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General Session #3

**RISKY BUSINESS: HOW TO NEGOTIATE LEASE INSURANCE PROVISIONS
IN ORDER TO PROTECT YOUR CLIENT**

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INSURANCE AND ITS VARIOUS TYPES

Insurance Defined:

A contractual relationship that exists when one party (the insurer), in exchange for consideration (payment of premium), agrees to reimburse another party (the insured) for loss to a specified subject (the risk) caused by designated hazards or perils.

Insurance is a risk transfer mechanism that allows the insured to pass on a portion of its risk of loss to an insurer in exchange for premium. Insurance by its nature is not intended to cover that which is expected nor intended. Most policies contain "intentional acts" exclusions prohibiting the offending insured from recovering under its policy(ies) for any intentional acts committed by the insured resulting in a loss.

CASUALTY INSURANCE

Casualty Insurance Defined:

Insurance that is designed to respond to losses caused by bodily injury to persons and property damage resulting in legal liability imposed upon the insured.

Casualty insurance protects the insured against the covered risks of bodily injury (including death) and damage to the tangible property of a third party, and is considered a third-party coverage. In other words, casualty insurance protects the insured from its own actions to third parties. The words "Casualty" and "Liability" insurance are used interchangeably in the insurance industry.

Common types of Casualty insurance include:

Commercial General Liability ("CGL") Insurance — an insurance policy issued to businesses to protect them against liability claims alleging bodily injury ("BI") and/or property damage ("PD") arising out of premises, operations, products and completed operations. The CGL policy was introduced in 1986 as a successor to the "comprehensive" general liability policy.

CGL Insurance generally covers most third-party claims, including (but not limited to), bodily injury and medical expenses, property damage, and advertising injuries (e.g., libel and copyright infringement); however, it expressly excludes (i) intentional acts, and (ii) the insured's personal property.

ISO Wording:

This insurance does not apply to:

a. Expected Or Intended Injury "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

Care Custody Control and Own, Rent, Occupy Exclusions under ISO CGL Policies:

This insurance does not apply to:

j. Damage To Property "Property damage" to: (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property; (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises; (3) Property loaned to you; (4) Personal property in the care, custody or control of the insured;

Used For (Example): Tenant negligently damages landlord's or supplier's property in tenant's care, custody or control, or tenant's employee intentionally causes property damage to landlord's property.

Why You Need It: CGL Policies are currently written with a "combined single limit" per occurrence for bodily injury and property damage.

Typical Limits: \$1,000,000.00 with respect to injury or death of any number of persons and property damage per occurrence and \$2,000,000.00 designated location general aggregate.

Additional Suggested Requirements: (i) Additional insured coverage for other party; (ii) require such policy to be primary & non-contributory; (iii) waiver of subrogation; and (iv) prohibited exclusions.

NOTE: If your lease form uses the phrase "comprehensive general liability insurance", or distinguishes between limits of property damage and bodily injury - it is time to update your form.

Contractual Liability Insurance — insurance typically provided as part of a CGL policy that covers liability of the insured assumed under a written contract or agreement (or in our case, a lease) for bodily injury and property damage only. Under the standard CGL policy, such coverage is often limited to liability assumed under defined "insured contracts" or to liability that the insured would have in the absence of the contract (i.e. – under common law). This coverage extends to the indemnity and provides coverage for the assumed liability.

Used For (Example): Tenant assumes risk under the lease for any and all bodily injury occurring within the premises, including bodily injury occurring as a result of landlord's joint or contributory negligence.

NOTE: This coverage used to be known as "broad-form contractual liability" coverage but carriers, realizing it was a misnomer, moved away from the "broad-form" descriptor in 1986.

NOTE: Contractual Liability Insurance only covers bodily injury and physical injury to tangible property, subject to the limits of liability. No additional liabilities assumed in an indemnification agreement are covered.

Umbrella & Excess Liability Insurance — policies designed to provide protection against catastrophic losses that are generally written above various primary liability policies, such as the CGL policy, commercial auto policy and employer's liability portion of workers' compensation coverage. Umbrella policies serve three primary purposes:

- 1) provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims;
- 2) under certain scenarios, "drops down" and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and
- 3) provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR).

Ultimately, umbrella policies increase liability limits for a business and offer more risk protection. Excess liability coverage is less broad than umbrella coverage.

Typical Limits: Limits of not less than \$1,000,000.00 - \$3,000,000.00 per occurrence.

NOTE: Consider increasing limits of tenant's insurance by requiring umbrella coverage dependent upon the risk of use. For example, fitness users, restaurant/food operators, supermarkets, etc. may warrant higher limits.

NOTE: Umbrella policies tend to have more inexpensive premiums, since the umbrella insurer knows such insurance is excess of primary coverage. Umbrella insurers also may not necessarily have the same ratings as the primary carrier.

NOTE: Umbrella and excess liability policies should be at least as broad as the underlying coverage required under the lease.

Workers' Compensation— policies that, in addition to other coverages, provide medical benefits and/or wage replacement to employees that are injured during the course and scope of their employment.

Used For (Example): Tenant's employee falls off of a ladder and is injured while stocking shelves within the leased retail premises.

Why You Need It: Most states have laws requiring businesses to carry workers' compensation; however, those requirements and exemptions can vary from state to state and can depend upon the applicable business.

Typical Limits: Limits of not less than that required by applicable laws, covering all of tenant's employees at the premises.

Additional Suggested Requirements: Waiver of subrogation.

NOTE: Consider addressing contractors, vendors, temporary employees, etc.

Employer's Liability — typically written as a supplement to the Workers' Compensation policy form and intended to pick up employee injury or illness claims that are not clearly defined and/or clearly compensable under existing statutory guidelines. Often this coverage part responds to allegations of gross negligence resulting in employee injury, illness or death.

Used For (Example): Employee becomes ill with a severe case of COVID-19 and alleges employer did not provide necessary personal protective equipment ("PPE").

Typical Limits: Limits of not less than \$1,000,000.00 per employee accident or disease.

Additional Suggested Requirements: Waiver of subrogation.

Professional Liability — policies that, in addition to other coverages, provide coverage for bodily injury, property damage and economic loss as a result of professional negligence on the part of the insured. Policies are typically held by individuals providing advice as part of their service - such as doctors, lawyers, architects, engineers, insurance agents, or various types of contractors. Neither bodily injury nor property damage are conditions precedent to triggering economic loss coverage under a professional liability policy. Unlike many other liability policies, third parties should not seek additional insured status under these policies, as the claimant is expected to file a first-party claim directly against the insured and the insured's carrier rather than seek defense and indemnification for third-party claims.

Used For (Example): Tenant, a primary care physician, leases space in landlord's center for a small primary care practice and commits medical malpractice on a patient.

Why You Need It: Add if tenant is a professional and will be practicing in the premises (e.g., doctor) as well as for certain third-party property managers ("Property Manager's E&O").

Typical Limits: Limits of not less than \$1,000,000.00 each claim / policy aggregate.

NOTE: Additional considerations may be required to ensure coverage is adequate for all professional exposures. The defense of such claim is typically provided within the limit, thereby eroding that limit.

NOTE: You can request additional insured status on a professional liability policy; however, professional liability policies have an insured vs. insured exclusion. Therefore, this would essentially negate coverage.

NOTE: Not all professional liability policies will provide coverage for bodily injury and property damage - such as professional liability insurance for attorneys.

Commercial Automobile Liability — policies designed to provide both bodily injury and property damage coverage associated with an automobile accident or other vehicle damage caused by a vehicle owned, leased, rented, borrowed or otherwise used by the insured.

Why You Need It: Add if tenant owns and/or uses any vehicle as part of its business to cover risks of accidents, theft or vandalism.

Used For (Example): Tenant, a caterer, leases space in landlord's center for a catering business, which delivers food from the premises to customers. Tenant's business vehicle damages landlord's property.

Typical Limits: Limits of not less than \$1,000,000 per accident.

Additional Suggested Requirements: (i) Additional insured coverage for other party; (ii) require such policy to be primary & non-contributory; and (iii) waiver of subrogation.

Liquor Liability — also known as "dramshop", is liability coverage for businesses that sell, serve, distribute, manufacture or supply alcoholic beverages. In addition to other protections, liquor liability insurance protects third parties from the insured's sale of alcoholic beverages to intoxicated customers and minors.

Used For (Example): Tenant, a restaurant, leases space in landlord's center for a restaurant and over-serves a customer who, upon leaving the premises, causes a vehicular accident resulting in injuries to customer and third-parties, as well as damage to each of their property.

Why You Need It: Add if tenant has the right to sell and/or service alcohol from the premises. If tenant is not permitted to do so, but might occasionally serve alcohol without a charge, a host liquor liability coverage requirement might be appropriate.

Typical Limits: Limits of not less than \$1,000,000.00 - \$3,000,000.00 per occurrence.

Additional Suggested Requirements: (i) Require a designated location aggregate; (ii) additional insured coverage for other party; (iii) require such policy to be primary & non-contributory; (iv) waiver of subrogation; and (v) prohibited exclusions.

NOTE: Do not allow for exclusions or limitations on assault and battery.

Environmental Liability — policies designed to provide coverage for bodily injury, property damage, or injury or damage of actual, alleged or threatened hazardous material losses, including coverage for pollution clean-up.

Used For (Example): Tenant's business involves hazardous materials, and in the course of tenant's business, there is a hazardous materials loss.

Why You Need It: Add if (i) tenant will be using/storing treating or remediating hazardous materials in the ordinary course of tenant's business, or (ii) Tenant could cause water intrusion, which could lead to mold.

Typical Limits: Limits of not less than \$1,000,000.00 each loss / policy aggregate.

Additional Suggested Requirements: (i) Additional insured coverage for other party; (ii) require such policy to be primary & non-contributory; (iii) waiver of subrogation; and (iv) prohibited exclusions.

NOTE: This type of policy is the only way to procure mold coverage

**note that each policy is written differently and it should not be assumed that any/all policies will respond in the manner described above – thus, it is important to obtain copies of policies and complete a full review of coverage terms, conditions, limitations and exclusions in order to be able to identify any key coverage limitations which could be problematic for the insured and/or additional insureds*

Typical Tenant Casualty Insurance Requirements: See typical coverages above. Generally speaking, a landlord will require the following types of insurance from a tenant to ensure that (i) tenant will be able to pay for any damages or injuries caused by tenant to a third party (including other tenants, employees, and customers), (ii) tenant will be able to continue to pay the rent and satisfy all other monetary obligations under the lease in the event of a claim from a third party (including other tenants, employees, and customers), and (iii) landlord will not have to cover the cost of an accident or injury at tenant's business.

Typical Landlord Casualty Insurance Requirements: Landlords typically do not put the limits of their insurance in their form lease, as such policies are generally carried on a blanket basis, and landlords want the flexibility to modify coverage; however, landlords typically do carry CGL. For landlords, CGL is typically for bodily injury and property damage arising from landlord's ownership, management, use and/or operation of the common areas with coverage limits as may be required by landlord's mortgage.

PROPERTY INSURANCE

Property Insurance Defined:

Insures against damage to buildings and contents due to a covered cause of loss, such as a fire or windstorm. The policy may also cover loss of income or increase in expenses that result from the property damage (PD). Property insurance generally covers loss arising from physical damage to real or personal property owned by the insured, but it can sometimes be extended to include non-owned property in the care, custody or control of the insured.

Property insurance generally covers loss arising from physical damage to real or personal property owned by the insured, and is considered a first-party coverage. In other words, property insurance protects the insured from other party's actions that damage the insured's property.

Property Insurance generally covers the insured's personal property against loss such as fire and theft, and can - in limited circumstances - include loss of income or expenses as a result of such loss.

Used For (Example): Tenant's personal property is damaged fire, explosion, burst pipes, storms, theft and/or vandalism.

If not specifically set forth in the lease, the landlord-tenant relationship will be governed by common law - which typically does not require either party to insure, repair, or maintain the property. In all likelihood, this does not reflect the expectations of, nor properly allocate the risk of loss between, the parties. Therefore, one purpose of the lease is to clearly and definitively memorialize the responsibilities, expectations, and appropriate allocation of risk between the parties.

Typical Landlord Property Insurance Requirements: Landlords typically do not put the limits of their insurance in their form lease, as such policies are generally carried on a blanket basis, and landlords want the flexibility to modify coverage; however, landlords typically do carry property insurance. For landlords, property insurance is typically for Replacement cost. Requirements on landlord are usually minimal. Coverage may be provided on a blanket basis.

Ownership of Leasehold Improvements: Typically, each party insures their own property on a replacement cost basis against damage or loss (landlord insures the building / tenant insures their business personal property, contents and leasehold improvements). In a typical triple net lease, leasehold improvements installed by tenant remain tenant's property until the expiration of the lease; however, sometimes, these improvements become landlord's property upon their installation or prior to leasehold expiration. Ideally, whoever owns the leasehold improvements should be required to insure them.

NOTE: If the lease is not clear on ownership and the insurance obligation, the claim adjustment process will be much more difficult and full recovery could prove challenging. Landlord and tenant should each understand their respective responsibilities to insure the leasehold improvements to ensure a loss is appropriately covered. When negotiating the lease, be sure to state: (i) who owns the improvement; (ii) who is responsible to replace the improvement if it is damaged; and (iii) whose insurance policy covers the improvement.

Current Trend - Replacement Cost Valuations: Carriers are more focused on replacement cost valuations than ever before. This is primarily driven by two factors:

1. Inflation has had a significant impact on the cost of labor and materials, not to mention supply chain issues affecting the lead time required to secure such labor and materials. FM Global's most recent

building cost index indicated an average YoY increase of nearly 20% in replacement cost valuations for most commercial real estate assets. Couple that with the fact that many insureds have routinely failed to adequately and comprehensively evaluate their declared values at each renewal, and you have a compounding effect wherein reported values could be far below actual replacement cost. Valuations have been the main topic of discussion in every single client / underwriter meeting I have had this year. Clients who have not paid particular attention to valuations and/or updated them consistently in recent years (or significantly this year) are facing pressure to: (a) have professional replacement cost valuations completed by a qualified firm; (b) accept a “margin clause” stating that the maximum recovery for an asset will only be the reported replacement cost valuation + a buffer of 15-20%, irrespective of whether or not the policy provides “blanket” limits (not the same as coinsurance, but similarly limiting coverage in the event of a large loss); (c) increase valuations to a level the carrier dictates and/or accept a combination of RCV increase along with a rate increase that amounts to the same impact on premium as would occur if the valuations were set at the level proposed by the carrier(s).

2. Over the past 5 years there have been a handful of 8 and 9 figure losses paid by the insurance market for assets that were severely undervalued relative to declared replacement cost. Carriers contend that: (a) their loss modeling has been adversely impacted by using RCVs that are not accurate, particularly for “CAT” exposed assets; (b) they have not charged the appropriate amount of premium relative to actual exposure since the properties since RCVs have been underreported; (c) they are facing pressure from management and reinsurers to correct underreported values, attach coverage restrictions such as the margin clause referenced above or a combination of the two.

Current Trend - Wildfire Exposure: Carriers are increasingly modeling for wildfire exposure in addition to more traditional CAT modeling (Named Windstorm, Earth Movement, Flood and Convective Storm / Wind-Hail) and limiting the amount of capacity they are willing to deploy for wildfire-exposed assets. This is increasingly becoming an issue in areas in addition to the west coast as we have seen wildfires in various parts of the country in recent years including Florida, Texas, Tennessee, Nebraska and others.

Just as specific wording is frequently included in leases with regard to other CAT perils, we can expect to see tenants and others seek allowances for sublimits and/or coverage restrictions relative to the peril of wildfire, particularly those occupying assets in wildfire-prone areas.

Contingent Property Insurance: In typical triple net leases, it is not unusual for a landlord to shift the risk of property damage and liability claims to a tenant for claims resulting from a tenant's negligence or intentional misconduct, even though (i) tenant contributes to the payment of the insurance premiums through operating costs, and (ii) tenant will be responsible for its own property damage and liability claims even if they are caused by landlord's negligence. Tenants should be careful to make sure their insurance policies do not contain exclusions that would make certain landlord-transferred risks uninsured claims under tenant's insurance policies. If a tenant believes such gaps in coverage exist as created by landlord's transfer of its own risks to tenant via the lease, many property insurance carriers are willing to provide “contingent coverage” which in many instances will provide additional protection for the insured tenant, or the Landlord, as appropriate:

Used For (Example): Landlord allows tenant leasing 100% of the premises to provide property coverage on the premises in accordance with contractual insurance requirements within the lease. However, landlord wishes to have a backstop in place should tenant's coverage be insufficient and/or fail to respond in the event of a loss. Therefore, landlord reports the location as a “contingent coverage” location on its Statement of Values and secures agreement from landlord's property insurance carriers to sit excess of tenant's coverage provided that tenant at all times maintains primary insurance coverage in accordance with the lease. Landlord's property insurance carriers offer coverage at a reduced rate as compared with landlord's typical rate since tenant's coverage is intended to be primary.

Contingent Property Insurance Coverage: Allows the insured to secure coverage for property damage on an excess and/or contingent basis in the event the primary Property coverage does not / will not respond to a certain loss scenario. This is often secured by landlords as a safety net when a tenant provides Property insurance on landlord-owned assets in accordance with applicable Lease provisions (such as a build to suit single tenant property). Oftentimes contingent coverage can be secured at a fraction of the Property program rate (range = 15-30%) since the insurance carrier's expectation is that the coverage would be triggered only under extremely limited scenarios. Insureds are expected to provide the insurance carrier with current and renewal evidence of the primary Property insurance coverage on the insured asset as well as a copy of the lease provisions specifying which party is to provide Property insurance. We do not recommend writing contingent Property coverage requirements into

leases as it could appear the parties are seeking redundancy in their Property insurance placements and carriers, regardless of how much insurance is placed on an insured asset will only indemnify the parties equal to the value of the asset / indemnification owed (i.e. – one claim payment with no “stacking” of limits).

ADDITIONAL INSURANCE CONSIDERATIONS

In addition to addressing the limits above, also consider adding the following requirements:

- Require the insured's insurance company to be licensed within the applicable state, with a minimum A.M. Best rating.
- Require tenant to provide certificates of insurance upon entry, and regularly during the term.
- Require tenant to provide (or its insurer to provide) notice of any change in coverage, cancellation, expiration, replacement or other similar change to the policy

NOTE: Insurance providers typically will offer only notice of cancellation, material change and sometimes non-renewal. The statutory obligation for the insurance company to provide notice to the insured does not extend to the additional insured. The providing of these notices to an additional insured is no longer market, and not all carriers will agree to provide them. As an alternative, additional insureds can seek to require notification from the insured and/or the insurance broker.

- Consider adding the right to require additional policies that may be reasonably necessary based upon the use of the property over time.
- If a party is added as an additional insured, require the insured party's coverage is primary and non-contributory.

NOTE: In order to effectively add additional insured coverage, be sure to use language similar to the following:

Tenant shall name Landlord parties as additional insureds under tenant's Commercial General Liability, Commercial Automobile Liability and Umbrella / Excess Liability policies as respects liability arising from use, operation or maintenance of the premises by or on behalf of tenant.

- Consider adding the right to procure insurance on the non-insuring party's behalf, at their cost, if they fail to obtain.
- Consider the scope of coverage provided. There are literally 100's of additional insured forms out there. The ISO standard is CG 20 11, of which there are a couple of editions available offering different scopes of coverage. It can sometimes make sense to reference a specific form “or its functional equivalent” in order to eliminate ambiguity regarding the extent of additional insured coverage due to variations in forms.

HOW INSURANCE AFFECTS OTHER PORTIONS OF THE LEASE

The purpose of the Lease is to clearly and definitively memorialize the responsibilities, expectations, and appropriate allocation of risk between the parties. This allocation of risk is memorialized through the insurance, indemnity, and waiver of claims/subrogation provisions. The intent of this allocation is that neither party will have (or will have few) uninsured risks, and both parties can protect the economic deal they have struck.

INDEMNITY

Used For (Example): Tenant, a restaurant operator, leases space in landlord's center. A customer suffers a slip and fall within tenant's space. The customer sues both landlord (as the building owner) and tenant (as the business owner) for damages sustained by the fall.

The purpose of a contractual indemnity provision is to expressly allocate risk of liability for bodily injury and property damage amongst the parties. As a result of this allocation, the parties may ultimately agree to assume liability for damage and/or loss for which it might not otherwise be liable. Without an indemnity provision, the rights of the parties are governed by common law causes of action, and such actions (i) may create uncertainty as to which party is responsible (and therefore make it difficult to ascertain what insurance may be required), (ii) may not make the damaged party whole, and (iii) may create unlimited exposure to the at-fault party. At the end of the day, the indemnity is either compensation to the damaged party for loss or damage that has already occurred, or a guarantee to repay the damaged party for loss or damage that may occur in the future.

NOTE: It is essential that the indemnification provision be read together with the insurance provisions to ensure they are consistent.

NOTE: Since an indemnity is ultimately tied to compensation, an indemnity is only as good as the party that gives it. If the party giving the indemnity has no assets, the indemnity will similarly be limited.

Components of the Indemnity:

Indemnification: Essentially, the indemnifying party guarantees and agrees to compensate the indemnified party for all specified costs and expenses from a claim (which may or may not include the indemnified party's attorneys' fees, depending on the language of the provision and local law). An indemnity does not prevent claims, but shifts the economic risk from the indemnified party to the indemnifying party per the terms of the indemnity. Note that the indemnified party may have to sue the indemnifying party to collect and, even if the suit is successful, the indemnifying party may not be fully collectible.

Hold Harmless: While similar to indemnity, some jurisdictions distinguish between indemnification and hold harmless. For these jurisdictions, it appears that the indemnifying party may be responsible for advance payment of unpaid costs and expenses, even if the recoverable damages do not include liabilities, claims and causes of action, as noted below. Furthermore, some jurisdictions have found that "hold harmless" is an agreement that the indemnifying party will not to seek damages from the indemnified party for its own losses.

Agreement to
Defend:

The indemnifying party is obligated to step in and assume the costs and burden of any defense of the claims against the indemnified party. In some jurisdictions, the obligation to defend is separate and distinct from that of indemnification. The agreement to defend can be more broad than that of an indemnity, because an agreement to defend may apply regardless of whether the claim has merit or the indemnifying party is found liable. Similarly, many jurisdictions have determined that an insurance company's duty to defend is more broad than their duty to indemnify. The obligation to defend includes: (i) the obligation to reimburse covered losses, and advance payment of liabilities, defense costs and expenses, and (ii) the right to assume and control the defense. If an indemnity does not expressly include the duty to defend, the indemnified party runs the risk that only actual damages will be paid by the indemnifying party.

Scope of the Indemnity: The indemnity can be further tailored or limited as follows:

Indemnified
Parties:

Indemnities may be unilateral or mutual, and may include other parties, such as officers, directors, managers, members, employees, agents, subcontractors and affiliates as indemnified parties. In a perfect world, the indemnifying party should not bear an indemnification obligation if it cannot insure the risk. Therefore, indemnifying parties should try and limit being responsible for acts and omissions of customers, invitees or other individuals not within their control, or - at a minimum - limit the indemnity to the extent such liability is caused by persons within their area of control.

Covered Events: The covered events are the events for which the indemnity applies. The broader the covered events, the greater the liability to the indemnifying party. These covered events can be specifically tailored; however, the typical covered events include:

- Breach of the agreement
- The indemnifying party's acts or omissions
- Specific occurrences

NOTE: Generally, an indemnity for a breach of the agreement is not insurable. Similar to failure to perform, etc., liability coverage almost always must be triggered by an occurrence resulting in bodily injury and/or property damage.

The covered events can be further limited in a variety of ways, including by area of control and/or fault.

- Losses occurring within a defined area (e.g., landlord is responsible for losses in the Common Areas, and tenant for losses within the premises), regardless of the fault of the indemnifying party. This allocation is typically based upon the areas each party primarily controls. The indemnifying party should avoid indemnities for areas in which they have no control, as these could result in uninsurable risks.
- Losses occurring based upon fault (e.g., based upon a party's act, omission, negligence, gross negligence or willful misconduct), regardless of where such conduct occurs. Fault-based seem the most "fair" because it places responsibility and liability on the party at fault. However, in reality, the determination of proportionate fault can be difficult and may lead to litigation to determine who is responsible and to what extent. From an insurance perspective, this can lead to finger pointing by each party's insurer(s) and will inevitably delay the claim process while potentially confusing matters of coverage.

Nexus:

The nexus phrase allocates the extent of liability. The indemnified party typically wants a broad nexus phrase (such as "related to" or "arising from"), whereas the indemnifying party wants a narrow nexus phrase (such as "caused by" or "to the extent caused by"). The broader the nexus, the greater the exposure to liability. Some common nexus phrases include:

- "Caused by"
- "Resulting from"
- "Solely resulting from"
- "To the extent caused by or resulting from"
- "Arising out of"
- "Related to"
- "Attributable to"

Note that using "arising out of" or something more broad may result in the indemnifying party being 100% liable for the claim, even if only partially at fault. Using a modifier such as "to the extent caused by or resulting from" appears to allocate liability along the lines of fault, but is not explicit.

Recoverable Damages:

Under common law, not all damages are recoverable under an indemnity. To ensure the indemnified party is made whole, the indemnity should list all recoverable damages.

- Losses (e.g., paid costs and expenses): This typically includes judgments, settlements, fees, costs and expenses, but only after they are paid by the indemnified party.
- Liabilities (e.g., unpaid costs and expenses): This typically includes debts and other legal obligations. These costs are payable when liability is legally imposed, but before the money is paid. In some jurisdictions, the advance payment of costs and expenses are only recoverable if the indemnity expressly includes liabilities, claims or causes of action - in addition to paid costs and expenses.
- Claims: This typically includes damages from a lawsuit. These damages are payable upon the filing of the claim. Claims can either be direct or third-party claims. Direct claims are those that the indemnified party has against the indemnifying party. Third-party claims are those a third-party has against the indemnified party. If not clearly specified, language such as "claims sustained by any person or entity" could result in an indemnification claim for direct damages being brought for a breach of the agreement, which is duplicative for default or other remedies in the Lease. In these cases, the notice/cure periods may not apply, and the indemnified party may seek relief under this provision vs. the default provision.
- Causes of Action: This typically includes damages resulting from a right to seek relief. These damages are payable when the right to seek relief accrues.

- Attorneys' Fees: Some jurisdictions require attorneys' fees to be expressly included within the indemnity in order for the indemnified party to recover these costs and expenses. To avoid these potential losses, the indemnification should always provide for attorneys' fees and legal expenses, as well as whether such fees must be reasonable, out-of-pocket, etc.
- Consequential Damages: Most leases contain broad waivers of consequential damages, but if a lease does not, be sure to exclude indirect, consequential and special damages from the indemnity provision.

Note that, unless expressly set forth in the indemnity, the indemnified party is not required to mitigate its damages.

The foregoing list is not exhaustive, and can include more narrowly tailored items.

Limitation of Liability:

To further reduce the indemnifying party's liability under an indemnification, the indemnifying party can attempt to:

- Control the degree to which the indemnified party can participate in the legal defense
- Cap the indemnity to the indemnifying party's insurance coverage, or some other set amount
- Include materiality or other qualifiers
- Cap the timeframe for which the indemnity applies

Landlord and tenant should always make sure that they are not indemnifying the other party for risks that cannot be insured.

Typical Inclusions / Exclusions:

Landlord wants to limit its exposure against any claims - particularly where tenant is in control of the premises, as tenant has more day-to-day knowledge of the premises than landlord. Landlords will typically (i) limit indemnities to (a) landlord's negligence (preferably gross negligence) and willful misconduct, and (b) landlord's area of control - which is the common areas, (ii) not indemnify tenants for invitees or other tenants, (iii) limit their liability or indemnity obligations to the extent of their insurance coverage or some other set amount, and (iv) not indemnify tenants for a breach of the Lease, and instead rely on the Lease's default provisions.

Tenants do not want to assume liability for landlord's negligence or for claims occurring in spaces controlled by landlord. Tenants will typically want to exclude invitees from their indemnification obligation, limit their exposure to the premises and tenant's actions, and carve-out any negligence or willful misconduct of landlord. Tenants will also seek to have any landlord indemnification be as mutual as possible.

NOTE: Contractual Liability Insurance only covers bodily injury and physical injury to tangible property, subject to the limits of liability. Therefore, anything beyond these components in your indemnity are not insured. Contractual liability does not fully cover an indemnification provision.

NOTE: The indemnity provisions should always make an exception for the mutual waiver of property damage claims.

Enforceability: Some jurisdictions limit the enforceability of an indemnity. Therefore, the parties should review local, applicable laws when drafting the indemnity. Pay attention to the indemnities like the ones below, which may be limited by applicable laws:

- Indemnities where a party seeks indemnity for its own negligence
- Indemnities providing for punitive or consequential damages
- Indemnities given by protected classes under that state's statutes

NOTE: Enforceability of indemnity clauses in leases is subject to strict legal limitations - and indemnities are banned in some states. Generally, in states where indemnities are legal, indemnities are enforceable so long as they don't indemnify a party against their own negligence.

Sample “Middle-Ground” Lease Indemnification Provisions

Mutual, Control Based, with Exculpation: Subject to the waiver of subrogation provision set forth in Section _____ of this Lease and applicable laws, Tenant shall indemnify, defend, and hold Landlord harmless from and against any and all costs, losses, demands, liabilities and expenses whatsoever to the extent arising from (i) the negligence or misconduct of Tenant, its employees, agents and contractors, occurring within the Shopping Center, and (ii) the use, occupation, condition or operation of the Premises by Tenant, its employees, agents and contractors.

Subject to the waiver of subrogation provision set forth in Section _____ of this Lease and applicable laws, Landlord shall indemnify, defend and hold Tenant harmless from and against any and all costs, losses, demands, liabilities and expenses whatsoever to the extent arising from the gross negligence or willful misconduct of Landlord, its employees, agents and contractors, occurring within the Common Areas.

The duties to indemnify contemplated hereby include the duty to pay all reasonable attorneys’ fees and costs incurred by the indemnitee in connection with any such proceedings and shall survive the termination of the Lease.

Landlord shall not be liable for, and Tenant hereby waives, all claims against Landlord for any damage to any property in or about the Premises or the Shopping Center by or from any cause whatsoever, except to the extent caused by or arising from the gross negligence or willful misconduct of Landlord or its agents, employees or contractors.

Mutual, Fault-Based, with Exculpation: Subject to the waiver of subrogation provision set forth in Section _____ of this Lease and applicable laws, Tenant shall indemnify, defend, and hold Landlord harmless from and against any and all costs, losses, demands, liabilities and expenses whatsoever to the extent arising from the negligence or misconduct of Tenant or Tenant’s agents, contractors and employees.

Subject to the waiver of subrogation provision set forth in Section _____ of this Lease and applicable laws, Landlord shall indemnify, defend and hold Tenant harmless from and against any and all costs, losses, demands, liabilities and expenses whatsoever arising solely from the gross negligence or willful misconduct of Landlord or its agents, contractors or employees.

The duties to indemnify contemplated hereby include the duty to pay all reasonable attorneys’ fees and costs incurred by the indemnitee in connection with any such proceedings and shall survive the termination of the Lease.

Landlord shall not be liable for, and Tenant hereby waives, all claims against Landlord for any damage to any property in or about the Premises or the Shopping Center by or from any cause whatsoever, except to the extent caused by or arising from the gross negligence or willful misconduct of Landlord or its agents, employees or contractors.

WAIVER OF CLAIMS / WAIVER OF SUBROGATION

CGL (Example): Tenant, a restaurant operator, leases space in landlord’s center. A fire occurs in tenant’s premises, injuring a customer. Tenant is found liable to the customer for tort damages; however, it is determined that the fire was due to a failure in landlord’s electrical system within the walls of the premises. Tenant’s CGL insurer pays the damages to the customer, but pursues tenant’s right of action against landlord in a subrogation action. If successful, tenant’s insurer would recover the damages it paid to the customer as tort damages from landlord.

Property (Example): Tenant, a restaurant operator, leases space in landlord’s center. A fire occurs in tenant’s premises. It is determined that the fire was due to a failure in landlord’s electrical system within the walls of the premises. Tenant’s property insurer pays the damages to tenant, but pursues tenant’s right of action against landlord in a subrogation action. If successful, tenant’s insurer would recover the damages it paid to tenant as property damages from landlord.

The waiver of claims is designed to prevent a double recovery by the damaged party, and the waiver of subrogation is designed to protect the agreement that each party bear the risk of loss for that which it insured by preventing the subrogation by the damaged party’s insurance company.

Subrogation is the right of the insurer to “step into the shoes” of the insured and pursue any right of action the insured may have against the party that caused the loss. When the insurer pays a claim, the insurer is assigned

the insured's right to pursue the party that is liable for the claim. Ultimately, subrogation allows the insurer to be made whole after having paid out the claim to the insured.

An insurer's subrogation rights can be waived either: (i) expressly, or (ii) indirectly by the insured waiving its own rights to recover against third parties, which thereby extinguishes the insurer's right of subrogation. For the express waiver - this can only be done by the insurer, so it would happen by way of endorsement in the insurance policy. While the parties can require that such endorsement be included in the policy, the insurer is not a party to the Lease, so there is no guarantee there will be an express waiver. In most cases, an insurer's rights of subrogation are indirectly waived by its insured's waiver of claims in the Lease. Since the insurer's rights can be no greater than the insured's rights, with no rights of action by the insured, the insurer has no right of subrogation.

In most insurance policies, the insured has the right to waive its rights against third parties; however, more antiquated policies may still prohibit this waiver, which would require the endorsement above. While it may no longer be necessary in most cases to require a party to obtain an endorsement to the policy effectuating the waiver of subrogation, best practices would require that the parties waive rights of subrogation in their respective insurance policies, as well as waive their individual claims. Additionally, some states limit or prohibit waiver of subrogation.

NOTE: Workers' compensation does not permit a waiver unless endorsed and some builder's risk and floaters are similarly restrictive.

Note that virtually all Commercial General Liability policies contain exclusions for:

- Property in the care, custody or control of the named insured
- Property owned, rented or occupied by the named insured

Absent a waiver of subrogation under the applicable Property insurance policies, these exclusions can be problematic and lead to significant uninsured risk as subrogated claims are likely to be denied by the landlord's / tenant's liability insurers citing the above exclusions.

Typically, waiver of claims and waiver of subrogation in leases is limited to property insurance; however, it also applies to CGL, commercial vehicle liability, workers' compensation insurance, and excess liability.

In CGL policies, waiver of subrogation is known as "Waiver of Transfer of Rights of Recovery Against Others to Us".

Workers' Compensation (Example): Tenant leases space in landlord's center. Tenant hires a contracting firm to perform some maintenance of tenant's equipment. During the maintenance of such equipment, one of the contractor's employees is injured by a falling ceiling tile (which landlord maintains). The contracting firm's insurer awards its employee benefits under its Workers' Compensation policy, but pursues the contracting firm's right of action against landlord in a subrogation action for landlord's failure to maintain.

NOTE: Unlike waiver of claims for first-party property insurance claims, third parties cannot waive claims in a lease, as they are not a party to the lease. Therefore, injured third parties are not prevented from seeking reimbursement from landlord and/or tenant; however, that third party would be required to reimburse the insurer that paid the initial claim to prevent double recovery.

NOTE: Waivers of subrogation are not broadly excluded by any states, but certain states limit their application similar to anti-indemnity statutes; therefore, be sure to consult your insurance broker.

Tips on Negotiating the Waiver of Claims and Subrogation:

- Do not give-in to opposing counsel's request to carve-out gross negligence or willful misconduct from the mutual waiver and release. If the event is covered by insurance, it is proper for it to be waived and released.
- The waiver of claims should extend to all related parties (e.g., officers, directors, partners, members, managers, and employees); however, they should not include vendors, contractors, service providers, agents, invitees, etc. These unaffiliated parties should have their own liability insurance which is intended to respond to third-party bodily injury and/or property damage claims caused by each unaffiliated party's work or operations.
- A waiver of claims should not be limited to the extent such party has insurance or the amount of insurance actually carried, because if that party does not have sufficient insurance, is self-insured, or has substantial

deductibles, the other party would not be fully protected by the waiver of claims. It is ok to limit the waiver to the amount of property insurance required to be carried under the Lease, so long as the Lease requires insurance in amounts sufficient to cover the applicable losses. This can be a trap, however, if tenant is not required to carry casualty insurance on its personal property, leasehold improvements and inventory. As an alternative, the parties can agree to waive claims that are coverable by a special form causes of loss property insurance or contents insurance (or other similar industry equivalent); however, if the waiver is mutual, both parties must be comfortable with this level of insurance coverage.

- Some antiquated insurance policies require that the insured not take any action that would limit or diminish the insurer's right to subrogation, which would include waiving the insured's claims - thereby extinguishing the insurer's claims. If agreed-to without the insurer's consent, the insurer would be permitted to deny coverage. Therefore, before agreeing to waive subrogation (and possibly being in breach of the insurance policy), the insured should either obtain the insurer's approval, or obtain an endorsement which waives subrogation from the insurer. This will likely result in an increased premium, so the insurer can recoup its possible losses; however, the insured will be in compliance with both the Lease and the insurance policy. Furthermore, for "large" insurance placements, blanket waiver of subrogation forms are available and commonly offered wherein the waiver is permissible provided it is agreed to by the contracting parties in writing prior to the loss occurring.

NOTE: Typical waiver of claims/waiver of subrogation claims do not apply to self-insurance or self-insured retentions, and it is unclear whether or not it applies to deductibles. Therefore, to have these amounts included in the waiver, be sure to expressly state the waiver of claims/waiver of subrogation applies to these components.

In the past, some courts used equity arguments to imply a waiver of claims / waiver of subrogation in order to protect tenants from subrogation claims by landlord's insurer. In these cases, the court would find that the Lease required landlord to insure the building and that tenant was a beneficiary of the insurance held by landlord - and therefore a "co-insured". As a "co-insured", the insurer was not permitted to pursue recovery from tenant. The courts were not; however, as sympathetic to landlords. Today, since waivers of claims / waivers of subrogation are standard, courts are unlikely to imply such a waiver, so it's essential that it be included in each and every Lease.

Sample Lease Waiver of Claims and Waiver of Subrogation Provision

Notwithstanding anything to the contrary contained elsewhere in this Lease, Landlord and Tenant each agree to, and hereby do, waive all rights of recovery, claims, and causes of action against the other (including their respective agents, offices, employees, and insurance company insuring the other party by way of subrogated rights or otherwise) for any loss or damage to property caused by any of the perils that (a) would be insured against under the terms of any insurance required to be carried under this Lease (or other similar industry equivalent), or (b) is insured against under the terms of any property insurance actually carried, notwithstanding that any such damage or destruction may be due to the negligence of either party (including but not limited to the negligence of such party's agents, officers, employees or contractors), or persons claiming under or through them, whichever is greater. Landlord and Tenant agree and acknowledge that the waiver herein contained shall expressly extend to and include any uninsured loss paid by the insured in the form of a deductible, self-insurance, or self-funded retention cost. All insurance policies required to be carried by either party pursuant to this Lease shall, to the extent permitted by law, expressly waive any right on the part of the insurer against the other party. The parties agree that their policies will include such waiver clause or endorsement. The failure of any insurance policy to include such waiver clause or endorsement shall not affect the validity of this Lease or this waiver.

EXCULPATORY CLAUSE

Property (Example): Tenant, a restaurant operator, leases space in landlord's center. Landlord fails to maintain the roof. A leak forms and damages tenant's equipment. Tenant sues landlord for the damage to tenant's equipment.

The exculpatory clause and other similar releases memorialize the intentions between the parties when there are claims against each other in certain situations. This prevents the waiving party from recovering damages in connection with a direct claim from the other party under the applicable circumstances. The parties agree that the party granting the release is in the best position to manage its risk, and can choose the appropriate insurance to manage that risk.

Landlords generally use exculpatory provisions to limit and/or exclude its liability for: (i) loss and/or damage to tenant's personal property, (ii) personal injury or property damage suffered by tenant upon landlord's property (not just within the premises), and (iii) damage to the premises.

Courts tend to construe exculpatory clauses as narrowly as possible, and also tend to find them unenforceable in situations where there has been negligence on the part of the party being released (unless otherwise carved-out). Courts also do not typically apply the exculpatory clause to gross negligence, unless it expressly includes it within the provision.

Sample Exculpation Provision

Landlord shall not be responsible or liable to Tenant, or those claiming by, through or under Tenant, for (i) any damage to Tenant's trade fixtures, signs, furniture, furnishings, equipment, apparatus, non-affixed floor and wall coverings, and all other items of personal property located in the Premises, regardless of the cause of such damage, (ii) any acts or omissions of other tenants and/or occupants of the Shopping Center, (iii) any condition of the Premises whatsoever. Landlord shall not be liable for any injury to the person of Tenant or other persons in or about the Premises. None of the above events shall constitute an actual or constructive eviction, in whole or in part, or entitle Tenant to any abatement or diminution of rent, or relieve Tenant from any of its obligations under this Lease.

CASUALTY

Typically, the Lease will designate which party is responsible for repairs and/or replacement of the premises and personal property damaged or destroyed in the event of a casualty. The repair and/or replacement obligations should be consistent with the availability of insurance (e.g., if tenant is insuring the leasehold improvements installed by tenant and its personal property, and landlord is insuring the building, then the Lease should obligate landlord to repair the damage to the premises (or to make the insurance proceeds available to tenant for repair), and should obligate tenant to repair the damage to the leasehold improvements and its personal property (or to make the insurance proceeds available to landlord for repair)). Furthermore, it should be clear that the party carrying the insurance has the repair/restoration obligation if insurance is insufficient.

Rent Abatement: In many instances, providing rent abatement that is not specifically detailed in the applicable lease could be considered a voluntary payment, and thus not covered under the Business Interruption portion of a Property policy. Avoid this pitfall by clearly and specifically addressing rent abatement terms and conditions within the applicable lease.

NOTE: Many leases will state that the rent abatement does not apply if the loss was caused by tenant. If landlord elects to take this position, then any rent abatement granted will be voluntary and therefore, uninsurable. If landlords are insured for rent loss, the most practical course of action is to abate the rent regardless of cause to ensure landlord can obtain the applicable insurance proceeds.

In some circumstances, voluntary rent abatement might be covered to the extent it helps mitigate the overall Business Interruption claim (negotiable with claim adjuster).

Sample Rent Abatement Provision

If the loss renders the Premises untenantable, in whole or in part, all Rent shall abate proportionately during the period of such untenantability, calculated based upon the ratio of untenantable Net Rentable Area of the Premises as compared to the total Net Rentable Area of the Premises. Such abatement shall terminate on the earlier of (i) ninety (90) days after the date any such repair and restoration work is substantially completed by Landlord, or (ii) the date Tenant reopens for business in the portion of the Premises previously rendered untenantable.

REPAIRS AND MAINTENANCE

This is where the agreed-upon allocation of risk and responsibility of each party typically breaks down in a lease (e.g., tenant causes damage to the roof; however, the lease states that landlord is not responsible to repair damages caused by tenant). As set forth above, the repair obligations should be consistent the waiver of claims - if there is insurance coverage, then the repair obligation should fall to the insured party, not the party who caused the damage. The only situation where the party who caused the damage should be responsible for the repair is if such damage is not covered by insurance required to be carried by the insured party.

Note, as set forth above, in typical triple net leases, it is not unusual for landlords to shift the risk of property damage and liability claims to the shopping center to tenant as a result of tenant's negligence or intentional misconduct, in an effort to manage the increases to its insurance premiums - thereby keeping tenant's operating costs in check.

SURRENDER

A typical Lease may require tenant to surrender the premises in “good condition and repair”; however, to ensure consistency with the insurance obligations and the waiver of claims, surrender of the premises should exclude damage by casualty, condemnation and situations to which the mutual waiver and release apply.

GLOSSARY OF INSURANCE TERMS

Additional Insured: The person or entity added to the policy (e.g., not automatically insured) to recover insurance proceeds if such person or entity has an insurable interest in the property, which protects that interest in the event coverage for the insured party is denied due to negligent actions.

NOTE: This can only be done via endorsement.

NOTE: Additional insureds are different than loss payees, as additional insureds receive only liability protection and loss payees receive only property damage coverage.

A.M. Best Rating: A.M. Best rates the various insurance carriers. The rating is comprised of two scores - (1) the overall financial stability and management of the insurance carrier [A, B or C, + / -], and (2) the insurance carrier’s net worth [XV - I].

NOTE: A-/VII is a typical, acceptable rating.

Blanket Policy: Coverage that insures multiple properties under one policy.

Certificates of Insurance: Standard forms published by ACORD that are often used as a quick and easy reference point regarding the required insurance.

NOTE: Certificates of insurance do not provide binding evidence of coverage and often should not be viewed as sufficient proof that the insured party has adequate coverage. Other items, such as copies of key endorsements and/or policy forms, may be required.

“Claims made” Policies: Policies that cover claims filed during the policy period for claims that occurred during the policy period or an earlier policy period provided that the policy “retroactive date” precedes the date the claim is made.

NOTE: Supplemental coverage is available to cover outlying claims, known as “nose” and “tail” coverage.

Deductible: The amount the insurer will deduct from the loss before paying up to its policy limits.

NOTE: Typically, higher deductibles results in lower premiums; therefore, it is typical for a landlord to pass through reasonable deductibles to tenants if there is a loss.

ISO Forms: Insurance Services Offices forms, upon which most policies are written, or in the case of carrier “manuscript” forms, serve as the basis upon which the carrier form has been developed.

Limit: The total amount the insurance company will pay the insured for such claim.

Loss Payee: The person or entity added to the policy (e.g., not automatically insured) to recover insurance proceeds if such person or entity has an insurable interest in the property, which protects that interest in the event coverage for the insured party is denied due to negligent actions.

NOTE: This can only be done via endorsement.

NOTE: Loss payees are different than additional insureds, as loss payees receive only property damage coverage, and additional insureds receive only liability protection.

Malicious Mischief:	Deliberate damage or destruction, which is typically covered under vandalism.
Named (or Specified) Peril:	Events named in a policy (e.g., vandalism, windstorm, fire or sprinkler leakage). A named-peril policy covers only the specified events.
Named Insured:	The party that pays the premium, and for whom the insurance policy is underwritten.
"Occurrence" policies:	Policies that cover claims that occur during the policy period, even if the claim is filed after the expiration of the policy period.
Personal Property:	All property not classified as real property, which is easily moved (e.g., furniture and trade fixtures).
Primary and Noncontributory:	Primary and noncontributory endorsements and/or policy language dictate the order in which multiple policies respond to a loss - primary, non-contributory policies mean these policies go first without contribution from other insurance policies of an additional insured.
Real Property:	Land and the permanent things on it (e.g., buildings and fixtures).
Replacement Cost:	The actual cost of replacing damaged or destroyed property, without consideration for depreciation.
Self-Insurance:	When the insured assumes the risk of loss by setting aside an amount of its own monies in the event of any losses that occur—losses that could ordinarily be covered under an insurance program.
Self-Insured Retention ("SIR"):	A dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will respond to a loss. Credit risk within the SIR lies with the insured, as opposed to the insurer (carriers ultimately bear the credit risk for claimed amounts within deductibles should the insured default upon their deductible obligation). Carriers typically do not require nor desire to be notified about claim amounts within SIR's unless or until there is a reasonable expectation that the SIR will be breached.