

SIGNIFICANT ISSUES IN COMMERCIAL LEASES

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Leases are documents which define the elements of a relationship between the Landlord and Tenant

- Dense agreements filled with covenants, procedures and definitions
- Landlord's and lenders tend to desire uniformity in their documentation
- Often the landlord provide the same lease for a large significant lease space to a tenant that may have a relatively small less material lease within a project
- This creates a dilemma for tenants of small spaces as the cost of the review of the lease is often disproportionate to the size of the lease transaction
- This phenomena also creates a dilemma for counsel when the client ask that you do a "general review" to look for the "big stuff" in a lease agreement.

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As legal counsel we

- Review documents to see the issues
- Review the issues with our clients and
- work together with our clients to obtain a lease agreement which they find acceptable.

So how do we meet these requirements while meeting client expectations for an efficient process, given the size of the transaction?

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“Just look at the big stuff”

Where the client states “just look at the big stuff” without more being discussed, this may cause a disconnect between the client and the lawyer. The legal counsel may make a judgment call and the client may feel differently.

Preparation:

- ✓ Make certain both client and counsel understand what is intended as a part of a “limited scope review”
- ✓ Have a good grasp of the client’s intended use.
- ✓ Ask the client to explain the transaction from their perspective. Often this may include feedback from the real estate broker who put the Landlord and Tenant together.

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Overview

Based upon the client's level of familiarity with the lease process sensitize a client to the various aspects of the lease including the importance of understanding:

- (i) The economics of the deal
- (ii) The Use of the premises
- (iii) The behavior required of the tenant during the term of the lease
- (iv) The allocation of risk
- (v) The rights and limitations on transferability and subleases
- (vi) The definition of default and remedies on default
- (vii) The end of term responsibilities of the Landlord and Tenant
- (viii) Any preferential rights granted to the Tenant

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Economics of the Deal

Have the client confirm the basic terms that make up the economics of the deal.

- Rent
- Percentage Rent (if applicable)
- Additional Rent (gross vs net lease)
 - ❖ Pass through operating expenses (Op Ex)
 - ❖ Utilities
 - ❖ Insurance
 - ❖ Taxes
 - ❖ Special costs
- Security deposits
- Term
 - ❖ Execution Date - Commencement Date and Rent Commencement Date
 - ❖ Sensitivity to delays on delivery

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First appeared as part of the conference materials for the
2021 Bernard O. Dow Leasing Institute session

"Big Issues in Leasing - A Review of Issues in Leases That are the "Must Review" Provisions from the Tenant's Perspective"