

by M. Jeffrey Vinzani, Esq.

In most situations, a typical commercial lease document is drafted by or for the landlord. The lease document is given to the tenant often already signed by the landlord. It should therefore not be a surprise to the tenant that such a form lease is going to contain terms that are most favorable to the landlord.

Although hiring a lawyer to review and negotiate a commercial lease can cost money, the consequences of not hiring a lawyer in such a situation can be much more unpleasant. Tenants tend to look only at the provisions of a commercial lease that have a direct monetary impact; however, many terms are buried in the lease that could have an unintended impact on the tenant.

Most typical commercial leases cover hundreds of issues, most of which are drafted in such a way as to favor the landlord's position. Tenants need to understand that such leases have the potential to blow up in their faces. Some of the lease provisions which need to be reviewed carefully in negotiating with the landlord are discussed below.

REPAIR AND MAINTENANCE: Some leases will require the tenant to repair and maintain areas that are traditionally the landlord's responsibility. Repair and maintenance obligations for the tenant should be limited to the interior surfaces of the leased premises, excluding any structural elements or building systems located therein. The tenant must also be sure that the cost of the repair and maintenance for the items for which the landlord is responsible is not passed on to the tenant through the operating expense provision.

CAM CHARGES: These are Common Area Maintenance expenses or operating expenses. The CAM provision of the lease requires the tenant to pay its pro-rata share of the operating expenses incurred by the Landlord in the maintenance and operation of the building. Over time, the list of CAM charges has been expanded to include every expenditure imaginable. This provision should only pass through to the tenant legitimate expenses relating to the operation and maintenance of the common areas. The CAM charges provision should be revised so that only the legitimate CAM charges are included and items such as capital improvements and compliance with laws are excluded. Today, most Landlords will accept what has become known in the leasing industry as a "standard list" of operating expense exclusions.

TENANT IMPROVEMENTS: A tenant must make certain that the obligation to pay rent and other charges does not begin until the tenant improvements are completed by the landlord. Before signing the lease, the tenant should be sure that the final space plans and estimates for the work are completed so that the tenant is not exposed for the cost of improvements in excess of the agreed upon allowance. It is also important that the tenant negotiate remedies for landlord-caused delay in construction, and carefully define and limit the consequences of tenant-caused delay of construction.

ASSIGNMENT AND SUBLETTING: In a standard commercial lease, the landlord requires the tenant to get the landlord's consent prior to any assignment or sublease. It is important that the tenant ask for several exclusions from the consent requirement, including the ability to assign or sublease the space to an affiliate or parent. Once the lease has been assigned or sublet, the tenant should ask for a release from the lease. In the absence of such a release, the tenant will continue to bear the economic risks of paying the rent and all of the charges under the lease for the balance of the lease term, which could include any existing options to extend or renew following an assignment.

In such a situation, an additional clause needs to be added to the lease that would require the landlord to give the tenant notice of any default following an assignment so that the tenant will have the right, but not the obligation, to cure the default and retake possession of the premises.

Although a tenant's ability to revise or delete such unfavorable provisions will depend on a number of factors, including the size and goodwill of the tenant, current market conditions, the size of the space, the current occupancy level of the building, and the length of the term of the lease, tenants should make every effort to dilute the effect of these and other pro-landlord terms.