

**A Review of Business Issues to be Addressed by a Tenant
In Connection With The Negotiation of a Commercial Real Estate Lease**

Leo F. Schumacher
SJOBERG & TEBELIUS, P.A.
2145 Woodlane Drive
Suite 101
Woodbury, Minnesota 55125
Telephone: 651-738-3433
Fax: 651-738-0020
Email: leo@stlawfirm.com

A Review of Business Issues to be Addressed by a Tenant In Connection With The Negotiation of a Commercial Real Estate Lease

By Leo F. Schumacher

* * *

The subject of this seminar is a review of the business issues that a Tenant should address in the negotiation of a commercial Lease. Lease Agreements are customarily prepared by the Landlord, and the Tenant needs to negotiate revisions to the Lease Agreement with the objective to create a more balanced agreement that comprehensively addresses the rights and obligations of both parties.

Particular attention should be given to the Lease negotiations because the Lease is a document that prospectively attempts to allocate risk between the Landlord and Tenant, and given that the Lease is for a period of multiple years, it is a document that will be continually referred to by the parties. Therefore, in any Lease transaction, it is important that the parties fully understand the rights and obligations created by the Lease Agreement and address not only the current issues related to the leasing of the property, but also issues that may arise in the future. In these materials, we will review the most significant business issues that a Tenant should be prepared to negotiate when leasing commercial real estate.

I

INTRODUCTION

In understanding the business issues present in a Lease negotiation, it is helpful to have an appreciation for the different perspectives of a Landlord and Tenant. A Tenant seeks to obtain the right to operate its business from a particular location. The Tenant is concerned with having a sufficient length of time to lease the property and that the property will be appropriately maintained during the Term of the Lease, including the maintenance of common facilities that may be shared with other Tenants. In contrast, the Landlord seeks to preserve the cash flow generated from the Lease or Leases. The Landlord will seek to allocate risk to the Tenant to preserve the cash flow from the Leases. This is especially important for Landlords who are seeking to finance their property with nonrecourse loans where the terms of the Lease and the cash flow is an important consideration in the loan.

For example, the Landlord will allocate the responsibility for payment of variable costs to the Tenant, such as insurance, taxes and operating expenses. By allocating to each Tenant the responsibility for the payment of all or a pro rata portion of these costs, the Landlord has shifted the risk of future increases to the Tenant, thereby preserving the Landlord's cash flow from the property.

In contrast, the Tenant will seek to negotiate limitations on this risk allocation. If the Tenant is successful in shifting the risk back to the Landlord, the Lease is converted from a "net lease" to what is commonly referred to as a "gross lease," in which the Tenant pays a fixed amount of rent and the Landlord is responsible for payment of taxes, insurance and operating expenses, including any increase.

Because these issues are negotiable, any number of variations in the allocation of the costs and risks are possible. Therefore, understanding that the Lease negotiations primarily relate to risk and cost allocation provides a context within which to approach the Lease negotiation. The balance of these materials will briefly outline what I have found to be the significant business issues that should be addressed by a Tenant.

II

PRE-LEASE DOCUMENTS - LETTER OF INTENT

In some Lease transactions, especially where leasing brokers are involved, the parties may start out with what is commonly referred to as a "Letter of Intent" or "Term Sheet." Customarily, the Letter of Intent or Term Sheet is designed to facilitate negotiations, but it is not intended to be a legally binding document. If this is the understanding of the parties, it is important that the Letter of Intent be properly drafted to include a specific provision that the Letter of Intent is deemed to be nonbinding and the parties intend to be bound only at such time as they enter into the Lease Agreement. Within the context of the nonbinding Letter of Intent, it is possible that the parties can agree to limited binding provisions, such as confidentiality and exclusivity with respect to the Lease negotiations.

If the parties are not using a Letter of Intent, the Landlord may present the Tenant with their form Lease Agreement. Whether a Letter of Intent or Lease Agreement is used, the overriding concern is to make sure that the documents that the parties execute accurately and completely set forth the Tenant's business agreements. Accordingly, it is important that in any communication with an attorney who may not have been a party to the Lease negotiations, that the terms and conditions that were discussed and the understandings reached between the parties are communicated to the attorneys who are charged with the responsibility of drafting the Lease Agreement.

III

PARTIES TO THE LEASE

A Lease is a contract. The parties to the contract are the Landlord, who transfers its right of possession to the Premises to the Tenant, and the Tenant. In most situations, the Landlord and Tenant will both be legal entities, such as a corporation or a limited liability company. Even if the ownership of the real estate and the business involves the same individuals, customarily separate entities will be established and a Lease will be entered into between the two entities. I customarily refer to this situation as a "related party lease." It is commonly encountered in single-tenant buildings and, in this situation, the parties customarily allocate the risk to the Tenant with a net lease where the Tenant is responsible for payment of taxes, insurance and all operating expenses.

In those situations where the ownership of the Landlord entity and the Tenant entity is different, such as where the property is a multi-tenant building and the Tenant is leasing it from an unrelated third party, the Lease Agreement, although usually structured as a net lease, is subject to negotiations between the parties. Although the issues are the

same whether the Lease is a related party lease or a third party lease, the fact that the interests are not aligned leads to more extensive negotiations. However, even in a related party lease, when there is a change in ownership of the Tenant entity, such as when associates buy into the practice, the issues that are negotiated within the context of a third party lease are relevant to a related party lease and the terms and conditions of a related party lease may need to be re-visited.

In addition to the Landlord and Tenant, the Landlord may seek guarantees from the principals of the Tenant referred to as a "Guarantor" for the purpose of providing credit enhancement. If the Tenant is thinly capitalized, or a new business, the Landlord may seek what is commonly referred to as "credit enhancement." This can include security deposits, letters of credit or guarantees. If an individual is being required to sign a guarantee, the terms and conditions of the guarantee need to be reviewed and negotiated since it is possible to incorporate limitations as to the guarantor's liability. Some examples are time limitations, monetary limitations or limitations based upon a percentage.

IV

PREMISES

The Lease Agreement needs to identify with specificity the portion of the property commonly referred to as the "Premises" that are being leased. For a single-tenant building, the Premises may be the entire property and for multi-Tenant buildings, it is a location within the building, customarily referred to by a suite number with an exhibit to the Lease identifying the Premises.

In addition to the leasing of the Premises, the Lease can also address other issues involving the use and ownership of the property. For example, the Lease Agreement may include a right of first refusal, right of first offer, or an option to purchase the property. This is more common in a single-tenant property. If the Lease is to contain any of these additional rights, the terms and conditions of the purchase need to be fully negotiated and documented within the Lease Agreement or within a companion document.

An additional issue that should be considered is the future space requirements of the business and the Lease Agreement can address this issue through agreements allowing for the expansion of the Premises. For example, a right of first refusal or option can be incorporated within the Lease allowing the Tenant a right to lease adjacent space as it becomes available.

In multi-Tenant buildings, some Landlords will incorporate a right of relocation in the Lease, which allows the Landlord to relocate the Tenant to a similar space within the building. If a right of relocation is incorporated within a Lease, the Tenant has significant business issues that need to be addressed in the relocation clause, since

considerable expense and interruption to the business will be incurred and the allocation of those costs need to be addressed. For most Leases, the Landlord will negotiate the terms and conditions of the right of relocation, or eliminate the provision in its entirety. If a Tenant encounters a right of relocation clause within the Lease, attention needs to be focused on the terms and conditions for the Landlord's exercise of the right of relocation.

In addition to the Premises, some Tenants may seek to address exclusive or special rights, or impose upon the Landlord restrictions, as they relate to common areas that, although outside of the Premises, are important to the Tenant. For example, the Tenant can seek to secure exclusive rights to portions of the common areas that, although not within the Premises, would be limited to the use by the Tenant. Also, exclusive rights for parking in the immediate vicinity of the Premises can be secured in order that parking is readily available in close proximity to the Premises.

In reviewing the square footage set forth in the Lease, if the building is a multi-Tenant building with common facilities, the Tenant must be aware that the rentable square footage as referenced in the Lease and upon which the Rent is based may not be the same as the actual useable square footage and, accordingly, a Tenant will want to verify the actual square footage that is useable in considering various alternatives.

The Lease needs to address the condition of the Premises. Customarily, the Premises are not in the condition required for the business operation and the space will need to be built out to meet the Tenant requirements. This is customarily referred to as "Tenant Improvements." The parties need to discuss how the Tenant Improvements are constructed. The Tenant Improvements can be constructed on a "turn key" basis where the Landlord constructs the Tenant Improvements and delivers the Premises in its improved condition. An alternative is for the Tenant Improvements to be the responsibility of the Tenant, either constructed by the Landlord's contractor or the Tenant's contractor, with the Landlord providing an allowance to fund all or a part of the cost of the Tenant Improvements. This issue is addressed either within the Lease or, in some cases, a separate work letter agreement. How the Tenant Improvements are constructed and the funding of the cost of the Tenant Improvements are business issues that need to be negotiated. In some cases, the Tenants will also require the Landlord to complete certain improvements to the property, especially where there appears to be deferred maintenance.

V

LEASE TERM

The business issue regarding the Term of the Lease is usually straight forward and the Term is based upon a number of years from a commencement date. It is customary that a Tenant will seek to obtain option terms that can be exercised at the Tenant's sole discretion. Landlords customarily will not offer option terms since the option is a

beneficial right to the Tenant and usually not in the interest of the Landlord. It has been my experience that option terms are customarily in increments of five years and exercised by the Tenant on 90 days to up to 180 days prior written notice. In addition, the parties need to establish the commencement date for the Term. When the Lease involves the construction of Tenant Improvements, the commencement date of the Lease needs to be negotiated. For construction of a new facility or when the Landlord is making separate Landlord Improvements, the Lease will provide that the Landlord is to deliver the Premises, usually within a fixed number of days after the execution of the Lease. The Tenant then usually is granted possession of the Premises and during a limited period of time (customarily called a "fixturing period"), the contractor will be completing the Tenant Improvements. During this fixturing period, the Lease is in full force and effect; however, the Term does not commence to run and the Tenant customarily will not be obligated to pay Rent or operating expenses. The Term will then commence upon the expiration of the fixturing period, or earlier if the Tenant completes the Tenant Improvements and commences business at the Premises.

VI

RENT

In a gross lease, the Tenant pays one fixed sum. For net leases, a Tenant will pay what is commonly referred to as "base rent" or "minimum rent." Rent can be a fixed amount that usually includes some form of escalation during the Term of the Lease. The escalation can either be what is commonly referred to as "step rent," which are periodic increases usually on the anniversary date of the commencement of the Term, or can be based upon a formula, such as the Consumer Price Index (CPI).

For retail Leases, in addition to the base or minimum rent, a Tenant may be paying what is commonly referred to as "percentage rent," which is a percent of gross sales, usually after the sales reach a break point, which is usually based upon the annual Base Rent.

If the Lease includes options to extend the Term of the Lease, the rent needs to be negotiated for the option terms. I customarily will recommend against the use of a indefinite rent, such as "market rent" because disputes can arise with respect to the establishment of market rent and customarily the dispute resolution mechanism involves an appraisal process, which adds uncertainty and additional cost to the transaction. Accordingly, the option terms customarily will provide for a fixed rental rate, which is usually either based upon a CPI or stepped rental increases.

For net leases, in addition to the payment of the base or minimum rent, the Tenant will pay operating expenses or, in a multi-tenant property, a pro rata portion of operating expenses. It is important for Tenants to review the definition of what is included as an operating expense, as well as how the operating expense is allocated among the Tenants

of the facility. Operating Expenses are one of the most commonly negotiated provisions. First, with respect to allocation, they should be based upon a pro rata allocation of the square footage of the Premises to the rentable area of the building. One should avoid an allocation based upon rented area because rented area will vary depending upon the occupancy of the building. Once again, in the context of risk allocation, the Landlord should be allocated, and customarily is allocated, the risk of the operating expense for that portion of the property that is vacant.

With respect to what is included as an operating expense, it customarily would include real estate taxes, which may or may not include assessments levied against the property, the insurance paid by the Landlord both in the form of property insurance and liability insurance, and the Landlord's costs and expenses in maintaining the building and common areas. Customarily, the definition of operating expenses in a Landlord drafted Lease is broad and all inclusive. The challenge is for the Tenant to negotiate exclusions from the operating expenses or to negotiate caps or limitations. Most Landlords are willing to include certain exclusions to operating expenses, such as Landlord's costs that relate to a specific Tenant (Tenant Improvements, commissions, or costs of Lease enforcement), cost of the Landlord's business entity (including the filing of tax returns), and costs associated with the payment of the Landlord's mortgage or ground lease payments, costs incurred in repair or maintenance that are funded by insurance proceeds.

The more problematic and negotiated exclusions customarily involve repairs or replacements that one would consider to be an item that should be capitalized rather than expensed. For example, if a property receives a new roof or a new HVAC System (heating, ventilating and air conditioning systems), should the entire cost of the new roof or HVAC System be included in that particular year's operating expense or should it be excluded because it is deemed a capital expenditure versus an expenditure that is expensed. Where the Landlord is not willing to exclude capital items from the definition of operating expense, then the Tenant should request that the capital improvement be amortized over the useful life of the improvement, and not paid in the year of completion. For example, if the roof is replaced in the last year of the Lease, the Tenant would request that, instead of paying for the entire cost of the roof in the last year of the Lease, they would pay only the installment amortized over the useful life of the roof. How to allocate and define "operating expenses" is one of the more challenging issues of the Lease negotiation; however, given the potential economic impact, it is an issue that the parties need to address. Where the Tenant is leasing a small percentage of the overall property, most Landlords are less willing to deviate from their standard position because they do not want to have to recalculate operating expenses for an individual Tenant. However, where the Tenant is leasing a substantial portion of the property, or all of the property, the Tenant will have an opportunity of negotiating a more balanced definition of operating expenses.

In addition to defining what is included as an operating expense, the parties need to negotiate how the operating expenses are paid. Customarily, on larger buildings with multiple Tenants, the Landlord will want to estimate the operating expenses for the fiscal or calendar year, with the Tenant paying prorated installments on a monthly basis. At the

end of the calendar or fiscal year, the Landlord will then reconcile the actual expenses incurred for the year and amounts collected from the Tenants and will provide the Tenants with a statement. To the extent the Tenant paid in excess of the actual expenses, the Tenant customarily does not receive a refund, but will receive a credit.

If the estimated expenses are less than the actual expenses incurred, customarily the Tenant will be asked to pay the deficiency with the next month's installment of rent. Tenants need to negotiate the right to audit the books and records of the Landlord. For a smaller Tenant, the Landlord may be reluctant to provide rights of audit and it may not be cost effective for a smaller Tenant to audit the Landlord's records of a large complex. However, the Tenant needs to have effective audit rights in order to insure that they are not being overcharged for operating expenses. Customarily, the Tenants will be given a limited period of time to audit after the Tenant receives the reconciliation. In some situations, we have been successful in negotiating audit rights that include the Landlord agreeing to reimburse the Tenant for the cost of the audit if the Tenant discovers a discrepancy between the Landlord's reconciliation and the actual costs incurred. Caps or monetary limitations to operating expenses are also possible, although a smaller Tenant will have a hard time negotiating these limitations.

In conclusion, the determination of what is included in Rent and how the Rent is calculated is the most negotiated provision of the Lease and, in a net lease, one can see the potential for abuse. The Tenant needs a clear understanding as to how operating expenses will be determined and billed to the Tenants, and appropriate limitations and protections are necessary to protect the Tenant against abuse. Even though the Tenant may have a good working relationship with the current Landlord and feel that the Landlord will not abuse the provision, properties are bought and sold and the Tenants may find themselves with a different management company and Landlord. Therefore, one should not rely upon the perceived goodwill of your current Landlord because there are no assurances that the Landlord will continue to own the property throughout the Term of the Lease.

VII

TRANSFER PROVISIONS

It is important that attention should be given to the transfer provisions in the Lease. Customarily, the Landlord will have the absolute right to transfer the Lease upon the sale of the property and, upon the transfer, the Landlord is relieved of the contractual obligations. Those obligations then become the responsibility of the new owner of the property. In contrast, most all Leases will contain restrictions upon the ability of the Tenant to transfer their interest in the Lease. Tenants customarily will transfer their interest either through an assignment or a sublease arrangement. Customarily, both require the Landlord's consent. If there is a sale or transfer of ownership of the business, that sale or transfer will include either an assignment of the Lease or a transfer of an

interest in the business entity (which, under some Leases, is also deemed to be a prohibited transfer) and Landlord's consent would be required. Customarily, Landlords will agree that in reviewing a proposed transfer, they agree to not unreasonably withhold their consent. However, this is an indefinite standard, and if the transfer of the business or an ownership interest in the business entity is contemplated, one should negotiate an express right for transfer. In most cases, the Landlord will agree to the transfer of a minority interest in the business, where control and governance rights are not transferred. If the entire business is to be sold, then financial net worth standards may be incorporated so that the transfer is permitted if the acquiring entity has the same financial condition as the business entity at the time the parties entered into the Lease, or at the time of the proposed sale. If there are personal guarantees, the obligations of the existing guarantors after the sale also need to be addressed.

If, in leasing the Premises, the Tenant anticipates that the size of the facility is more than the Tenant will need, the Tenant needs to consider retaining a right to sublease a portion of the facility. Once again, a sublease is generally defined as a transfer under the Lease and Landlord's consent is customarily required. If the Tenant anticipates that a sublease will occur at some point during the Term, then this provision needs to be negotiated and addressed within the Lease Agreement.

To the extent a business owner anticipates that they will be engaging in an estate plan, which will require a transfer of the ownership of the business entity, such as to a trust, most Leases would require Landlord consent. If requested in the Lease negotiations, most Landlords will agree to changes in the ownership of the business entity for estate planning purposes, as long as there is not a change in control or the management of the business entity.

VIII

LEASE PROVISIONS REGARDING BUSINESS OPERATIONS

Each business will have unique issues that need to be addressed within the Lease. For example, issues involving permits and licenses for the business need to be considered. One needs to review the permitted uses within the zoning of the property to determine whether the business operation would be a permitted or conditional use. If it is a conditional use, then there is a permitting process that is customarily required in addition to securing your business licenses. Accordingly, it is good to check in the beginning of the Lease negotiations and determine what licenses or permits would be required to conduct the business from the specific location. Most Landlords will be familiar with the zoning for their property and what businesses are permitted. However, most Leases provide that the Tenant is responsible for all permits and licenses and, accordingly, it is incumbent upon the Tenants review this issue.

Although never found in the Landlord's Leases, Tenants can request, and we have been successful in securing on behalf of our clients, restrictive covenants as they relate to competing businesses within the property. Accordingly, you may want to consider incorporating within the Lease a covenant or condition that would prohibit the Landlord from leasing other space to a competing business or a business that would sell a competing product. Although Landlords never offer this in their draft of a Lease, many Landlords are willing to discuss the issue because they realize that competing businesses can be detrimental to the Tenant's business and the overall viability of a multi-tenant property.

Signage is an important issue for all Tenants, and the Lease customarily will require the Tenant to secure the Landlord's consent for all signage and may incorporate a signage criteria. Prior to entering into the Lease with the Landlord, the Tenant needs to negotiate the right to signage, whether the signage is listing within a building directory, on a monument sign or a sign on the exterior of the Premises. For those properties that include a pylon sign, there may be an opportunity to incorporate a sign on the pylon.

As previously indicated, the Tenant may want to seek specific rights as it relates to common areas, including customer parking. Accordingly, in addition to reviewing the provisions that would be customarily found in the Landlord's Lease, the Tenant needs to consider their overall business operation and what additional rights and obligations should be included in the Lease Agreement.

IX

REPAIR AND MAINTENANCE

The Lease will allocate the repair and maintenance obligations between the Landlord and Tenant. The Landlord generally retains the maintenance obligations for the structural components of the building, the building systems utilized by multiple Tenants, and the common areas of the property. The Tenant is usually allocated the maintenance obligation for the Premises. This can include the plumbing and electrical systems within the Premises, and the HVAC when the HVAC System provides service to only the Premises. As with the operating expense definition, this section of the Lease needs to be reviewed carefully to make sure that it is consistent with the expectations of the parties. Note that repair and maintenance can also include replacement costs, and the Tenant has to determine whether it is willing to bear the cost of the replacement of a critical component, such as a HVAC System, especially when it is occurring at the end of the Term. In addition, Tenants should consider negotiating warranties or guarantees from the Landlord concerning the construction of the Premises and its building systems, or require the Landlord to be responsible for repairs and maintenance that exceed a certain dollar amount.

With respect to the Landlord Improvements, one needs to review the maintenance and repair obligations within the context of the operating expense provision because customarily the Landlord's costs and expenses in fulfilling their repair and maintenance obligation will be included as a component of the operating expense. If the parties' expectation is the Landlord will be responsible for repair and maintenance, such as structural repairs (especially when required to fix a construction defect), those should be excluded from the operating expense definition and the Lease should provide that they are made at the sole cost and expense of the Landlord, without the right to seek reimbursement from the Tenant.

X

UTILITIES

The Lease customarily will address utility service. The Tenant needs to make sure that adequate utilities will be provided to the Premises. Depending upon how the property is served by utilities, they are directly obtained by the Tenant, or may be furnished by the Landlord, with the costs being allocated to the Tenants. If the Landlord is allocating the costs of utilities to the Tenant, one has to be aware of the fact that utility use may not be consistent among all of the tenants of the property, and if there is a tenant that requires an excessive amount of utilities, there may need to be a special allocation. In a Lease, expect that the Landlord will disclaim any liability for damages or costs resulting from an interruption of utility service even when the utility service is provided by the Landlord.

XI

INSURANCE

All Leases will contain a provision regarding insurance and risk of loss. I recommend that the insurance provision be reviewed by your insurance agent in order to determine that the coverage being required in the Lease is available at a reasonable cost. For a single- tenant building, the Tenant may be required to obtain and pay for the property insurance coverage. For a multi-tenant building, the Landlord will customarily maintain the property insurance and the Tenant is obligated to maintain a separate liability policy and insure their trade fixtures and personal property.

Imbedded in the insurance provision can be an indemnification provision. Most Leases will provide for a one-sided indemnification provision, which provides that the Tenant will indemnify for the Landlord for loss or damage. The scope of the indemnification needs to be reviewed and it is not uncommon that, if requested, the

Landlord will agree to a mutual indemnification provision, whereby the Tenant is indemnified against loss or damage arising out of acts or omissions of the Landlord.

XII

GENERAL LEASE PROVISIONS

In addition to the business issues already discussed, a Lease will contain numerous other provisions that address the legal rights and obligations of the parties. They customarily appear at the end of the Lease and may be referred to as "boiler plate" or "miscellaneous." Although in most Lease transactions and especially for a smaller Tenant, there is a limited opportunity to negotiate the general Lease provisions, they still are important to review and understand what the rights and obligations of the parties are. These provisions address the rights and obligations of the parties in the event of casualty losses, such as damage or destruction to the property, condemnation, subordination of the Lease, delivery of estoppel certificates, the surrender and holding over of the Premises after expiration, and default remedies. All of those provisions deserve review.

A section that specifically warrants attention is the surrender of possession provision, especially as it relates to the rights and obligations of the parties for removal of Tenant Improvements. It is not uncommon that the Lease will provide that at the end of the Term, the Landlord has the option of either requiring the Tenant to surrender the Premises with the Tenant Improvements, or to require the Tenant to restore the condition of the Premises to the condition existing prior to the completion of the Tenant Improvements. Given the substantial nature of Tenant Improvements, their removal can be an unanticipated cost at the end of the Lease term. Accordingly, this section needs to be reviewed, and my approach in the Lease negotiation is to require that the Landlord make a decision prior to entering into the Lease whether the Tenant Improvements are to be removed. The Tenant Improvements will not include personal property and trade fixtures, which customarily remain the property of the Tenant and are removed at the end of the Term. In most Lease transactions, it is my experience that the Landlords are motivated to complete the Lease and are willing to accept the surrender of possession with the Tenant Improvements and not require the Tenant to incur the expense of the restoration of the Premises.

With respect to the casualty provision, one may consider trying to negotiate some reciprocal rights regarding termination in the event of a casualty loss. For example, if the casualty loss occurs at the end of the Term and the Tenant was not anticipating extending the Lease or exercising an option, the Tenant may want to have the right to terminate the Lease and to relocate their business, without the need to re-establish their business at the Premises once the Landlord has completed the restoration.

With respect to default provisions, Landlords customarily will not negotiate the remedy provision in the default section of the Lease; however, Tenants can, on a limited

basis, secure rights to receive notice and an opportunity to cure a Lease default. Also, it comes as a surprise to some Tenants that the Lease will not address the rights and remedies of a Tenant in the event of a Landlord default. Because the covenants in a Lease are deemed to be independent, a Tenant does not have a right of offset and self-help in the event of a Landlord default. The consequence is that the Tenant may still be obligated to pay the Rent even if the Landlord has failed to fulfill all their obligations under Lease. The Tenant may want to consider incorporating in the Lease a default provision, which would be applicable to the Landlord. In most Landlord default provisions, the Tenant is obligated to provide the Landlord with notice and the Landlord has an opportunity to cure the default before the Tenant can exercise Tenant remedies. If the Landlord fails to cure the default, then the Tenant may elect from any number of potential remedies, including termination of the Lease, a right to set off rent, or a right to self-help and cure with the right to seek reimbursement by setting off the costs from the Rent. Landlords are reluctant to grant any of those rights and remedies to the Tenant, and this can be one of the more difficult provisions to secure in the Lease negotiations.

XIII

CONCLUSION

In conclusion, a Tenant should expect that the Landlord will seek to allocate risk to the Tenant, and the Lease Agreement presented to the Tenant will be one-sided, and will contain numerous provisions that would appear to be unreasonable. It is the job of the Tenant and their professionals to address the business and legal issues presented in the Lease Agreement and to develop a strategy to negotiate a fair and balanced Lease Agreement that recognizes the legitimate concerns and interests of the Tenant. Since the negotiations need to be cost effective, the Tenant should work with their professionals to develop a cost effective strategy by prioritizing those provisions of the Lease that are most critical to the Tenant. The negotiations should focus on those primary issues. If the parties comprehensively address the business issues in the Lease negotiation, the Lease Agreement will provide for a legally enforceable document that will govern the relationship of the parties and avoid disputes and misunderstandings in the future. Although considerable time and expense can be incurred in a comprehensive Lease negotiation, the cost of attempting to resolve a future dispute through arbitration or litigation is an expensive process, with an uncertain outcome. Therefore, it is well worth the Tenant's time to fully review and negotiate the terms of the Lease.

Disclaimer. These materials are for informational purposes only and do not constitute legal advice. While we welcome the opportunity to represent you in regard to your legal matters, transmission of the information in this seminar is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. You should not rely upon this information without seeking professional counsel to discuss your unique issues.