

## Caution: Boilerplate Lease Provisions Aren't Always the Same

Commercial landlords and tenants often spend substantial resources negotiating a fair lease. During negotiations, both sides bargain for the right rental price, determine a reasonable rental term and identify which parties will be responsible for maintenance, insurance, and taxes. Commercial leases, however, contain much more than these primary terms.

Parties are likely accustomed to seeing “boilerplate” language—often found at the end of the lease—related to the choice of law, forum selection, force majeure, counterparts, severability, fee shifting, and a number of other standard provisions. Many parties take these provisions for granted. However, while the inclusion of these provisions is standard practice, the terminology of such provisions can vary greatly from one lease to the next. And it's usually not until a dispute arises that these provisions become noticeable.

Take, for example, a standard fee shifting clause, which typically provides that the prevailing party in the litigation will recover its legal fees from the non-prevailing party. For example, if a tenant owes \$100,000 in overdue rent, and the landlord spends \$20,000 in legal fees to recover the rent, the landlord is entitled to \$120,000.

Unfortunately, not every fee-shifting clause is that simple. Some fee shifting clauses only allow *one* of the parties to recover legal fees if they prevail in litigation. In that instance, if *both* sides have competing claims, the fee-shifting clause can present a substantial advantage to one party and a corresponding disadvantage to the other. For example, if a landlord and tenant each have competing claims for \$50,000, but the fee shifting clause is one sided in favor of the landlord, the tenant is limited to its \$50,000 claim while the landlord has a \$50,000 claim *plus* a claim for its legal fees that will continue to increase as the litigation proceeds. Such a scenario could compel the tenant to settle out of court.

Consider also situations where a "prevailing party" is entitled to its legal fees, but where the prevailing party only recovers half of the amount demanded in its complaint. Does the prevailing party recover its full legal fees, half of its legal fees, or some other percentage? Some fee shifting clauses leave that question ambiguous while others may answer this question in differing ways.

### POSTED:

May 2, 2019

### RELATED PRACTICES:

#### [Litigation](#)

<https://www.reinhartlaw.com/practices/litigation>

#### [Real Estate](#)

<https://www.reinhartlaw.com/practices/real-estate>

### RELATED SERVICES:

#### [Real Estate Leasing](#)

<https://www.reinhartlaw.com/services/real-estate-leasing>

#### [Real Estate Litigation](#)

<https://www.reinhartlaw.com/services/real-estate-litigation>

### RELATED PEOPLE:

#### [Joshua D. Taggatz](#)

<https://www.reinhartlaw.com/people/joshua-tagatz>



Any of these boilerplate provisions can rear their ugly head at the worst time. So what can you do about it? First, if you are negotiating a new lease or inheriting an existing lease as part of a larger deal, ensure *all* provisions are thoroughly reviewed by legal counsel. For leases to which you are already a party, ensure legal counsel annually reviews them to determine where you have the greatest exposure. Finally, if you identify provisions that create a power imbalance to your disadvantage, use the next bargaining opportunity to secure an amendment that corrects the imbalance. You won't have that opportunity after a dispute arises.

If you have any questions or need assistance, Reinhart has a team of attorneys that focuses on commercial leasing, including transactional work, litigation, and dispute resolution.

*These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.*