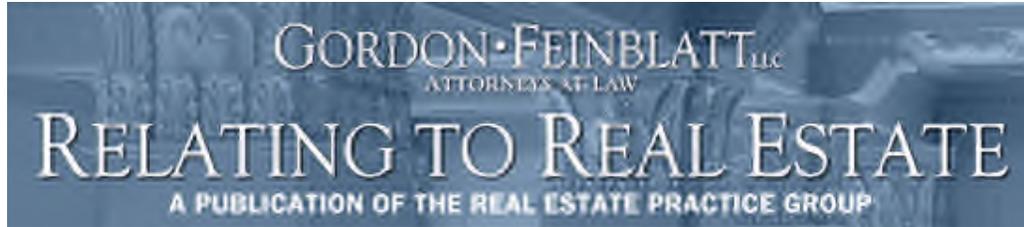


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## Who Needs an SNDA (Subordination, Non-Disturbance, and Attornment Agreement)?

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One of the closing documents in a real estate financing transaction when the property is leased is a Subordination, Non-disturbance, and Attornment Agreement (“SNDA”). SNDAs have a number of purposes and uses, and they serve to connect the lender with the tenant.

### Basic Provisions of an SNDA

Let’s consider each of the terms in the title of the agreement.

#### 1. Subordination

Subject to private agreements (and occasionally equitable principles), priority is typically established by order of creation under the rule: first in time is first in right. If a landowner mortgages its property and then signs a lease covering all or part of it, the mortgage is senior to the lease, and the lease is regarded as subordinate to the mortgage. On the other hand, if the lease were executed before the mortgage, the mortgage would be deemed to be subordinate to the lease.

If one instrument is superior to another, the provisions of the first instrument will control over those of the second to the extent of any conflict. For example, if a fire damages or destroys all or part of the property or if a condemnation takes all or part of it, questions regarding application of insurance or condemnation proceeds (among other issues) would be decided based upon the relative priority of the lease and mortgage. If the lease is prior, the lease provisions will control. These may mandate that the landlord use insurance proceeds to rebuild the premises. In contrast, if the mortgage is first, the mortgagee would be entitled to take all of the insurance proceeds and use them to reduce the debt, if the mortgage so provides.

A lender typically wants to use an SNDA if in the absence of such an agreement the lease would be prior to the mortgage. In order to ensure that the terms of the mortgage will govern, the lender will insist that its borrower (which is also the landowner and the landlord) and the tenant enter into an SNDA with the lender.

Another effect of characterization of one instrument as being subordinate to another may be

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even more dramatic than the issue of what clause controls in particular circumstances. The general principle is that the termination of a senior instrument will terminate all instruments that are junior to it and controlled by it. Therefore, if a mortgage is senior to a lease, the foreclosure of the mortgage will terminate the lease, unless there is an agreement that provides otherwise. However, if the lease is senior to the mortgage, the foreclosure of the mortgage will not affect the lease - other than to place a new party in the role of landlord.

## 2. Non-Disturbance

As suggested above, the subordination of the lease to the mortgage could have disastrous consequences to the tenant - the lease could be terminated if the mortgage were foreclosed. Therefore, subordination of its lease, by itself, would be unacceptable to a tenant. To avoid the lease's being put in peril of its existence, in the non-disturbance part of the SNDA the lender agrees that if it forecloses on the property or if the property is transferred by a deed in lieu of foreclosure, the lease will continue. Under either of these situations, with a non-disturbance clause the tenant remains in possession of the property and the new owner of the property (whether it be the purchaser at a foreclosure sale or the transferee of a deed in lieu of foreclosure) becomes the successor landlord.

The non-disturbance right under an SNDA is typically premised on the tenant's being in compliance with the terms of its lease.

The credit of the tenant is often a basis for the underwriting of the loan, and the lender typically wants the lease to continue even after a foreclosure sale or a transfer in lieu of foreclosure. Section 7-105.6(c) of the Real Property Article of the Maryland Code enables lenders to choose which subordinate leases they want to continue after the sale by stating in the advertisement for the foreclosure sale which will survive. By virtue of an amendment to the predecessor of this section in 1985 sponsored by the Real Property Section of the Maryland State Bar Association, lenders have the right to make this election even if the mortgage does not have a provision about it.

## 3. Attornment

The final term in the name of an SNDA is "attornment" which is the act by the current tenant agreeing to become the tenant of the holder of the remainder or reversionary estate. (The word "attornment" has the same root as "attorney" which literally means one who is appointed to act in place of another.) Under the attornment provisions of an SNDA, the current tenant agrees to be bound by all of the terms of the lease to any person or party to whom the remainder or reversion is transferred by reason of foreclosure of or other proceedings brought pursuant to or under the loan documents. These provisions are supplemented by §8-101 of the Real Property Article of the Maryland Code ("RP"), which provides that transferees of the reversion in leased property are entitled to the same remedies, and are subject to the same obligations contained in the lease, as the original landlord.

### **Additional Provisions in SNDAs**

In addition to the three points mentioned above, SNDAs often contain other provisions such as the following (which might be called the "additional provisions").

#### a. Estoppel Provisions

SNDAs may have portions that are essentially estoppel certificates from the tenants. These may include an identification of the original lease and all amendments and all collateral agreements regarding it; an acknowledgment

that the landlord does not have any remaining construction obligations; an assertion that the tenant is not in default under the lease, a statement that the landlord is not in default under the lease and that the tenant has no claim against the landlord, or a description of any defaults or claims; or a representation that the tenant has not assigned, sublet, or mortgaged its interest in the property. The estoppel provisions may also include other information that the lender may consider relevant, such as whether the tenant has exercised any option or rights under the lease; whether the tenant has any remaining options or rights under the lease; or whether other agreements, such as reciprocal easement agreements, are in effect.

Instead of including these estoppel provisions within an SNDA, the parties may agree to set them forth in a separate document.

b. Additional Notice

Sometimes SNDAs provide that the tenant will give to the lender not only copies of all notices that the tenant is required to furnish to the landlord but also that the lender will have an extra period of time to cure any defaults. Further, lenders sometimes require that SNDAs state that if the tenant alleges that there is a default under the lease, and the lender is in the process of exercising its rights under the loan documents, the lender will be given as much time as it needs to complete a foreclosure of the property or otherwise to gain possession of the property before the cure period commences.

c. Use of the Property

Some lenders add certifications by the tenant that it has always used the property in accordance with the lease and that it has not created any environmental problems on the property.

d. After the Foreclosure Sale

The lender may also request certain agreements from the tenant with regard to what happens if the lender forecloses or the property is transferred by action in lieu of foreclosure. The lender may ask the tenant to agree that the lender has no liability to the tenant for any defaults that the original landlord may have committed under the lease. Additionally, the lender may disclaim any liability to the tenant for the return of its security deposit except to the extent that the lender, or other successor of the landlord, has actually received the security deposit.

e. Future Agreements and Limitations on Actions

In some cases lenders will include provisions in SNDAs requiring that tenants execute estoppel certificates in the future and that the tenants agree that without the lender's consent they will not surrender, cancel, or terminate their leases, except due to an uncured default by the landlord.

## Read the Lease

I recently represented a borrower on a refinance loan transaction in which the lender requested an SNDA regarding the lease that covered the entire property. Although the basic points of the SNDA - the subordination, non-disturbance, and attornment aspects of it - were

readily agreed to by the parties, the additional points of the proposed SNDA were more problematic. Specifically, the tenant did not want to release the lender or other successor to the original landlord from any claims that the tenant may have against the original landlord, the tenant did not want to agree that it would not look to the lender or other successor to the original landlord for the return of the tenant's security deposit upon the termination of the lease - even if the successor never actually received the security deposit, and the tenant was not inclined to allow the lender more time to cure landlord defaults than the original landlord had bargained for in the lease.

As I watched the lender and tenant dig into their positions, I feared that an SNDA might not get signed and that the loan closing might be in jeopardy. I read the lease in question, and I found that it contained a paragraph that was very helpful to my client, the property owner. The relevant provision provided that the lease was subject and subordinate not only to any mortgage or deed of trust that encumbered the property at the time that the lease was signed, but the lease was also subject and subordinate to any mortgage or deed of trust that the landlord may enter into in the future. Further the lease stated that the tenant agreed to execute any SNDA that a lender requested in order to implement the provisions of that paragraph.

I pointed out these provisions to counsel for the lender, and I suggested that in light of them the lender did not need an SNDA to ensure that its loan documents would control over conflicting provisions in the lease, and that in reliance on RP §7-105.6(c) the lender would have the ability to decide whether to keep the lease in place if it were to foreclose on its loan. The lender and its counsel realized that the lender would have the basic rights that it sought under an SNDA even without such a document, and it agreed to proceed to the loan closing without an SNDA.

What the lender gave up were the "additional provisions" noted above. However, the lender did not consider the additional provisions to be important enough to hold up the loan transaction.

Note that it is more normal for a lease to provide that a tenant will subordinate its leasehold interest to future financing *only if* the lender will agree to provide non-disturbance protection for the tenant. To the extent that the lease that I was looking at did not have such a clause, it was defective from the tenant's prospective.

### **So Who Needs an SNDA?**

The lender that takes a lien on real property subject to an existing lease wants an SNDA so that its loan documents will control. It wants the additional provisions described above so that if it takes over the property it will have time to cure any landlord defaults and it will not be subject to claims that the tenant may have against the original landlord, including a claim for the return of the security deposit that the lender may have not received.

The tenant that signs its lease when a mortgage or deed of trust already encumbers the property wants the assurance that if its landlord (the loan borrower) defaults under the loan, the tenant's lease will not be affected.

The landlord (the loan borrower) does not care about the terms of an SNDA. The SNDA will be effective, by and large, at a time when the borrower has defaulted and has lost its interest in the property. The borrower's sole interest is that the process in obtaining an SNDA is not costly and will not hold up the loan closing.

For questions about this, please contact [Ed Levin](#) at (410) 576-1900.