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■ PURCHASING PROPERTY WITH A LEASE

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Often when purchasing a company, certain assets pose issues not easy to discern. For example, a purchaser can buy real estate through a purchase contract and perhaps even personal property such as furniture and furnishings, fairly easily. When purchasing real estate, title insurance can be ordered, surveys re-dated, and abstracts renewed. Information on mortgages can be obtained from a county clerk's office and assurances can be given of non-default status.

One major asset exists, however, that is not so easy to determine currently — the status of leases. But there are tools that can help, as follows; and requiring them in a purchase offer can be essential. These are some, but by no means all of such tools.

1. Past breach of lease. If a purchaser is taking a lease amongst other assets, it is critical to know that the lease is not in breach, and that there will be no future landlord or tenant action. But how to find this out? There would be no public filing regarding a breach particularly if no lawsuit has yet been brought by or against either party.

The tool here, is an “estoppel letter” where the seller, tenant, and the landlord each state, under oath or not, that there has not now nor ever been a breach. Having given such assurance, the assuring party is then estopped from asserting a current breach into the future. Of course, it would have been astute for the purchase contract to require an estoppel letter if and when demanded during the lease term. Careful drafting of leases may even attach a sample estoppel letter in acceptable form, as an exhibit.

2. Assignment of subletting clause. A purchaser must also study a lease to determine what rights the landlord has regarding assignment or subletting. There are many variations of this so the assignment and subletting consents need to be carefully examined. For example, it is possible that if this is a store in a chain of branch stores, that there may be a lease clause simply stating that if all or a significant number of related locations are to be sold, the landlord need only be given notice and its consent is

unnecessary. Other typical such clauses may or may not require that landlord consent, be reasonable or not and prompt or not. The number of days when landlord consent is required to an assignment or sublet may also be stated.

3. Use clause. A purchaser must study the use clause in every lease. I was once confronted with a purchaser who wanted to open a car dealership. The lease prohibited car dealerships because the landlord had also been a car dealer. Often, leases require only that any Use be permitted by zoning. Sometimes a non-compete clause will determine prohibited competitive users even in an extended geographic radius.

4. Attornment clause. For a person purchasing a landlord position, it's important to determine if the lease contains an "attornment clause" requiring the current tenant to be governed by the new landlord (purchaser) as the original landlord had been.

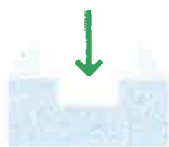
5. Internal and external. Every provision in each lease must be examined including, for example, whether or not the landlord's approval of a new tenant as an assignee rather than as a sub-tenant excuses the current tenant from further liability.

If so, or if not, a purchaser of the landlord's position should request updated financials of all successor tenants. Hopefully, when the lease was first drafted (or in the purchase contract), provision was made for requiring financial statements on demand. Otherwise, the current tenant (or landlord) may not be compelled to provide one. Knowing what items of equipment and personality go with the departing tenant or remain after the sale are often referenced in the lease.

6. Physical examination. Purchasers are benefited by a physical examination not only by the purchaser itself, but also by a building engineer or inspector. It may be that costly repairs need to be made for safety or government compliance, which might be used to offset the purchase price. It would be helpful to check with the applicable zoning or building department to determine if the building qualifies or perhaps has ever been cited under environmental, federal, state, and local legal and administrative guidelines.

All told, there are many important leasehold analyses that need to be examined when purchasing property that includes a lease. The tools to discover problems prior to purchase may not be obvious, but they exist in your attorney's lexicon.

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