Every year there are thousands of disputes in which retail tenants claim they are overcharged by owners and operators of shopping centers for rent, CAM expenses, utilities, taxes, marketing fund payments and other charges. The disputes can be for hundreds of dollars or millions of dollars depending on the magnitude of the overcharges, the period over which the overcharges can be collected and the number of leases involved. Some of these disputes are resolved quickly and favorably to tenants, others are dropped, and some result in lawsuits.

For a retailer, which claims are a success? From a retailer perspective, the overcharge claims that are the greatest success are those that are resolved quickly and for a substantial percentage of what the tenant seeks.

So what makes landlords compensate retailers for overcharge claims?

**Step 1: Convince the Landlord the Claim Has Merit**

In evaluating the merits, there are three criteria that come into play. The first and most important is the language of the lease. The second criteria is whether so-called “extrinsic evidence” supports the position of the tenant regarding the meaning of the lease. Extrinsic evidence is nothing more than information other than the language of the lease itself. The third criteria, once the meaning of the lease is established, is whether there is evidence that the landlord breached the lease.

### Criteria 1–The Language Of The Lease

The single most important criteria in demonstrating a claim has merit is what the lease says. A claim that a tenant is merely overcharged because it is paying more than its “fair share” is not likely to be successful. Rather, a tenant needs to point to lease language that has been violated leading to an overcharge. **In short, “read the lease.”**

At times, consideration of the language in the lease will involve the application of lease interpretation rules to lease language. The rules of interpretation include:

- Terms should be given their plain and ordinary meaning.
- Lease provisions should be construed in the context of the entire lease.
- All lease language should be given meaning and effect.
- A practical interpretation should be given to lease language so that the parties’ reasonable expectations are realized.
- In some states a rule of last resort: Ambiguous language should be construed strictly against the drafter.

One of the most common rules of interpretation applied by courts is the principle that the words in a lease are to be given their plain and ordinary meaning. In *Dinnerware Plus Holdings, Inc. v. Silverthorne Factory Stores, LLC*, a 2004 decision by a state appellate court in Colorado, the court ruled that the lease language meant that the tenant was not obligated to pay any pass-through charges unless other tenants were obligated to do so. The court based this conclusion on the plain and ordinary meaning of the phrase “provided that all other tenants are similarly obligated” in the lease’s language regarding payment of pass-through charges.

### Criteria 2–Extrinsic Evidence

While the words of the lease are the most important criteria in determining the meaning of a lease, there are times that other evidence is considered. Other evidence considered in interpreting the meaning of a contract is referred to as “extrinsic evidence” or “parol evidence.” Some states, such as California, allow the consideration of extrinsic evidence to demonstrate that which would otherwise appear clear on its face is really ambiguous. Other states, such as New York, require that there be a determination first that the document is ambiguous on its face before the consideration of parol evidence is allowed.

The extrinsic evidence that is most often persuasive are statements or actions used against the party making them. An example of such evidence is course of
dealing evidence. For example, in *Johanneson’s, Inc. v. Kraus-Anderson, Inc.*, a 1999 decision by a state appellate court in Minnesota, the court in disallowing a 5% management fee relied on the fact that from 1986 through 1995 the landlord had charged the tenant only for its share of actual maintenance expenditures plus the salary and benefits of the shopping center’s manager. Later, starting in 1996 the landlord began charging 5% of the tenant’s gross revenues as a fee for the landlord’s related management company to manage and maintain the common areas. The court seemed persuaded by the prior dealings between the parties that the additional 5% management fee was impermissible and not intended to be a chargeable CAM expense.

**Criteria 3—Evidence Of Breach**

If the tenant has developed a persuasive argument as to the meaning of the lease based on the lease language and rules of interpretation, the tenant must still have proof that the landlord has breached the lease provision. There are circumstances where there is no dispute as to the facts once the meaning of the lease is established. However, there are many circumstances where complete evidence is not available to tenant. In some cases, the reason is that landlord has not provided it and in others, it is that center owner and operator never collected the evidence and it will be difficult to reconstruct the relevant evidence.

When information is available but not provided, it can be obtained through discovery, if a lawsuit is filed. In such circumstances, a tenant can consider how likely the evidence will support the claim in making an evaluation and recognize that a shopping center owner would likely provide the evidence if it supported the shopping center owner’s position.

When relevant information was not collected and it is difficult to reconstruct the relevant evidence, tenant may still be able to make a persuasive claim. Courts in such circumstances often place the burden on the party that had access to the information. The lease in *Sheplers v. Kabuto*, a 1999 decision by a federal court in Kansas, required the landlord to provide the tenant with reasonable detail and a breakdown regarding CAM expenses, so the court shifted the burden to the landlord to show that challenged management costs were CAM-related as required by the lease. The court explained: “Giving the provision such an effect is sound policy because defendant has complete control over all the records related to CAM expenditures.”

**Step 2: Convince The Landlord The Retailer Will Take Action**

Even faced with strong evidence that a retail overcharge claim has merit, landlords may refuse to compensate a retailer, because they doubt there will be any consequence. From the landlord’s perspective, why should a landlord compensate a retailer if the landlord can keep the alleged overcharge without any consequence?

What can a retailer do? Bottom line: A retailer must convince the landlord it will take action. A strong lease language-based claim, a track record of taking action, a reputation of not being a paper tiger, and lease language that reduces the costs of taking action all make it easier to convince a landlord that there will be consequences to the landlord’s refusal to compensate a tenant for an overcharge claim. There are, however, times that action will be required if the retail tenant is not prepared to just walk away from a claim.

The actions a retailer can take will depend on the lease language, its relationship with the landlord and a multitude of other factors. Actions include:

1. **Offsetting payments (most successful when the lease explicitly allows it);**
2. **Altering overall relationship regarding other leases and possible new leases; and**
3. **Initiating a lawsuit, an arbitration or some other lease provided dispute resolution mechanism.**

For retailers, taking any of the three actions likely involves risks and costs. Depending on the lease language,