

# Annual ICSC Law Conference Update: Another Year, Another Round of Great Topics and Speakers

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The annual ICSC U.S. Law Conference took place recently in Phoenix, Arizona. While the weather was a bit cool for this time of year, the topics were not. Once again, ICSC compiled a great line up of speakers delving into the hottest topics in Shopping Center leasing, development, and financing. The topics ranged from old standbys, like insurance, ground leases, and CAM reconciliation, to new subject matter like the legal implications of drones in the shopping center context and data security breaches. Old or new, the presentations did not disappoint. Below is a summary of a few of the trending topics at this year's conference.

**1. Technology.** As you can imagine, the implications of the advancement of technology was a topic creating buzz at this year's conference. From very basic questions such as, are Landlords and Tenants still exchanging hard copy executables, to more advanced issues, like how to determine the nexus of online sales made via smartphones and other technological advancements, it is clear that technology is having a great impact on today's retail leases. Landlords and Tenants alike need to become familiar with the advances being made in document compilation and storage, data security, online retail, and the technological demands of today's retailers in order to ensure that their leases can carry them through these changing times.

**2. Opening Covenants and Co-Tenancy.** While the tension between Landlords and Tenants regarding opening covenants and co-tenancy is nothing new, it seems the focus on these provisions continues to increase. The speakers at the ICSC legal conference agreed that they are seeing more and more Tenants pushing back against strict opening covenants and requesting greater cure periods before mandatory opening dates. For new developments, co-tenancy requirements are becoming more common and are being requested by smaller tenants than one might expect. On the Landlord side, the negotiation of broader replacement language seems to be more popular than ever as Landlords are attempting to gain more flexibility in how they fill vacated anchor space. The negotiated remedies in this area seem to be shifting as well, with Landlords now tending to tie the remedy to the Tenant's actual experience rather than agreeing to automatic reductions as they might have in the past.

**3. Leasing Exit Strategies.** Since change seems to be inevitable in today's retail market, it is not surprising that many Landlords and Tenants are looking for exit strategies in their leases. Planned exit strategies include items like operating covenants, go-dark/recapture rights, co-tenancy requirements, and gross sales thresholds. Unplanned or negotiated exit strategies may include items like exclusives and use restrictions, assignment and subletting provisions, and lease termination rights. Both Landlords and Tenants are looking for flexibility to respond to changing circumstances, though as one might expect the position from which they approach this will often be very different. Regardless of which side you are representing, it is important to have the end game in mind, even as you are negotiating the beginning.

**4. CAM Charges.** The old standby when it comes to leasing seminar topics, seminars on CAM charges and reconciliation, continues to draw large crowds of Landlords, Tenants, representatives, and developers alike and this year was no different. CAM's can be one of the most highly negotiated provisions of a retail lease and an area where it seems there are more questions than clear answers. One of this year's most popular sessions on this topic addressed the allocation of expenses between tenants in mixed-use projects. With the pool of retail tenants becoming more and more diverse, the allocation of expenses among them seems to be getting more and more difficult to define. While every different center and tenant mix seems to require a very unique and specific negotiation on this topic, one guiding principal that seemed to rise to the top was the importance of considering who causes the cost and who benefits from the expense? Using this as a base may assist one in navigating through this complex provision.

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