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Commercial Leases: Risk Mitigation Strategies for Landlords and Tenants

Negotiating Insurance, Indemnity and Mutual Waiver of Subrogation Provisions

TUESDAY, APRIL 26, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Iryna Lomaga Carey, Member, Cole Schotz Meisel Forman & Leonard, Hackensack, N.J.

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INSURANCE

Commercial Leases: Risk Mitigation Strategies for Landlords and Tenants

April 26, 2011

Presented by:

Brett Cutchin, AAI, CIC, CRM
President Commercial Lines – Lipscomb & Pitts Insurance, LLC

Iryna Lomaga Carey, Esq.
Cole, Schotz, Meisel, Forman & Leonard, P.A.



Overview of Types of Insurance

- Property

A. Building – walls, roof, floor, permanently affixed items.

B. Contents – all items not permanently affixed to the building.

C. Improvements & Betterments – improvements which are permanently affixed to the premises, ownership of which is governed by the lease.

D. Business Interruption- covers loss of income and expenses due to a covered claim. Different than “rental income coverage”?



Considerations re: Property Insurance

- “Board of Fire Underwriters” and applicability of recommendations?
- Is 100% replacement coverage necessary?
- Disbursement of Insurance Proceeds upon a Casualty?
- “All risks of loss” now referred to as “Special Causes of Loss”
- What is Co-Insurance?



Types of Insurance cont'd.

- **Boiler Machinery / Equipment Breakdown Coverage**

Provides coverage for losses arising out of the operation of pressure, mechanical, and electrical equipment, boiler and machinery, plus related business interruption losses. Review whether landlord or tenant is responsible under lease for such equipment. Needed as it provides coverage for the Perils of mechanical breakdown, artificially generated electrical currents and electrical arcing which are excluded perils in the standard "Special Form"



Types of Insurance cont'd.

- **Commercial General Liability**

Provides coverage for bodily injury & property damage due to alleged negligence of the insured and includes the following elements:

A. General Aggregate

B. Products/Completed Operations Aggregate

C. Personal & Advertising Injury

D. Occurrence Limit (includes premises and operations)



Liability Insurance Considerations

- No longer referred to as “public liability insurance”.
- Occurrence Vs. Claims Made
- Including endorsement for Blanket Broad Form Contractual Liability



Types of Insurance cont'd.

- **Automobile**

Provides coverage for bodily injury & property damage resulting from operation of a motor vehicle and includes the following elements:

- A. Liability
- B. Physical Damage
- C. Hired/Non-Owned – Excluded in the General Liability Policy



Types of Insurance cont'd.

- **Worker's Compensation**

Provides medical & disability coverage to employees injured in the course of employment. Limits are typically governed by local statute.

What if they are Exempt from the Law?

- **Professional Liability**

Provides coverage when the insured causes another party a financial loss due to professional services rendered. Not typically required in lease transactions.



Types of Insurance cont'd.

- **Excess Liability/Umbrella**

Provides additional liability coverage excess of primary general liability, auto, and worker's compensation. Consider whether appropriate based upon whether tenant/landlord have multiple properties.

- **Ratings and Licensing** – What is important?



Certificate of Insurance

- Form used as evidence of insurance in compliance with the lease. Typically includes the following type of information:
 - A. Name of Insured
 - B. Name of Insurance Agency
 - C. Name of Insurance Company
 - D. Types of Coverage Carried
 - E. Limits of Insurance
 - F. Effective Date of Policies
 - G. Policy Numbers



Issues re: the Certificate of Insurance

- Verification of Requested Endorsements
- Confirmation that Premium has been Paid - no
- What should be reviewed on the Certificate of Insurance?
- Notification of Cancellation – new rules on typical 30-day notice period.
- Notice of “material” modifications and/or change – what does this mean from an insurance perspective?



Basic Terminology

- Binder - provides a more detailed account of insurance coverage and is considered a “temporary policy” until the original is received.
- Policy - the actual contract between the insurance company and the insured detailing exactly what is, and what is not, covered.
- Endorsement - a modification to the original policy.



Basic Terminology cont'd.

- Additional Insured - an endorsement which extends the rights of the policy to the person named as additional insured. Who should be named as additional insured?
- Indemnification - contractual transfer of liability from one party to another. What to consider in drafting mutual indemnification provisions in leases.
- Waiver of Subrogation – an provision that waives the right of the insurance company to recover claims paid from a specific party.



Tenant Insurance Provisions

- Required Insurance:
 1. Contents
 2. Improvements & Betterments
 3. Business Interruption
 4. Commercial General Liability
 5. Automobile Coverage
 6. Worker's Compensation



Tenant Insurance Provisions cont'd.

- **Appropriate Policy Limits**
- **Providing Satisfactory Evidence of Insurance**
- **Self-insurance Guidelines**



Tenant Insurance Provisions cont'd.

- Indemnification - should protect property owner for claims arising from the following classes of people:
 1. Employees
 2. Guests, Clients, Invitees
 3. Contractors/Sub-contractors
 4. Vendors
- Scope of Indemnification



Tenant Insurance Provisions cont'd.

- Gross Negligence vs. Simple Negligence in Indemnification Provisions
- Indemnification and carve-outs when a party is “grossly negligent”
- Indemnification when the indemnified party is the sole cause of the harm.



Tenant Insurance Provisions cont'd.

- Waiver of Subrogation
 1. Commercial General Liability - good if you can get it
 2. Workers Compensation - good if you can get it
 3. Property – a must
- Deductible and self insurance issues as they relate to the waiver of subrogation.



Landlord Insurance Provisions

- Insurance
 1. Building
 2. Contents used to maintain the building (if any)
 3. Commercial General Liability
 4. Pollution
 5. Excess Liability
 6. Loss of Rents



Landlord Insurance Provisions cont'd.

- Indemnification – Most tenants will seek mutual indemnification. Scope of indemnity depends on the nature of landlord's responsibility under the lease.
- Waiver of Subrogation
 1. Building – would prefer not to
 2. Commercial General Liability- not typical
 3. Worker's Compensation – not typical



Property Management Agreements

1. Scope of duties
2. Manager's indemnification for acting outside scope of authority
3. Owner's indemnification



Property Management Agreements

Sample Indemnification Language:

Indemnification of Owner. The Manager shall indemnify, protect, defend (with legal counsel approved by Owner) and hold harmless Owner and Owner's partners, together with their respective officers, directors, agents, employees and affiliates (collectively "Indemnitees") from and against any and all claims, demands, actions, liabilities, losses, costs, expenses, damages, penalties, interest, fines, injuries and obligations, including reasonable attorneys' fees, court costs and litigation expenses ("Claims") incurred by any Indemnitee as a result of (a) any act by Manager (or any officer, agent, employee or contractor of Manager) outside the scope of Manager's authority hereunder, (b) any act or failure to act by Manager (or any officer, agent, employee or contractor of Manager) constituting negligence, misconduct, fraud or breach of this Agreement, other than as covered by Owner's insurance (for negligence or misconduct only) and to the extent Owner's insurance is available, (c) Claims made by current or former employees or applicants for employment arising from hiring, supervising or firing same, or (d) my act or omission by Manager, its employees, officers, agents or contractors in violation of any applicable law.



Property Management Agreements

Sample Indemnification Language:

Indemnification of Manager by Owner. Owner shall indemnify, protect, defend and hold harmless Manager from and against any and all Claims incurred by Manager resulting from performance of its obligations under this Agreement, except that this indemnification shall not apply with respect to any Claims (a) resulting from any act by Manager outside the scope of Manager's authority hereunder, (b) resulting from any act or failure to act constituting negligence, misconduct, fraud or breach of this Agreement, (c) resulting from Claims made by current, former employees or applicants for employment arising from hiring, supervising or firing same, or (d) any act by Manager, its employees, agents or contractors in violation of any applicable law. Owner shall control, without recourse, all aspects of Manager's defense against any Claims in matters in which Manager is entitled to indemnification under this Paragraph 8(b). If at any time during the course of such defense Owner determines, in its reasonable judgment, that such Claim results from an event, action or nonaction for which Manager is not entitled to indemnification hereunder, Owner shall automatically be entitled to immediate reimbursement for all losses, costs and expenses incurred on behalf of itself and of Manager incurred to the date of such determination.



Property Management Agreements

Sample Insurance Language:

Manager will obtain and maintain on its behalf the following insurance:

- (a) Commercial general liability insurance on an occurrence form for bodily injury, property damage, personal injury and advertising injury with limits of \$1,000,000 combined single limit each occurrence and \$2,000,000 from the aggregate of all occurrences within each policy year, including but not limited to premises-operations, products-completed operations and contractual liability. Managers insurance will be excess basis.
- (b) Business automobile liability insurance covering owned, hired and non-owned vehicles with limits of \$1,000,000
- (c) Excess liability (umbrella) insurance with limits of \$5,000,000
- (d) Workers' compensation insurance in accordance with the laws of the State the Property is located in and Employer's liability insurance in an amount not less than \$1,000,000.
- (e) Blanket crime coverage, including computer fraud coverage & Client Coverage, protecting Manager against fraudulent or dishonest acts of its employees, whether acting alone or with others, with limits of liability of not less than \$1,000,000 per occurrence.
- (f) Professional liability insurance covering the activities of Manager (written on a "claims made" basis) with limits of at least \$1,000,000. Coverage shall be maintained in effect during the period of this Agreement and for not less than two (2) years after termination of this Agreement.
- (g) Employment practices liability insurance in an amount not less than \$1,000,000 per occurrence and in the aggregate.
- (h) "Special Form" (aka all-risk) property coverage for the full replacement cost of any personal property owned by Manager and located on the property. Any deductible on covered losses shall be borne by Manager.



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