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Workshop 3

Indemnity: To Indemnify or Not to Indemnify — That is NOT the Question [Advanced]

Presented to

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Although nearly ever commercial lease contains indemnification provisions, these provisions are often not given their due for focus, drafting, and breadth. The purpose of this workshop is to explore advanced concepts, relating to indemnification, as well as the interaction of indemnity provisions with other connected provisions, and to provide and elicit practice tips, in order to enable the successful negotiation of these concepts in the context of a commercial lease.

I. HISTORICAL DEVELOPMENT OF CONTRACTUAL INDEMNITIES IN COMMERCIAL REAL ESTATE CONTRACTS

Contractual indemnification provisions in commercial real estate transactions have evolved from simple agreements to hold indemnitees generally harmless against third-party claims to targeted provisions providing that indemnitors will cover both direct and indirect losses sustained as a result of specific violations of an underlying contract.

Historically, indemnification provisions tended to constitute boilerplate language requiring one party to indemnify the other against third-party claims. The legal rationale supporting this approach was based on the notion that common law damages, irrespective of any specific contractual provision concerning remedies, provided sufficient recourse for a non-breaching party in the event of a direct contract default. At that time, the greater concern among parties seeking indemnification was establishing a clear obligation on the part of their counterparty to cover damages arising indirectly from such counterparty's acts or omissions, namely, through third-party claims. In an atmosphere of relatively straightforward real estate transactions with a supposed "known universe" of first-party risks, narrow indemnification provisions addressing potentially uncontemplated, indirect, third-party claims were the desired form of protection. However, as real estate transactions became increasingly complex, particularly in the commercial space, indemnification provisions became more detailed and sophisticated.

Since the mid to late 20th century, there has been a notable shift in commercial real estate contracts to include more comprehensive indemnification provisions addressing the direct and indirect losses suffered by an indemnitee through contractual provisions, as opposed to relying on traditional common law remedies alone. This change in legal strategy was driven by a combination of factors. Increasingly complex commercial deals of this era saw a heightening of regulatory scrutiny, broader awareness of sophisticated parties concerning potential liabilities, and a desire among parties to high dollar value transactions to allocate risks precisely. As a result of these changes, indemnification provisions began to detail a wider range of specific risks and liabilities for which an indemnitor would be responsible. In direct response, negotiating and drafting around indemnity caps, limitations of liability, and carve-outs for certain types of claims became a common aspect of closing real estate transactions. However, these type of commercial contract provisions are not the subject of this workshop; we intend to focus on the indemnification provisions often found in commercial leases, identifying and negotiating them, proposing limits and/or broadening their coverage.

The refinement process of contractual indemnification provisions has continued to respond to legal developments and market trends in the commercial real estate sector. By necessity, real estate lawyers develop indemnification provisions for their clients that reflect the intricacies of modern transactions. In recent years, for example, there has been a focus on drafting provisions with an eye to enforceability and a growing emphasis on fairness to avoid repudiation of indemnification provisions in court. As lawyers and real estate professionals adapt to these market and legal conditions, it is likely the above-described trend of increasingly complex indemnification provisions will continue into the future.

II. GENERAL INDEMNITY PURPOSE AND COVERAGE

The general indemnity provision in modern commercial leases will frequently include several different clauses which provide different types of indemnities. The most common are discussed below in this section.

A. Fault-Based Indemnities

Contractual indemnity provisions sometimes shift the risk of loss away from the party that might otherwise bear such risk in the absence of the contractual provision. However, most frequently (and with some important exceptions), indemnity provisions serve to emphasize or reaffirm the fault-based liability of the party who would most likely be responsible for the loss even in the absence of the contractual indemnification. A typical fault-based lease indemnity provision (which is also extremely common in many types of contracts) will provide protection to an injured party for a loss caused by the other party. With a few exceptions (see, for example, Section V below), such a fault-based indemnity is fair, as it allocates liability to the party responsible for the loss in pretty much the same

way that the tort system does. However, while such a provision may seem uncontroversial, and even mundane, the exact scope of coverage of these provisions can vary greatly from lease to lease.

Consider the phrase "caused by" as used in the immediately preceding paragraph. Should either party indemnify the other for losses "caused" by even non-negligent and non-wrongful acts or omissions of the indemnifying party? In certain situations, that may be appropriate (see, for example, Section VI.A. below), but, in the "general" indemnity provision contained in most leases, this is not common. Typically, the reach of the provision is limited to losses caused by the negligence or willful misconduct of the indemnifying party, essentially mirroring the situation that would likely exist under general tort law. Sometimes a party will attempt to limit its indemnity given to the other party so that it covers only losses caused by the indemnifying party's gross negligence. In most situations, this really isn't appropriate. First of all, unless there is a waiver in the lease in favor of the indemnifying party that exculpates such party from responsibility for its own negligence, such a limit in the indemnification provision is likely to be of little value, since, generally-speaking, such party could still be sued in tort by the injured party, even if the injury isn't covered by the contractual indemnity. Second, subject to any appropriate waivers that may be included in the Lease, (see, for example, Section V below) it's difficult to argue with a straight face that a wrongdoer should be able to negligently injure another party and yet escape liability for the losses caused to the other party by such negligence.

It's also worth noting that, in order to avoid arguments with a clever lawyer defending a party from whom indemnification is being sought over whether the injury or loss was, strictly-speaking, "caused" by the indemnifying party (or by one of the other parties for which the indemnifying party is responsible), it's very common to see longer, broader phrases, such as, for example, "caused by, relating to, arising out of, or in connection with." Usually such phrasing can be accepted, but, of course, the particular language will matter.

For fault-based indemnities, one must also consider the scope of "wrongdoer" parties covered by the provision. In addition to being responsible for its own acts and omissions, having the indemnifying party bear responsibility for its agents, employees, and contractors is common and not typically controversial, since such parties really are under the control of the indemnifying party (and, with respect to contractors, the indemnifying party may be able to pass through the risk to the contractor by including an indemnity in its favor from the contractor in the contract). For similar reasons, language extending the scope of the indemnity to parties such as officers and directors of the indemnifying party is also commonly accepted. Having a tenant's indemnity cover parties such as its subtenants is also common and not usually objectionable (as mentioned above in the context of contractors, a tenant will likely pass this risk through to the subtenant in the form of an indemnification provision included in the sublease). However, including parties such as invitees or guests in a fault-based indemnity is usually not reasonable, as the indemnifying party does not exercise the same degree of control over such parties (however, the acts and omissions of such parties may in some circumstances be appropriately covered by a "geographic indemnity," which is described in Section II.B. below).

B. Geographic Indemnities

Many landlords also take the position that a tenant should indemnify the landlord for any losses relating to an event or occurrence within the tenant's premises (at least, unless caused by the landlord or its agents, employees, or contractors—see below in this Section B). This type of indemnity (sometimes referred to as a "geographic" indemnity) is generally considered fair, since the tenant is fully in control of its space and, as a general rule, as between the landlord and the tenant, the tenant should be responsible for things that happen within that space.

Some tenants will seek a reciprocal geographical indemnity from the landlord. An inexperienced attorney might thoughtlessly simply mirror the language in favor of the landlord, but doing so might result in each party indemnifying the other for losses relating to the same events, and may even render both indemnifications unenforceable. A more intelligent approach is for a tenant to ask for an indemnification by the landlord for losses arising out of or in connection with an event or occurrence within the common areas. However, at least arguably, the two "geographic" situations are not the same. In the vast majority of circumstances, a tenant really is fully in control of its premises. In contrast, the common areas are often open to literally the entire world. A tenant would argue that, since the common areas are owned by the landlord, they therefore are, legally, under the landlord's control. While technically accurate, such an argument overlooks the fact that, in the real world, it is often not feasible (and maybe not even possible) for a landlord to exercise strict control over such areas in the same way that a tenant can control its premises (at least not without losing the "open" nature of such areas that the tenant probably finds desirable). For that reason, in the context of an office or industrial lease, unless the tenant has an extremely high degree of leverage, sophisticated landlords typically will not grant geographical indemnities. However, in the retail context, except for leases with shop tenants and other tenants that, for whatever reason, have little leverage, it is

much more common for tenants to succeed in obtaining such geographical indemnities from landlords. Keep in mind that a landlord granting such a geographic indemnity as to common areas may have unexpected impacts on other portions of a lease. For example, a landlord may say in the lease that it is not responsible for providing security in common areas, but, if that landlord agrees to indemnify the tenant for losses connected to events occurring within the common areas, it may find that it has inadvertently assumed the responsibility that it attempted to disclaim. For these reasons, a prudent attorney serving as a landlord counsel should carefully think through the impact of such geographic indemnities.

If one agrees to a geographic indemnity, it is almost always appropriate—and important—to exclude losses caused by the negligence or willful misconduct of the indemnified party (or others for which the indemnified party is responsible, as discussed above) within the applicable area. While there can be some circumstances where it would be appropriate to indemnify a party for losses caused by its own negligence or willful misconduct, those circumstances are rare, and any request to do so should be carefully considered (indemnification of a party for losses caused by its own negligence or willful misconduct can also sometimes run afoul of state anti-indemnification laws—see Section IV below).

Bear in mind that, unlike the fault-based indemnities discussed above, geographic indemnities do create liability to the indemnified party that, depending on the circumstances, may not have existed under common law in the absence of the contractual provision. Below is a sample reciprocal geographic indemnification provision from an anchor tenant lease (which contains the qualifier language to prevent the mere location of the occurrence to excuse the fault based conduct of the indemnitee)[1]:

Landlord as Indemnitor

During the Term, Landlord shall, subject to the release and waiver of subrogation set forth in Articles [_] and [_], indemnify Tenant, its directors, officers, shareholders, employees, sublessees, and permitted assigns (individually and collectively, "Tenant Indemnitees") from, and hold Tenant Indemnitees harmless against, any and all claims for personal injury, death and property damage occurring in the Common Areas of the Shopping Center, unless arising from the negligence or willful misconduct of Tenant, its subtenants, licensees or concessionaires, or their respective agents, employees, or contractors of any and all tiers or (ii) arising from the negligence or willful misconduct of Landlord or its agents, employees or contractors of any and all tiers.

Tenant as Indemnitor

From the date of Delivery of Possession (or the date of Tenant's entry into and upon the Demised Premises pursuant to Article [_], if earlier) and thereafter only with respect to claims arising during the Term, Tenant shall, subject to the release and waiver of subrogation set forth in Articles [__] and [__], indemnify Landlord, its partners, members, directors, officers, shareholders, employees, and permitted assigns (individually and collectively, "Landlord Indemnitees") from and hold Landlord Indemnitees harmless against, any and all claims for personal injury, death and property damage (i) occurring on the Demised Premises (unless arising from the negligence or willful misconduct of Landlord or its agents, employees or contractors of any and all tiers) or (ii) arising from the negligence or willful misconduct of Tenant, its subtenants, licensees and concessionaires, or their respective agents, employees, or contractors of any and all tiers.

C. Indemnity for Breach

Sometimes indemnification provisions also cover losses caused by the indemnifying party's breach of the lease. If such a clause is included, a party may argue that the indemnity should only apply to defaults that continue beyond any applicable notice and cure period. However, we disagree with this position. While notice and cure is often perfectly appropriate before the non-defaulting party can exercise the lease remedies commonly found in the "default" section of a lease, if the non-breaching party is actually injured by the breach, then it is reasonable to expect that the breaching party make good those losses (as a party's breach of a lease can reasonably be analogized to its negligence or willful misconduct).

Indemnities for breach of the lease should be considered carefully. Arguably, they aren't needed at all, as the non-breaching party can always sue for breach of contract (although, in the absence of the indemnity, the notice and cure issue mentioned above might prevent recovery if the breach is cured within the cure period). In addition, including such a clause in the general indemnity provision can create liability where a party might have believed that such liability had been negotiated out of the lease. For example, if a tenant is able to negotiate for the removal

[1] See Section VII below for a similar provision with notes regarding negotiation considerations.

from the holdover provision of language that makes the tenant responsible for consequential damages sustained by the landlord from tenant's holdover, but agreed to a general indemnity for losses caused by the tenant's breach of the lease, then, since holding over is a breach, the tenant could be liable to the landlord under the indemnity provision (unless the lease includes a properly-worded express waiver of consequential damages). On the other hand, an indemnity for breach of the lease can often cover other "holes" that may exist in the document. Consider, for example, a (poorly drafted) waiver of subrogation provision that only waives claims to the extent of insurance actually carried by the indemnifying party. If the indemnifying party is required to carry insurance under the Lease but breaches the Lease by failing to actually carry the required coverages, then there may be a good argument that the waiver does not apply, allowing the breaching party to make claims against the other party that it would have been unable to assert had it not breached the Lease. However, if the general indemnity provision includes an indemnity for losses caused by the indemnifying party's breach, this would likely serve to eliminate the breaching party's ability to bring such claims against the non-breaching party, and keep the breaching party from unfairly profiting from its breach.

D. Other General Indemnity Clauses

It's not uncommon to see the general indemnity provision of a landlord's form worded much more broadly so as to cover losses and injuries well beyond the concepts described above. As an example, one might see a requirement for a tenant to indemnify a landlord for losses "in any manner arising out of, by reason of or in connection with the use, non-use or occupancy of the Premises," or for damages arising from "the use of the Premises or the common areas or from the conduct of Tenant's business or from any activity, work, or things which may be permitted or suffered by Tenant or any of the Tenant Parties." Clauses like these can be viewed as essentially expansions of either the "fault-based" indemnity provision (although, as can be seen here, such phrasing really extends the scope of the indemnity beyond any sort of "fault") or the geographic indemnity provision. Unless the tenant really has no leverage whatsoever, most reasonable landlords will not insist on such broad language, and will, if requested during the course of lease negotiations, agree to scale back the indemnity language to the concepts described above.

E. Third Party Claims

On occasion, one might run up against opposing counsel who, more in line with the antiquated view of indemnities described above in Section I, takes the position that indemnities by their nature can only apply to claims being made by a third party against the indemnified party. As set forth above, this is not the modern view. Usually this issue can be resolved simply by reference to Black's Law Dictionary, which defines an "Indemnity" as

1. A duty to make good any loss, damage, or liability incurred by another.
2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty.
3. Reimbursement or compensation from for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.[2]

As can be seen, the concept of third parties isn't mentioned at all until definition #3. The first two definitions make clear that indemnities can be used by an injured party to recover its direct losses from the party with the indemnification obligation. In our experience, pointing out this definition will typically end the argument, as few attorneys will wish to get into a dispute with the dictionary. To be clear, third party claims can definitely be covered by an indemnity, but, as set forth above, the concept is by no means inherently limited to such claims. Another point worthy of mention in the third party claims context, is that when the commercial contract contains the reciprocal limitation against liability for consequential and indirect damages, it is best to exclude third party claims subject to indemnification to avoid the unintended consequence of excluding consequential damages awarded to such third party for which the indemnification is intended to cover.

III. INSURANCE COVERAGE FOR INDEMNITY OBLIGATIONS

As noted above, while some indemnity obligations are likely to be co-extensive with liability risks that a party would face under general tort law, others can expand the indemnifying party's liability risk—perhaps dramatically. The good news is that such indemnity risks can usually be insured. Standard commercial general

[2] *Indemnity,* Black's Law Dictionary (11th ed. 2019).

liability insurance coverage will typically cover the party's contractual indemnity obligations in the lease, even if there might not otherwise have been coverage in the absence of the contractual indemnity.[3]

In its essence, the contractual liability coverage is liability insurance for financial consequences that the insured agrees under the contract (or lease) to be liable. It should cover the hold harmless concept in the indemnification clause but it is not an assumption of the indemnitee's liability. Further, while a client may have its commercial general liability policy, that policy may have exclusions from coverage that preclude contractual coverage and/or separate limits unless, in those instances of the exclusions from coverage for such contractual liability, the insured has a contractual liability endorsement, rider, or declaration specifically providing coverage at the limits specified in such rider or declaration. If a negotiating party is looking for the other party to be fully insured on that risk, it is recommended to fully understand the liability policy and its exclusions, and the ability to add to it by endorsements, riders, or declarations if the anticipated coverage is not included in the base policy.

Related provisions in the commercial lease corresponding to the indemnification provision are reciprocal provisions found in the insurance article, samples of which are the following:

> Such liability policy or policies required to be procured and maintained by Tenant under this Lease shall name the Landlord Indemnitees as additional insureds, but only to the extent of losses or claims caused by or arising out of the negligent acts, omissions or breach of this Lease by Tenant, and claims against which Tenant is obligated to indemnify Landlord and the other Landlord Indemnitees pursuant to Article [___].

> Such liability policy or policies required to be procured and maintained by Tenant under this Lease shall name the Tenant Indemnitees as additional insureds[4], but only to the extent of losses or claims caused by or arising out of the negligent acts, omissions or breach of this Lease by Landlord[5], and claims against which Landlord is obligated to indemnify Tenant and the other Tenant Indemnitees pursuant to Article [___].

When negotiating indemnity provisions, an intelligent attorney will consider whether or not his client is likely to have insurance to cover the obligation. In fact, under some circumstances, it may actually be desirable to grant an indemnity, as doing so could, at least theoretically, create insurance coverage through the contractual liability insurance for a loss that might not otherwise be covered in the absence of the indemnity. Notwithstanding the foregoing, when considering issues of contractual liability coverage, caution is advised. Even practitioners with a relatively high level of understanding of these issues vis-à-vis most other attorneys likely haven't actually read the policies, and don't know every particular requirement, exclusion and limitation. A wise attorney will always be cognizant of the limits of his or her knowledge.

IV. INDEMNITY LIMITATIONS

Some states impose (sometimes surprising) requirements and limitations on indemnities, particularly in circumstances outside of a fault-based scenario. For example, many courts will permit a party to a contract to indemnify another party even for that other party's own negligence, but only if such intention is expressed in clear and unequivocal terms, and sometimes in bold, capitalized, and/or other conspicuous writing.[6] In some states, courts have held that an otherwise generally applicable statute providing that a party cannot be relieved of its responsibility for damages caused as a result of the indemnified party's own negligence does not preclude enforcement of an indemnification provision in a commercial lease negotiated at arm's length between two sophisticated parties when coupled with an insurance requirement.[7] Georgia has a so-called "anti-indemnity"

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[3] Typical commercial general liability insurance policies contain an express exclusion of contractual liability coverage, but then make an exception for certain "insured contracts," which usually includes leases.

[4] Note that, in office and industrial leases, it would be extremely unusual for a landlord to ever agree to name a tenant as an additional insured on any of the landlord's insurance policies.

[5] Note that this clause is arguably unnecessary, since it is essentially describing how additional insured coverage works.

[6] *See, e.g.*, Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 171 (S.C. Ct. App. 2018) and Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987).

[7] *See, e.g.*, Castano v. Zee-Jay Realty Co., 866 N.Y.S.2d 700 (2008). *See also* Rodriguez v. 5432-50 Myrtle Ave., LLC, 50 N.Y.S.3d 99 (2017) (in the context of a commercial lease, negotiated between two sophisticated parties, where a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, the statute generally prohibiting a lessor's

statute[8] that prohibits indemnification where the loss is caused by the sole negligence of the indemnified party (and Georgia courts have interpreted this statute as completely invalidating indemnity provisions that could even *possibly* be read as covering the indemnified party's sole negligence—even if the particular situation at issue doesn't involve that scenario).[9]

Many leasing attorneys practice in multiple jurisdictions. Failure to understand the state-specific issues that may impact indemnity provisions in leases can lead to unexpected (and unwanted) results—and possibly a malpractice claim—so it behooves us to make sure that we understand these sorts of state-specific requirements and limitations.

V. WAIVERS

Commercial leases typically include a number of waivers and releases. For example, language like the following is not uncommon in landlord form leases:

> Landlord is not liable for and Tenant waives any claim in connection with: (a) any injury to Tenant's business or any loss of income, including without limitation from any relocation by Landlord of Tenant within the Building; or (b) damage to the goods, wares, merchandise or other property of Tenant or any of the Tenant Parties or any other person in, on or about the Demised Premises or Common Areas; or (c) injury to the person of Tenant or any of the Tenant Parties; whether any such damage or injury in clauses (a), (b) or (c) is caused by or results from fire, steam, electricity, gas, water, rain, wind storm, tornado, hurricane, virus or disease or from the breakage, leakage, obstruction or other defects of pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting or other electrical fixtures, failure of the security systems of the Building, or from any other cause, and whether the said damage or injury results from conditions arising upon the Demised Premises or from other sources or places, and regardless of whether the cause of such injury or the means of repairing the same is inaccessible to Landlord or Tenant. Landlord is not liable for any damages arising from any act, omission or neglect of any other tenant or occupant of the Building. Tenant hereby assumes all risk of damage to property or injury to persons in, on or about the Demised Premises from any cause, and Tenant hereby waives all claims in respect thereof against Landlord.

A tenant who negotiates for an indemnity from the landlord in favor of the tenant, but who does not consider how that indemnity interacts with waivers such as the one set forth above, may not have actually done itself any favors. At best, in many scenarios, the indemnity will be in conflict with such a waiver, leaving the parties in a dispute. At worst, the waiver may completely override the indemnity, rendering it all but useless. A common tactic for an intelligent tenant in negotiating such waivers is to exclude claims, losses, etc. caused by the landlord's negligence, willful misconduct, or breach of the lease. To the extent that exclusion dovetails with the scope of the indemnity provision, that can be effective. However, if the Lease contains an appropriate indemnity from the landlord in favor of the tenant, a safer approach to ensure that there is no conflict may be to expressly make the waiver subject to the indemnity provision. Indemnities and waivers can often be in conflict, so it pays to carefully consider the appropriate hierarchy of each waiver vis-à-vis the indemnity(ies).

One waiver provision that should always govern over all indemnities (whether in favor of the landlord or the tenant)—and, indeed, over any other conflicting provision in the lease—is the so-called "waiver of subrogation[10]. The waiver of subrogation is designed to ensure that, to the maximum extent possible, the party that bears a loss is the party that has the insurance covering the loss. Fault should not be a factor, as the purpose is to minimize the

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exemption from liability for damages or injuries caused by the lessor's own negligence does not prohibit indemnity).

[8] GA. CODE ANN. § 13-8-2 (West 2023).

[9] *See, e.g.*, Ameris Bancorp v. Ackerman, 674 S.E.2d 358, 361 (Ga. Ct. App. 2009)

[10] The term "waiver of subrogation" is really a misnomer for these provisions. The typical language in a commercial lease addresses two separate (albeit related) concepts: (1) a waiver of claims for losses covered by the injured party's insurance; and (2) a requirement for each party to have its insurance company waive its subrogation rights. The most critical part of the provision is the first concept—the waiver of claims, not the waiver of subrogation. If the waiver of claims is properly worded, then, even if there were no waiver of subrogation language in the lease, the insurance company exercising its subrogation rights would be stepping into the shoes of a party that had waived its claims, making the subrogation useless. Nevertheless, this lease provision is almost always referred to colloquially as the "waiver of subrogation," so these materials will use that term.

number of circumstances where one party to a lease would have the ability to make claims against (or sue) the other, and to instead shift most risks onto the insurance companies[11]. Only in situations where the waiver of subrogation provision doesn't apply should the parties fall back to the indemnities to determine liability.

VI. SPECIALIZED INDEMNITIES

Sometimes one or more provisions in a commercial lease may contain additional indemnities that apply to the specific topics covered by those provisions. In some cases, these indemnities can be superfluous, as the covered losses may already be properly addressed by the general indemnity provision (especially if the general provision includes "breach of the lease" coverage)[12]. In other cases, however, the "specialized" indemnity in these provisions can be a bit different. The following is by no means an exhaustive list of all specialized indemnities, but should provide a good idea as to some of the types of specialized indemnities that might commonly be found in sophisticated leases.

A. Hazardous Materials

Here is an example of an indemnity from a "hazardous materials" provision in an industrial lease where the tenants operations involve hazmat usage:

> Tenant agrees to indemnify, defend (with counsel reasonably satisfactory to Landlord) and hold Landlord, its members, managers, directors, officers, employees, agents and contractors, harmless from and against any and all liability, claims, judgments, damages, penalties, fines, assessments, fees, forfeitures, losses, costs (including, without limitation, clean-up costs and all costs of Corrective Action) and other expenses (including, without limitation, reasonable attorneys' fees actually incurred, consultants' fees and experts' fees) arising from, relating to, in connection with or caused in whole or in part, directly or indirectly, by: (i) the discharge or release in or from the Premises or any portion thereof of Hazardous Substances; (ii) the use, generation, transportation, handling, presence, disposal, storage, release or discharge of Hazardous Substances to, in, on, under, about or from the Project, whether actual or suspected, by Tenant, its directors, officers, agents, contractors, employees or invitees (even if the use of such Hazardous Substances is permissible under all applicable Environmental Laws and the provisions of this Lease); (iii) the failure by Tenant, its directors, officers, agents, contractors, employees or invitees to comply with any Legal Requirements relating to Hazardous Substances (including, without limitation, any Environmental Laws); or (iv) by reason of any actual or asserted failure of Tenant to keep, observe, or perform any provision of this Section ___. Tenant further agrees to pay any and all fines, charges, assessments, fees, damages, losses, claims, liabilities or response costs arising out of or any way connected with the violation of any applicable Environmental Laws by Tenant, its directors, officers, agents, contractors, employees or invitees. The indemnifications set forth in this paragraph are in addition to any and all other indemnification obligations of Tenant set forth in this Lease, and shall survive the expiration or termination of this Lease.

As you can see, this indemnity is very broad. It includes "fault-based" coverage, but, unlike the general indemnity, it's not limited to negligence or willful misconduct—rather, it reaches even legal, non-negligent activities (it even reaches "suspected" activities). Similarly, while it does include certain "geographical" elements, the area of coverage is extremely broad, covering the overall "Project," which includes the entire building and the land on which it is situated. While there is likely to be some overlap with the general indemnity provision (see clause (iv), for example, which is really just "breach" coverage), this provision clearly covers losses and circumstances that the general provision likely wouldn't reach.

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[11] Notwithstanding this general principle, some large national retailers do attempt to carve out certain exceptions from the waiver of subrogation, such as damage to the tenant's personal property caused by water intrusion resulting from the landlord's negligence. These sorts of carve outs defeat the purpose of the waiver and place the parties back into the arena of arguing about fault. Outside of the context of such large national retailers, these sorts of carve-outs would rarely, if ever, be accepted by a landlord. However, as is so often the case with such retail tenants, a party with tremendous leverage can sometimes achieve unfairly favorable terms.

[12] For example, a typical provision governing liens will likely prohibit the tenant from taking any action that will result in a lien against the property. Such a provision may also contain an indemnity in favor of the landlord if the tenant does something that results in a lien. However, if the general indemnity covers losses caused by the tenant's breach of the lease, then it's likely that the specific lien indemnity provides the same protection that was already available from the general indemnity.

A provision like this is arguably justified, both because of the "strict liability" standard that is often imposed in state and federal environmental laws, and because the tenant (and not the landlord) is presumably experienced in dealing with hazardous materials that are part of its normal operations and should, therefore, know how (and be expected) to comply with all applicable laws and prevailing safety standards in the tenant's industry. However, even if a very broad indemnity is appropriate in such circumstances, that doesn't mean that it's not reasonable to impose some limitations. For example, the above provision could arguably make the tenant responsible even for a groundwater contamination plume originating from a neighboring property. That may or may not be fair, depending on the circumstances[13]. As per Section III above, when negotiating such a provision, counsel for both parties should consider what insurance coverages may be available to backstop the indemnity obligations.[14]

B. Indemnity for title exceptions impacting Tenant's Operations[15]

Landlord shall protect, defend and indemnify Tenant and hold Tenant harmless from and against any and all claims, demands, losses, causes of action, suits, damages, liabilities, costs and expenses of any nature whatsoever arising out of, in connection with or resulting from any existing Tenant asserting any claim, action or otherwise seeking to enforce any Existing Exclusive (including without limitation any exclusive uses and/or restrictive covenants set forth in Exhibit) with respect to any Permitted Supermarket Uses at, from or within the Demised Premises or otherwise by reason of any default or breach of Landlord's foregoing representations and warranties.

C. Indemnity for breach of representations and warranties

Landlord further expressly acknowledges that Tenant has been materially induced into entering into this Lease and to Tenant's potential detriment is relying upon the representations, warranties and acknowledgments by Landlord and its indemnities contained in this Article 8.1. Landlord shall protect, defend and indemnify Tenant and hold Tenant harmless from and against any and all claims, demands, losses, causes of action, suits, damages, liabilities, costs and expenses of any nature whatsoever arising out of, in connection with or resulting from any breach by Landlord of the representations and warranties set forth in this Article [__].

VII. SAMPLE PROVISIONS AND NEGOTIATION CONSIDERATIONS

Below are a few examples of indemnification provisions, along with commentary regarding some possible negotiation considerations that may be applicable to each:

A. Broad Form Indemnification Provision in Anchor Tenant Lease

Tenant as Indemnitor:

From the earlier of Tenant entering upon the Demised Premises and the date of possession of the Premises is delivered to Tenant ("Delivery of Possession") and thereafter during the Term, to the extent not covered by the insurance which Tenant shall maintain pursuant to Article [__] of this Lease, to the fullest extent permitted by Law, Tenant shall defend and save Landlord, Landlord's officers, directors, shareholders, and employees, Landlord's managing agent for the Shopping Center (whose name and address shall have been provided to Tenant), and the holder of a mortgage upon the Shopping Center (whose name and address shall have been provided to Tenant) (all of the foregoing being individually and collectively referred to in this Lease as the "Landlord Indemnitees") harmless and indemnified from and against all bodily and personal injury, loss, claims or damage of any type or nature to any person or property (i) while on or about the Demised Premises (or the sidewalks contiguous thereto) from and after Delivery of Possession, (ii) occasioned by any work or construction done in or about the Demised Premises by or on behalf of Tenant, or (iii) relating to any condition of the Demised Premises created by Tenant. Landlord shall provide to Tenant reasonably prompt notice of any claim against Landlord. Tenant shall have the

[13] If the lease is a ground lease, or if the tenant is otherwise leasing the entire building, it may be appropriate to treat the tenant essentially as if it "owns" the property during the term. Conversely, if the lease is merely a space lease of a portion of a multi-tenant building, then, arguably, that wouldn't be a common type of liability for a tenant to assume.

[14] For example, pollution liability insurance may be helpful in the context of a hazmat indemnity.

[15] One might find this type of indemnity in the form lease of an anchor tenant at a grocery anchored center, whether tenant really has the lion's share of the leverage in the deal. Outside of that context, it would be extremely unusual for a landlord to agree to give an indemnity like this.

right to settle any such claim on any terms acceptable to Tenant, provided that such settlement does not impose any obligation on Landlord. If any action or proceeding is brought against any or all of the Landlord Indemnitees by reason of any such claim, upon written notice from Landlord or the applicable Landlord Indemnitee, Tenant, at Tenant's sole cost and expense, will defend such action or proceeding by counsel selected by Tenant or Tenant's insurance carrier. The indemnification provisions contained in this Article [__]_shall include reasonable attorney's fees and disbursements incurred by a Landlord Indemnitee arising solely due to a breach of Tenant's duty to defend as aforesaid.

Landlord as Indemnitor:[16]

Beginning on the Effective Date and thereafter during the Term, to the extent not covered by the insurance which Landlord shall maintain pursuant to the provisions of Article __ of this Lease, to the fullest extent permitted by Law, Landlord shall defend and save Tenant, any Wakefern Member Subtenant, any Affiliate and Related Party thereof, and their respective officers, directors, shareholders and employees (all of the foregoing being individually and collectively referred to in this Lease as "Tenant Indemnitees") harmless and indemnified from and against all bodily and personal injury, loss, claims or damage of any type or nature to any person or property (i) while on or about the Shopping Center (other than the Demised Premises from and after Delivery of Possession), or the sidewalks contiguous thereto subject, however, to clauses (ii) and (iii) of this Article ____), (ii) occasioned by any work or construction done in or about the Shopping Center by or on behalf of Landlord, or (iii) relating to any condition of the Shopping Center created by Landlord. Tenant shall provide to Landlord reasonably prompt notice of any claim against Tenant. Landlord shall have the right to settle any such claim on any terms acceptable to Landlord, provided that such settlement does not impose any obligation on Tenant. If any action or proceeding is brought against any or all of the Tenant Indemnitees, by reason of any such claim, upon written notice from Tenant or the applicable Tenant Indemnitee, Landlord, at Landlord's sole cost and expense, will defend such action or proceeding by counsel selected by Landlord or Landlord's insurance carrier. The indemnification provisions contained in this Article ___ shall include reasonable attorney's fees and disbursements incurred by a Tenant Indemnitee arising solely due to a breach of Landlord's duty to defend as aforesaid.

Note that the foregoing provisions don't include anything like the "fault-based" indemnities discussed above, or the "breach" indemnity. An attorney negotiating these provisions should consider adding those concepts.

B. Broker Indemnification[17]

Landlord agrees to indemnify and hold Tenant harmless from and against all liability, costs, and expenses (including reasonable attorneys' fees) Tenant may incur in defending any claim, demand, or action for a finder's fee, brokerage commission, or other similar payment brought or asserted by Broker and/or by reason of any breach by Landlord of the aforesaid representation and warranty in the first sentence of this Article [_] on Landlord's part.

Tenant agrees to indemnify and hold Landlord harmless from and against all liability, costs, and expenses (including reasonable attorneys' fees) Landlord may incur in defending any claim, demand, or action for a finder's fee, brokerage commission, or other similar payment brought or asserted by any broker or agent or other person by reason of any breach by Tenant of the aforesaid representation and warranty in the first sentence of this Article [_] on Tenant's part.

C. Environmental Indemnity (Anchor Tenant Oriented)

Landlord represents that, except as set forth in the Environmental Reports, it has no knowledge of the presence of any Hazardous Materials (hereinafter defined below) at, on, in or under the Land or the balance of the Shopping Center. Landlord agrees to indemnify, defend and hold Tenant and its officers, directors, shareholders, employees and agents harmless from any claims, judgments, damages, fines, penalties, costs, liabilities (including sums paid in settlement of claims) or loss (but specifically excluding consequential damages), including reasonable attorney's fees, consultants fees, and expert fees which arise during or after the Term, in connection with the presence or suspected presence of Hazardous Materials in the structures, buildings, air, soil, groundwater, or soil vapor at, on, in, or under the Shopping Center (or adjacent or proximate property to the extent a claim is based on the migration of Hazardous Materials from the Shopping Center to such property), unless such Hazardous Materials

[16] To the extent that the issues addressed above would also apply to this language, the comments will not be repeated.

[17] These provisions are not typically heavily negotiated. However, if there is an unusual broker situation (e.g., if the tenant is working with a broker that will not be paid a commission), it's important to consider what changes might be necessary to take those circumstances into account.

are present as the result of the actions or omissions of Tenant, or any subtenant (or sub-subtenant) of all or a portion of the Demised Premises acting by, through, or under Tenant.[18]

Tenant hereby represents and warrants that except for products offered for sale by Tenant (or any party claiming by, through or under Tenant), and/or used or consumed by Tenant (or any party claiming by, through or under Tenant), in the ordinary course of its business, and then only in compliance with, in each case, all applicable Environmental Laws, no Hazardous Materials, are or shall be associated with its use of the Demised Premises otherwise than in material compliance with, in each case, all applicable Acts. In the event of any breach of this provision, Tenant agrees to defend, indemnify and hold harmless Landlord, its successors and assigns from and against any and all liabilities, losses, damages, costs, expenses (including reasonable attorneys' fees and expenses) causes of action, suits, claims, demands or judgments of any nature arising out of or in connection with any failure by Tenant to comply with the terms of any order issued by or any Governmental Authority having regulatory authority over environmental matters, with regard to the Demised Premises.

D. Additional Considerations

Indemnification of a party, in its true form, is an agreement to reimburse a party for damages it suffers or for which it would be liable—including defense costs it incurs. However, without the additional language of "save" or "defend", it does not include the obligation to defend the indemnitee(s). The sample broad form clause provided above in Section VII.A. achieves all of the above.

VIII. NEGOTIATING INDEMNITIES AGAINST PARTIES WITH UNUSUAL REQUIREMENTS (E.G., LIFE INSURANCE COMPANIES)

Although indemnification provisions are all but ubiquitous in commercial leases, it should be noted that some insurance company owners have a strict policy against giving contractual indemnities, with no exceptions being permitted.[19] Many tenant attorneys that are unfamiliar with these policies find this position shocking, and may to rail against the landlord's unwilling to follow industry and market standards, as well as the unfairness of requiring an indemnity from the tenant without being able to grant a reciprocal indemnity from the landlord. Such tactics will almost certainly be futile. However, attorneys with more experience negotiating against these types of landlords may (depending on the leverage of their tenant client) attempt a fallback position that some of these owners may accept: deletion of the indemnity provision from the lease entirely. Since the parties still have their general rights to sue for breach of contract or for tort (subject to any applicable lease waivers), this might be a compromise that both parties can accept. In fact, it may even be at least somewhat to a tenant's benefit, as it will eliminate the "geographic" indemnity, which, as noted above, can often be one-sided in favor of the landlord.

IX. CONCLUSION

While there are many provisions in the commercial contract that require close attention and often warrant thoughtful analysis, discussion, and negotiation, the various indemnification, hold harmless, and defense provisions are certainly among them. As noted in the foregoing, the interrelation of many provisions within the commercial contract elicit the need to coordinate changes during negotiation of those provision. This is especially true for the indemnification, hold harmless, and defense provisions. It is imperative to track and contain the ripples in the document resulting from those changes. For example, if the expectation of the parties is that the insurance provided by the indemnitors will cover the lion-share of the liability exposure of the respective indemnitor, coordination with the release of claims, waiver of subrogation, and insurance provisions are a must along with a solid understanding of the actual insurance coverage procured by such indemnitor over such liability exposure. The intended goal of this Workshop, as we weave though the different types of indemnification provisions, the need to coordinate changes with the commercial contract, and the implications of the subject matter and breadth of those provisions,

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[18] Although not unheard of, in an office lease, it's not terribly common for a landlord to provide an environmental indemnity to a tenant, and, even when it is done, the provision is likely to be much more limited that this one. Having said that, it is common in office leases for a landlord to at least provide a representation, to its knowledge, as to any hazmat/environmental contamination, or the lack thereof.

[19] Interestingly, however, the form leases used by these owners will frequently include an indemnity in favor of the tenant for failure by the landlord to pay the brokerage commissions due in connection with the transaction. It seems likely that such provisions are, strictly-speaking, a violation of the "no indemnity" policy, but, in the real world, nobody cares because the landlord is going to pay whatever commissions are owed and, even if a dispute arises between the landlord and the tenant's broker, the tenant's broker will most likely lien the property, and almost certainly isn't going to look to the tenant for payment. Therefore, the brokerage indemnity will never actually become an issue.

is to provide the experienced practitioner with more food for the table and the opportunity to bring their basket of knowledge to the benefit of the co-presenters of this Workshop along with the attendees.