doors during this retail shift, shopping center owners are often left sorting through the debris, often in the form of abandoned personal property. These challenges are not unique or even new, but the increasing number of tenant closures has heightened the questions and focus on what personal property belongs to the tenant or the shopping center owner. When a tenant exits early, a shopping center owner is better protected by understanding the nature of each item of personal property, and how to properly distinguish fixtures from trade fixtures.

In the final part of this five-part series, we will discuss some of the overall lessons learned so far during the current retail shift.

Previous Alerts in the **Surviving the Retail Shift** *Series*:

Part I: Manage Expectations & the Legal Process

Part II: A Landlord's Duty to Mitigate its Damages

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