There are a few certainties in life beyond death and taxes. One certainty for retail tenants is that they will have disputes with their landlords. Those disputes could involve operating expenses, electricity charges, tax charges, co-tenancy provisions, minimum rent, exclusives, options, lease terminations, construction, casualty, insurance or a myriad of other issues. Some of the disputes may be minor, but others might involve millions of dollars and in some cases be critical to the fortunes of the retailer.

Given the certainty of lease disputes, what should a retailer think about in drafting a lease? This article seeks to answer that question from the perspective of someone who has handled hundreds of retail tenant disputes. It sets forth rules that are derived from that experience regarding: (1) language of the substantive lease provisions; (2) language regarding who decides disputes; and (3) language that expands or limits the relief and remedies available.

### Substantive Lease Provisions

Judges, juries and arbitrators almost always base their decisions on the words of the contracts between the parties. For retail lease disputes, they, in short, “read the lease.” Published decisions confirm that what becomes most important in deciding disputes between retailers and their landlords are the words of the leases that they enter into.

For example, in *Sheplers, Inc. v. Kabuto International (Nevada) Corp.*, a 1999 decision by a federal district court in Kansas, the dispute focused on whether certain management fees and expenses were properly charged to the tenant as CAM costs. The court rejected the landlord’s argument that the lease permitted it to include in CAM charges any costs associated with managing the shopping center, because the lease specifically stated that common area expenses include “the operating, managing, equipping, lighting, repairing, replacing, and maintaining the common areas.” Therefore, only management costs specifically related to the common areas were properly included in the CAM expenses.

So what should a retail lease drafter do?

- **Rule 1:** Read the lease. Whoever decides the dispute will begin and may end the inquiry with the words of the lease. Test all lease language on that basis. Attempt to read the lease from the perspective of someone who does not have the advantage of all the knowledge, negotiations and discussions that relate to the lease.

- **Rule 2:** Do not agree to lease language that you do not understand. If you do not understand it, a judge, jury or arbitrator is unlikely to see it as being clear. The result is that the probability of a dispute is very high. Examples where this problem may arise include energy provisions, insurance provisions and default provisions.

- **Rule 3:** If something is critical to the retailer, spell it out. Never assume the landlord agrees or understands anything the way you do.

### Who Decides

So what should retail lease drafters think about beyond making substantive language in the lease clear? There are certain procedural clauses that make a difference in the resolution of disputes. Among those clauses are clauses that determine who will decide the dispute.

Legal disputes as varied as *Bush vs. Gore* or the O.J. Simpson murder trial have often hinged on who was deciding the case.

So what should a retail lease drafter do?

- **Rule 4:** Avoid provisions that split the retailers’ claims. For example, do not agree to arbitrate some disputes and not others. Doing so will most likely disadvantage the retailer creating additional expense for pursuing its rights regarding any claims.

- **Rule 5:** If a retailer has multiple locations with a landlord, do not agree that any legal action must be brought in the location of each mall. By doing so, it disadvantages the retailer and if a retailer has claims cutting across locations, the retailer may have to sue in more than one location increasing its expenses and reducing the value of any claims.
Rule 6: Do not waive the jury trial right. While some issues cannot be decided by a jury, there are many issues in connection with a lease as to which a retailer has a right to have a jury decide the issue. If the jury trial is not waived in the lease and it is later decided that the retailer is better off waiving the jury trial right, it can always be done. Preserving the jury trial right almost certainly works to the advantage of the retailer.

Rule 7: Consider alternative dispute resolution provisions. Consider arbitration as a means of replacing the court system to resolve disputes. Also, consider building in a non-binding resolution procedure such as executive meetings and mediation into the lease.

Relief and Remedies Available
Leases often contain language that expands or limits what relief can be obtained. For example, a lease may provide full recovery of attorney’s fees, limit recoveries from successor or predecessor landlords, limit recoveries to landlord’s interest in a shopping center, or limit recoveries more generally that a tenant can seek.

Provisions that either expand or limit the remedies and relief available can become critical when a dispute arises. From the perspective of someone who has been involved in hundreds of disputes, there are some critical rules regarding limitations on the remedies that can be obtained. So what should a retail lease drafter do?

Rule 8: Provide for recovery of attorney’s fees. In general recovery of attorney’s fees is an advantage to a retail tenant because it provides for recovery of fees to enforce the lease. In no circumstances should a tenant agree to a one-sided attorney’s fees clause that allows the landlord to recovery attorney’s fees but not the tenant. While such clauses are not enforceable in some states, they are enforceable in others.

Rule 9: Do not expand the landlord’s default remedies unless you understand what the impact will be. Most states have specific provisions governing a landlord’s default (unlawful detainer) remedies. In most states those rights can be modified by agreement.

Rule 10: Make sure that any limitations on remedies are understood before they are agreed to. For example, a lease may contain provisions that limit the recovery from the landlord to the interest of the landlord in the shopping center or put a limitation on recoveries regarding successor or predecessor landlords. While such clauses may not ultimately limit the recoveries that are achieved, they almost undoubtedly provide landlord an additional argument and will likely be used for purposes of delaying and increasing the expense of any tenant pursuing claims. Avoid such provisions if possible.

Rule 11: Do not agree to provisions that might limit the retail tenant remedies based on tenant taking some action, unless you know the retailer will do it. Perhaps, the most common of such provisions are provisions that limit or seek in some way to limit the relief available to a retailer if a retailer fails to audit or otherwise object to billing statements received from a landlord.

While such provisions may have a limited legal effect depending on the specific language, they almost invariably create another basis for a landlord to contest a claim, increase expense and delay resolution. Agreeing to such clauses should be understood, and if the retailer does not as a matter of course take such action, do not agree.

Conclusion
The most important lesson from retail lease disputes is that the judge, jury or arbitrator will “read the lease.” The 11 rules that are identified here follow from that key lesson.