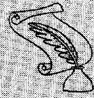

Nit-picking or Significant Contract Choices?—Part III

by K.K. DuVivier

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In the March "Scrivener,"[1] I quoted three examples of revisions proposed in a lease negotiation that were characterized by one reader as "nit-picking." In the June article,[2] I summarized the general responses I received about nit-picking from a number of readers. Two of those readers were kind enough to give me very specific feedback about the three clauses listed in the March article.[3] This article addresses each clause individually to provide help to other readers with their negotiations. Overall, these readers concluded that each of the proposed revisions listed raised legitimate concerns for their clients that were worth discussing with opposing counsel.

—**Lease:** "At all times during the continuance of this Lease, Landlord shall . . . "

Change: Delete the word "continuance" and substitute therefor "term."

Response 1: "In the first example, I have no idea what the 'continuance' of a lease would be. 'Term' seems more appropriate because it is a term of art; it has legal significance. I would guess that elsewhere in the lease agreement, there is a specified 'term.' It may even be a defined term in the agreement. While one could infer that 'continuance' means the same thing as 'term,' it's better to be precise with the language so as to prevent later question and possible dispute."

Response 2: "I assume that the lease has a term clause, not a 'continuance' clause. (*Black's Law Dictionary* defines 'continuance' only in the sense of the adjournment or postponement of an action.) While the word 'continuance' in the lease clause is probably okay under the 'Like, yeah man, you know what I mean, Dude!' standard, there is nothing wrong with exercising a bit of craftsmanship and using the word 'term.'[4] But whether the change is made or not would seem to have no substantive effect on the meaning of the clause. (Still, a question may arise as to whether, in the case of a hold-over tenant, the lease may have a 'continuance' after the 'term' has expired. (*Cf. First National Bank of Colorado Springs v. Struthers*, 121 Colo. 69, 215 P.2d 903 (1950)). But this should be addressed directly (*e.g.*, 'during the term of this Lease and any continuance or extension thereof'), and not by uncertain implication from the mere use of the word continuance standing alone.)"

—**Lease:** "Landlord shall make all structural repairs. . . ."

Change: "Landlord shall make all structural repairs *at Landlord's own and sole expense.*"

Response 1: "The second example is a very important point of clarification, as far as the would-be tenant's interests are concerned. Unless the lease agreement makes this point elsewhere, then I think it would be important to make clear that the landlord not only has to complete structural repairs, but also pay for them. Even if applicable state law is clear on this point, I think a good advocate for the tenant would want the agreement to be absolutely clear."

Response 2: "It seems to me that the questions of who is to do a certain act, and who is to pay for it, are two different questions. It is not out of the realm of possibility that the landlord would 'make all structural repairs' and then seek to recover the amount from the tenant on the theory that 'repairs fall to the expense of the tenant, unless otherwise provided by the lease' (*Denver Tramway Corp. v. Rumry*, 98 Colo. 24, 52 P.2d 396, 398 (1935))."

—**Lease:** "Tenant agrees to pay, as additional rental, 10% of the gross expense of lighting."

Change: Insert the word "reasonable" before the word "expense."

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through the *Scrivener* column. Send your questions to: kkduvivier@law.du.edu or call her at (303) 871-6281.

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Response 1: "The third example, in my opinion, is the most tenuous edit, because simply adding the word 'reasonable' does not seem to advance the ball at all. It would only lead to an argument down the road of whether the lighting expenses were 'reasonable'—an argument that probably would have ensued regardless of whether the word 'reasonable' appeared in the agreement or not. Perhaps the better thing to do would be to place a cap on the amount the tenant would pay on the gross expense of lighting, or draft some other mechanism that makes clear exactly what the tenant's obligations would be."

Response 2: "I think that a lawyer who relies upon the court implying the term 'reasonable' in any particular covenant of a lease is taking the risk that the court will not do so. After all, it is possible, contractually, to give the landlord *carte blanche* to spend money that the tenant must reimburse, in whole or in part."

Conclusion

Several readers have contacted me about these articles on nit-picking. While many voiced their frustrations about proposed revisions in the negotiation phase of a contract, most have confided to me that they would much prefer spending the time to make revisions during this initial phase rather than litigating these issues down the road—when the handshakes have turned to fist-shakes.

NOTES

1. DuVivier, "Nit-picking or Significant Contract Choices?—Part I," 31 *The Colorado Lawyer* 43 (March 2002).

2. DuVivier, "Nit-picking or Significant Contract Choices?—Part II," 31 *The Colorado Lawyer* 65 (June 2002).

3. The first response in each of the comments to follow is from Chuck Sensiba, of Van Ness Feldman, P.C. in Washington, D.C.; the second response is from George Reeves of Denver, Colorado. Also, Stanton Rosenbaum submitted a letter to *The Colorado Lawyer* regarding the March article. *See* "From Our Readers," 31 *The Colorado Lawyer* 57 (June 2002).

4. *See* Reeves, "Learning How to Practice Law in the Real World," 21 *The Colorado Lawyer* 947 (May 1992). ■

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