

Legal Issues Do Not End With Commercial Lease Execution

Clauses Controlling Post-Execution Issues Deserve Special Attention During Negotiations

by Gordon J. Golum

However carefully a commercial lease may be drafted, issues inevitably arise during its term that require interpretation of lease provisions. In that regard, an attorney should anticipate a call from his or her client subsequent to lease execution asking for advice related to some issue arising under the lease. This article will alert the reader to some provisions to which special attention should be paid in negotiating a lease. The article is not intended to be an exhaustive review of each issue addressed, or to address all post-lease execution issues that may arise.

To the extent practical, the parties should anticipate and negotiate these issues prior to lease execution. However, specificity in negotiating lease provisions will be compromised by a desire to reach a deal and worry about some issues later, should they ever occur.

The language of the lease is the starting point, and perhaps ending point, in lease disputes. It will govern resolution of the issues, subject to limited statutory constraints and case law.

Issues that often arise during the lease term relate to assignment and sublease, repairs and replacements, compliance with laws, common area or operating charges, options to renew, restrictive covenants, fire and casualty, condition of the premises upon surrender, and tenant relocation during the term of the lease. The duration of the lease, the nature of the use, the size of the space, the market and the nature of the parties will be among the factors affecting negotiations of these lease issues.

Repairs and Replacements

The necessity for repairs and replacements is almost inevitable with multi-year lease terms. Parties should negotiate their respective obligations with as much detail and clarity as possible. For example, who is responsible for making and paying for the heating and air conditioning, electrical and plumbing, parking lot, roof, and myriad of other areas that require repair and replacement? The negotiation of repair and replacement obligations is influenced by factors such as the term of the lease, tenant's use, the condition of the premises at the commencement of the lease and the nature of the market.

The parties should negotiate the condition in which the premises shall be delivered to the tenant. Is the tenant taking possession 'as is'? If not, it is essential to negotiate the condi-

tions in which the space shall be delivered by the landlord to the tenant. At the opposite end of the spectrum, where the tenant is under a contractual obligation to maintain the premises in good repair and fails to do so, a landlord may obtain damages for the cost of repairs after the lease has been terminated.¹

A lease may require a party to maintain, repair, replace, or to make structural repairs. The terms “maintain,” “repair” and “replace” have different meanings.² These words, and the term “structural,” are commonly used in leases, and have often been the subject of disputes.³

If a lease is silent or unclear with regard to the obligation to make certain repairs or replacements, the parties will inevitably be set for battle. In such a case, it may be held that neither party has the duty to repair or replace.⁴ However, if the tenant is being adversely affected by the failure to repair or replace, the tenant may be forced to make the repairs without a right of recoupment costs from the landlord. If the landlord fears the property is at risk, he or she may be forced to make the repairs or replacements.

Roof repair or replacement may be an issue for a tenant, particularly in a single-tenant building. In case of a roof leak, the tenant requires a speedy and permanent fix. But which party is responsible under the lease? Is the landlord only responsible if the roof has to be replaced, and patching is the tenant’s obligation? When does a roof need to be replaced rather than repaired? The landlord may prefer to patch the roof as leaks occur, instead of replacing it.

An attorney should be mindful that the duty to repair may also affect liability to third parties. A landlord is generally not under a duty to third parties to repair or assure that the tenant repairs the premises when the tenant is responsible for maintenance and repair under a lease.⁵ A duty to third parties is not created even where the landlord has reserved the right to enter the premises to perform

repairs the tenant has neglected.⁶ The parties may address issues of liability to third parties arising from a failure to repair or replace in the insurance and indemnity provisions of a lease.

Similarly, the parties should negotiate the landlord’s obligations for maintenance, repair and replacement of the common areas of the property. This may, for example, involve the obligation for removal of snow and ice in front of a retail store in a strip mall, or the timeliness of removal of snow and ice from the parking lot of an office building.

Sidewalk repair has also been a contentious issue the parties should address in the lease if sidewalks are an issue, for example, when a retail store is abutting the sidewalk. Though a commercial owner has been held liable for the disrepair of an abutting sidewalk, a subsequent decision has extended liability to commercial tenants in exclusive possession of the premises abutting the sidewalk.⁷

Common Area Charges

When operating or common area costs are passed through to the tenant, the parties negotiate how these costs are defined or allocated. When a property has common areas for common use of tenants, their visitors and invitees, the landlord will seek to pass through the expenses incurred in the common areas. These common areas may include parking lots, halls, bathrooms, common rooms, roofs, landscaped areas, etc. Operating costs may be defined to include common area expenses and other costs, such as insurance. Real estate taxes may be treated separately from, or as part of, operating expenses under a lease.

The parties may agree to pass through common area expenses or operating expenses of the property to the tenant on a *pro-rata* basis. This may be based upon increases over base period costs or payments from the commencement of the lease term, and is a business term to be negotiated by the parties. If there are

ambiguities to the common area calculations, a court may use extrinsic evidence to construe the lease provision.⁸

Parties should carefully negotiate which costs may or may not be passed through to a tenant. For example, will the tenant pay a *pro-rata* share of the expense of ‘replacement’ of the roof or of the parking lot, for repairs to another tenant’s space, or for penalties assessed against the landlord for violation of laws? Will the tenant pay a share of the real estate taxes assessed against the property? If a tax appeal is deemed appropriate, who will have the right or responsibility to file it, and who will bear the legal fees involved?⁹

The parties will negotiate how to calculate the tenant’s *pro-rata* share. For example, is it determined by dividing the tenant’s rentable area by the total rentable area of the property, or the rented area of the property? Such terms as “rentable” or “leasable” may create their own issues. When the building is in a complex, how will the *pro-rata* share be determined, and will it vary based upon the common areas for the entire complex? The type of lease will also affect this analysis: A shopping center raises different issues than an office building.

Should the tenant have the right to audit the landlord’s records to confirm the amount and allocation of common area or operating expenses to the tenant? If so, the parties should address how frequently this may be done. If the landlord agrees to an audit, it may wish to provide for a specific time period in which the tenant may request an audit after the tenant receives notice of the charges.

The parties may negotiate who pays for the costs of the audit if a mistake is found. The parties may agree that if the audit shows an overcharge of a certain percentage, the landlord should pay the cost of the tenant’s audit.

Compliance With Laws

The parties will wish to negotiate their respective obligations to comply

with the laws. Will the premises be delivered to the tenant by the landlord in compliance with the laws? If a certificate of occupancy is required, which party obtains it? When the tenant is complying with the use clause in the lease, but the law requires an alteration or modification to the premises, should the tenant or the landlord pay to bring the premises into compliance with the laws? A common example of this issue involves which party must pay to install sprinklers if a change in the law during the lease term requires installation for the building, but does not arise from the tenant's specific use.

In negotiations, consider the allocation of responsibility based upon factors such as whether the requirement arises from the tenant's particular use, whether it is a capital expenditure, the cost of compliance in relation to the duration of the lease, etc.

Generally, a tenant that is required to comply with all laws at its own expense may nevertheless not be required to bear the cost of a structural change.¹⁰ In a lease containing a provision requiring the tenant observe all laws and ordinances, but an additional specific provision would violate the law if the tenant had to comply with the provision, the tenant was found to have not breached the lease where it observed the law.¹¹

The parties should negotiate these terms to avoid such disputes.

Compliance with environmental laws is an increasingly important issue to address in a lease. This is usually addressed in a separate provision of the lease. Prior to entering into the lease, the tenant should inquire about the environmental condition of the property. The landlord should inquire about the nature of the tenant's use. The extent of the inquiry is obviously affected by the nature of the property (*i.e.*, industrial site) and the tenant's use (*e.g.*, manufacturing).

A landlord may be held liable for a tenant's environmental contamination.

Under the New Jersey Industrial Site Recovery Act (ISRA), certain cleanup obligations are triggered when an industrial site lease expires or a transfer occurs.¹² The parties should allocate responsibility between themselves, but this does not relieve a party of its statutory obligations.

Surrender of Possession by Tenant

The parties should negotiate the condition in which the premises are to be surrendered at the end of the lease. This condition is related to the repair and replacement provisions in a lease.

Does the tenant have to restore the premises to the original condition in which they were delivered (*e.g.*, to a shell)? What may the tenant remove from the premises at the end of the term? There are common law principles that will apply in the absence of clear lease language, but these may not reflect the intent of the parties.¹³

The Appellate Division has held that where a tenant agreed to surrender possession of the premises in good repair, ordinary wear and tear excepted, the tenant was only obligated to pay for repairs, rather than replacement, where there was no indication the repair would not hold until the end of the original lease term.¹⁴ In one case, a tenant was required to take timely steps to wind down its operations and arrange for removal of its machinery and equipment so it could meet the lease surrender deadline.¹⁵ Unfortunately for the parties, these issues were litigated instead of having been negotiated prior to execution of the lease.

Fire and Other Casualty

In the event of fire or other casualty, when does the lease end? The tenant will want to negotiate an option to end the lease as soon as possible. The landlord may ask to have an option to restore or not, following fire or other casualty. The landlord will desire as much time as possible to restore the building and premises

before the lease may be ended by the tenant, if the landlord elects to restore. Typically, the restoration periods discussed in negotiations range from 90 days to a year. Terms will vary based upon whether the building or premises is totally or partially destroyed.

In the absence of a contrary agreement, statutes provide that the lease is terminated if the building is totally destroyed and the tenant is not at fault.¹⁶ Where a lease did not provide for restoration by the landlord in the event of total destruction by casualty, the landlord had no such obligation.¹⁷ If the building is only partially destroyed, and the tenant is not at fault, the rent ceases and the landlord is under an obligation to repair it as speedily as possible in the absence of an agreement to the contrary.¹⁸ But the parties may and should negotiate these terms. In such an event, the terms of a lease will control.

Assignment or Sublease

As with other lease provisions, assignment and sublease clauses require negotiation depending upon the type of lease: warehouse, office, store, shopping center or industrial. If a tenant seeks to assign or sublease, is the landlord's consent required, and if so, what is the standard for consent? If this issue is not addressed in the lease, the tenant has a right to assign or sublease as a matter of law.¹⁹ If the lease states an assignment is prohibited, it does not prohibit sublease.²⁰

Assignment should be defined. Does it include a transfer of shares of stock? This is not prohibited by a restriction against assignment, unless this is stated in the lease.²¹

The tenant should ask that the landlord's consent not be unreasonably withheld or delayed. The tenant may wish the right to assign or sublease without consent in some circumstances, for example, to a related company or in the event its business is sold. Restraints on assignment are not favored.²²

The landlord may wish to circumscribe the right to assign in certain cases, such as when rent under the lease is based on a percentage of sales.²³ If the lease does not require the landlord to be reasonable in its required consent, then it appears the landlord may act arbitrarily under the existing state of the law.²⁴

The parties may wish to define the terms more specifically than just a statement that consent shall not be unreasonably withheld or delayed. The lease might state time periods for consent by the landlord and standards for consent, such as the financial condition of the assignee or subtenant, the use permitted, and other factors.

In case of a sublease, the landlord may wish to restrict the number of subtenants. The landlord may desire that the lease require reimbursement for attorneys' fees in the event the landlord requires its attorney to review the proposed assignment or sublease. The amount of reimbursement should be negotiated.

As a condition of its consent to assignment or sublease, a landlord may typically want the option to recapture the premises or any profits from the assignment or sublease. The tenant may ask to share the profits. These issues should be addressed in the lease.

The parties might wish to negotiate the remedies available to the tenant if the landlord wrongfully refuses its consent. The landlord may wish to limit the tenant to injunctive relief if a dispute arises, but this may not be a practical remedy for the tenant who may lose the proposed assignee or subtenant in the time it takes to obtain an injunction to compel the landlord's consent.

Landlord's Services

The parties will wish to define the services to be furnished by a landlord, such as janitorial services, utilities, heat and air conditioning, and snow removal from the parking area.

The landlord may be responsible for maintaining certain areas, such as the parking area and exterior of the premises, but where the tenant is "occupying premises to which third parties are invited," the tenant cannot be absolved from the "duty to maintain the premises in a reasonably safe condition."²⁵ However, the court has found that a tenant did not have to indemnify the landlord where the risk for injuries occurring in the common areas had shifted to the landlord, and where the tenant contributed to the landlord's insurance policy.²⁶

Depending on its use, the tenant may be concerned about charges and services during non-business hours, such as heat and air conditioning and the availability of elevator service.

What remedy is available to a tenant in the event of an interruption of services? Should the cause of the interruption matter (*i.e.*, was it caused by the landlord or by a third party, such as the utility)?

Although courts generally have declined to extend the repair and rent deduction remedy to commercial tenants that is available to tenants in residential leases, one court allowed an abatement of rent where the landlord violated an express provision of the lease by not providing heat to a tenant optometrist.²⁷

Option to Renew

The tenant may ask for an option to renew. This will involve negotiation of the rent to be paid during the renewal term, the notice required, whether any work will be performed in the premises at the landlord's cost upon commencement of the renewal term, etc.

Issues may arise if the tenant misses the deadline to give notice to renew or overlooks an element of the required notice. New Jersey courts will grant relief excusing a failure to give notice in the manner required by the lease in limited circumstances.²⁸

To restrict the likelihood of a mistake by the tenant in giving notice, the ten-

ant should avoid a narrow window for exercise of the option, ("not earlier than ___ or later than ___"), although the court may relieve the tenant from an error, at least if the notice was given early.²⁹ But the failure to exercise the option in accordance with the notice requirements of the lease may forfeit the option.³⁰

The tenant may ask for a reminder notice from the landlord, but landlords generally decline such requests.

Right to Expand

The tenant may negotiate to reserve a right to expand to other space in the building. Should this be a right of refusal or a right of first notice? If the landlord is agreeable, this has to be subject to any rights granted previously to other tenants.

Should the right of expansion be limited to the floor where the tenant is located? Should there be exclusions? What determines the rent for the expansion space? It might be the same rent per square foot the tenant pays for its original space, fair market value, or an agreed-upon fixed rent that is different from the original premises' rent.

Right to Relocate

The landlord may wish to negotiate a right to relocate a tenant during the term of the lease. The landlord may wish to accommodate a large tenant that needs contiguous space, for example. A tenant may not wish to be moved due to the obvious disruption, or for other reasons.

A landlord will generally agree that relocation will be at its expense, but what expenses are covered? Apart from moving costs and furnishing improvements comparable to those in the tenant's existing space, should costs include such items as printing new stationery and business cards with the new suite number? How much notice will be given the tenant? Are there certain

times when the tenant cannot agree to move (e.g., during tax season for an accounting firm)? Does the move have to be on a weekend, or to space with a comparable view? If the relocated premises are smaller or less desirable in some way, should rent be adjusted?

Restrictive Covenants

During the lease negotiations, a tenant may seek a covenant that the landlord will not lease space to a competitor, such as a supermarket, or to a tenant selling similar merchandise. On the other hand, a landlord may seek to limit the use by a tenant for various reasons (e.g., to limit competition with other tenants due to prior commitments or otherwise).

A restrictive covenant will be enforceable if found reasonable, and if it serves legitimate business purposes.³¹ In construing leases with restrictive covenants, the rule is that all doubts arising from the language of the lease “ordinarily are resolved in favor of that construction which least restricts the use.”³²

Such covenants often create disputes. A landlord must be careful in granting an exclusive use to a tenant. If a landlord agrees, the clause should be narrowly drafted and the landlord must be careful to limit uses of subsequent tenants when negotiating a lease. For example, it is not uncommon in a strip mall for a landlord to agree to an exclusive with a restaurant tenant for sale of a specific type of food and for one restaurant tenant to allege another restaurant tenant is selling a similar type of food in violation of its exclusive covenant.

In such cases, litigation may follow, with the landlord and the tenants comparing the menus of the restaurants and monitoring the food served. If a landlord agrees to grant an exclusive use to a tenant, the landlord should except uses in existing leases in the shopping center or strip mall and carefully analyze each

existing lease before committing to any exclusive use provision.

Landlord’s Duty to Mitigate Damages

The tenant may wish to negotiate the duty to mitigate in the event of its default under a lease. A commercial landlord must make reasonable efforts to mitigate damages after a tenant breaches the lease.³³ Failure to mitigate, however, may not preclude recovery for damages.³⁴ Moreover, it appears that parties to a commercial lease may, under existing law, explicitly contract to exonerate the landlord from mitigating damages.³⁵

Conclusion

The best way to avoid lease disputes is to anticipate issues that may arise subsequent to lease execution, and address the terms during negotiations. If the lease language is ambiguous, or fails to address issues, the matter may wind up with a court applying common law principles that do not reflect the intent of one or both of the parties. The court will not rewrite the lease agreement between the parties, but will seek to determine the intention of the parties from the language of the agreement and the attendant circumstances.³⁶ In each lease negotiation, each party should consider its own particular issues prior to commencement of the negotiations.

The examples in this article are only some of the red flags to consider prior to lease execution. The attorney should carefully review the terms the client requires in an effort to cover issues that may develop during the lease term. ♣

Endnotes

1. *Winrow v. Marriott Corp.*, 230 N.J. Super. 189, 194 (App. Div. 1989).
2. *See Seoane v. Drug Emporium, Inc.*, 457 S.E. 2d 93, 96 (Va. 1995) for definition of “repair” or “replace.”
3. *See Bertsch v. Small Invs., Inc.*, 4 N.J. 520 (1950) (meaning of “structural change” in a contract of sale); *Dolid*

v. Leather Kraft Corp., 39 N.J. Super. 194 (App. Div. 1956) (dispute over the term “necessary repairs”); *Donafrio v. Farr Lincoln Mercury, Inc.*, 54 N.J. Super. 500, 508 (App. Div. 1959) (“structural repair” defined); *Swern & Co. v. Morrisville Shopping Ctr., Inc.*, 239 A. 2d 302 (Pa. 1968) (“structural”).

4. *Paul v. Paul’s Liquor Store*, 217 A. 2d 197 (Del. 1966).
5. *Geringer v. Hartz Mountain Dev. Corp.*, 388 N.J. Super. 392, 401 (App. Div. 2006) (remanding, however, for a determination of whether the defendant landlord breached its duty to an employee of the tenant to exercise reasonable care in assuring the safe design and construction of the stairway where it reviewed and approved the tenant’s plans and encouraged use of the landlord’s in-house subcontractors).
6. *McBride v. Port Auth. of N.Y. and N.J.*, 295 N.J. Super. 521, 526-27 (App. Div. 1996).
7. *See Stewart v. 104 Wallace St., Inc.*, 87 N.J. 146 (1981) (imposing liability for sidewalk disrepair on commercial property owners and not tenants). *See also Antenucci v. Mr. Nick’s Sportswear*, 212 N.J. Super. 124, 130 (App. Div. 1986) (extending *Stewart* rule to impose a duty to pedestrian upon a lessee in exclusive possession to keep the sidewalk abutting the store premises in good repair).
8. *See Garden State Plaza Corp. v. S.S. Kresge Co.*, 78 N.J. Super. 485, 489-90 (App. Div. 1963) (holding that extrinsic evidence was admissible to interpret and construct the contract, and that a lease provision precluding use of previous negotiations, agreements and understandings to interpret or construe the contract was void as against public policy).
9. *See Village Supermarkets, Inc. v. Twp. of W. Orange*, 106 N.J. 628 (1987).
10. *Belmont Hotel, Inc. v. New Jersey Title*

- Guarantee & Trust*, 132 N.J.L. 403, 404 (E. & A. 1945) (concurring with the trial court's view that the landlord was responsible for converting the heating system as required by federal authorities because it was a structural change).
11. *Associated Realties Corp. v. Million Dollar Pier Operating Co.*, 6 N.J. Super. 369, 371 (App. Div. 1950). (The law precluded operation on Sundays, but another provision required Sunday operations. The court stated: "When one interpretation would render it legal, another interpretation illegal, the court will adopt the former.")
 12. N.J.S.A. 13:1K-6 *et seq.*
 13. *See Handler v. Horns*, 2 N.J. 18 (1946) (The tenant may remove trade fixtures provided they are removable without material injury to the premises.)
 14. *Liqui-Box Corp. v. Estate of Elkman*, 238 N.J. Super. 588, 602 (App. Div. 1990).
 15. *Union Minerals & Alloys Corp. v. Port Realty & Warehousing Corp.*, 129 N.J. Super. 41, 45 (Ch. Div. 1974).
 16. N.J.S.A. 46:8-7.
 17. *Schultz v. Kneidl*, 56 N.J. Super. 575, 580 (Law Div. 1959), *aff'd*, 59 N.J. Super. 382 (App. Div. 1960).
 18. N.J.S.A. 46:8-6.
 19. *Berkeley Dev. Co. v. The Great Atl. & Pac. Tea Co.*, 214 N.J. Super. 227 (Law Div. 1986).
 20. *Stark v. Nat'l Research & Design Corp.*, 33 N.J. Super. 315 (App. Div. 1954).
 21. *See Posner v. Air Brakes & Equip. Corp.*, 2 N.J. Super. 187 (Ch. Div. 1948); *Segal v. Greater Valley Terminal Corp.*, 83 N.J. Super. 120 (App. Div. 1964) (merger is not a breach of covenant against assignment).
 22. *Town of Kearny v. Mun. Sanitary Landfill Auth.*, 143 N.J. Super. 449 (1975).
 23. *See William Berland Realty Co. v. Hahne & Co.*, 26 N.J. Super. 477, 493-94 (Ch. Div. 1953), *modified*, 29 N.J. Super. 316 (App. Div. 1954).
 24. *See East Penn Sanitation, Inc. v. Grinnell Haulers, Inc.*, 294 N.J. 158 (App. Div. 1996) (involving consent under a contract, not a lease); *Jonas v. Purtaub Joint Venture*, 237 N. J. Super. 137 (App. Div. 1989) (citing growing minority view that a landlord's consent must be exercised reasonably).
 25. *O'Connell v. NJSEA*, 337 N.J. Super. 122, 128-29 (App. Div. 2001). *See also Jackson v. K-Mart Corp.*, 182 N.J. Super. 645, 650-51 (App. Div. 1981).
 26. *Stier v. Shop Rite of Manalapan*, 201 N.J. Super. 142, 156 (App. Div. 1985).
 27. *See Westrich v. McBride*, 204 N.J. Super. 550, 556 (Law Div. 1984) (holding that in limited commercial lease situations rent abatements may be available to a tenant whose use of the leased premises has been adversely affected to a significant degree by the landlord's breach).
 28. *Sosanie v. Pernetti Holding Corp.*, 115 N.J. Super. 409, 414 (Ch. Div. 1971) (late notice excused); *Brunswick Hills Racquet Club Inc. v. Route 18 Shopping Ctr. Assoc.*, 182 N.J. 210 (2005). (Bad faith by the landlord excused failure of the tenant to comply with element of renewal option.)
 29. *Goodyear Tire & Rubber Co. v. Kin Props., Inc.*, 276 N.J. Super. 96 (App. Div. 1994).
 30. *Kings Super Markets, Inc. v. Stop & Shop Supermarket Co.*, 2006 WL 1449339 (App. Div. 2006) (not approved for publication); *Brick Plaza, Inc. v. Humble Oil and Ref. Co.*, 218 N.J. Super. 101 (App. Div. 1987) (option to purchase); *Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp.*, 100 N.J. 166, 183-84 (1985).
 31. *Cox v. Simon*, 278 N.J. Super. 419, 432 (App. Div. 1995).
 32. *McGuire v. City of Jersey City*, 128 N.J. 310, 320 (1991).
 33. *Carteret Props. v. Variety Donuts, Inc.*, 49 N.J. 116, 127 (1967). *See also Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc.*, 196 N.J. Super. 262 (App. Div. 1984) (applying *Carteret* rule to construe use restriction as permitting any other lawful use separate and in lieu of supermarket use).
 34. *Harrison Riverside Ltd. P'ship v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470, 473-74 (App. Div. 1998) (finding that even if the landlord did not act reasonably, it would be entitled to recover the difference between the net square footage rate under the lease and fair market value in a declining market).
 35. *Carisi v. Wax*, 192 N.J. Super. 536, 542 (Dist. Ct. 1983) *and cited in Harrison Riverside*, 309 N.J. Super. at 473-74.
 36. *The Great Atl. & Pac. Tea Co. v. Checchio*, 335 N.J. Super. 495-501 (App. Div. 2000); *Garden State Plaza v. S.S. Kresge Co.*, 78 N.J. Super. 485, 496 (App. Div. 1963) ("Construing a contract of debatable meaning by resort to surrounding and antecedent circumstances and negotiations for light as to the meaning of the words used is never a violation of the parol evidence rule. And debatability of meaning is not always discernible at the first reading of a contract by a new mind. More often it becomes manifest upon exposure of the specific disputed interpretations in the light of the attendant circumstances.").

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