Kilpatrick

5 KEY TAKEAWAYS

Corporate Leasing and Portfolio Management

John Livingston, Kilpatrick's Real Estate Investment and Development Team Chair, recently spoke at the firm's inaugural "In-House Counsel Summit" in Durham, North Carolina. This full-day event featured multi-practice CLE sessions designed to address today's most pressing issues facing in-house counsel. Mr. Livingston led a session addressing "Current issues in Corporate Leasing and Portfolio Management."

Key takeaways from his presentation include:

1

Office owners are facing a difficult and uncertain market. There is uncertainty in the broader economy, tenant vacancies are up, space needs for tenants in the future are unclear due to mixed results of return to office, loans are maturing, banks are pulling back from the sector, values are down, and interest rates are up. This will lead to continued foreclosures and the inability for owners to obtain new financing all of which will have the potential to cause negative impacts on current and future tenants.

2

Corporate tenants need to protect themselves from landlord and building risks by performing due diligence, getting protections in the real estate records, and negotiating flexibility in their documents. Due diligence includes obtaining market information from brokers and observing the health of the landlord generally, and the building specifically. Recorded documents include a recognition agreement (protecting against termination of a master lease in a sublease situation), SNDA (protecting against a foreclosure), and memorandum of lease (protecting against a future purchaser).

3

Corporate tenants should negotiate expansion, contraction, extension, and termination rights to have flexibility in their space needs. Assignment and subleasing restrictions should not be so broad as to impair the right of the tenant to sublease. Recognition agreements and SNDAs should preserve the tenant's right to obtain the benefit of any negotiated build out or improvement allowance or to grant them an equivalent economic benefit in reduced rent. Special attention should be paid to initial construction and surrender at the end of the term to avoid issues with construction delay or unnecessary costs in reinstating the premises.

4

In the difficult office owner environment, protections should be in place to prevent overcharging for pass through expenses such as TICAM (taxes, insurance, and common area maintenance). Protections include exclusions from calculations of operating expenses, limits on controllable expense increases, the right to audit expenses, and preventing the landlord from charging for market rent on amenity spaces.

5

In this market, it is more common to confront issues relating to the bankruptcy of a landlord or a prior tenant where a bankruptcy attorney should be involved to protect the tenant's rights and ensure that they are getting the benefit of a negotiated lease or personal property purchase. The WeWork bankruptcy is a special instance where many tenants should be concerned about potentially losing access to their managed service office on short notice.

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