

## This Is Not a Drill: Damage & Destruction From the Trenches

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It is commonplace in lease negotiations to barely glance at damage and destruction provisions, judging the likelihood of having to call on such clauses to be remote. It can be hoped that destructive events are at best an academic exercise for lawyers to consider in most commercial tenancies. The increasing frequency of damaging weather events around the world, however, would suggest otherwise. Whether due to climate change or unfortunate luck, should your building or premises suffer a flood, fire or other destructive event, damage and destruction clauses take on renewed importance. More important still, however, will be an organization's ability to respond quickly and in an organized manner to the event and all surrounding issues.

It may not be possible to prepare for all situations that could result from a destructive event. It is possible, however, to draft lease templates and negotiate lease provisions that anticipate recurrent issues common to many destruction events. Similarly, it is possible for any organization to engage in advance preparation which will result in a quicker and more comprehensive response to any incident. Awareness on the part of in-house counsel and private practice lawyers of the multitude of issues an organization may deal with in the wake of a destructive event can enable any counsel to better prepare and respond in such circumstances. This paper provides suggestions on how to prepare in advance for a destructive event, immediate actions to take in the wake of an event, and discusses resultant issues common to many such events.

### Advance Preparation for Damage & Destruction Event Response:

Regardless of the size of the organization, it is possible to take internal steps and establish advance protocols which will assist in responding to a destructive event:

- *Have clearly defined roles & responsibilities already in place prior to any incident:* all employees should be aware of their own job description and responsibilities and those of other employees. The right "team" is able to jump into action if everyone knows their responsibilities.
- *Empower the appropriate employees to be able to make swift, agile decisions without running through various levels of management.* Any destructive event requires quick response time on a variety of fronts. Empowering your employees will save time and money in responding to an event and may avoid further risk to the organization.
- *Have a business interruption plan, including crisis management protocols in place, ensuring everyone is aware of those protocols.* Consider running tabletop or crisis exercises in real time to test your protocols. Also consider that most business continuity plans cover only a 48 hour period following an event. Thought should be given to how an organization responds if your business is interrupted due to a destruction event for a much longer time period.
- *Maintain good working relationships at various levels with landlords if you are a tenant, and with your tenants if you are a landlord, along with established rules on communications.* Knowing in advance the key personnel responsible in any such destruction event allows for quick response and action.

### Immediate Action in Wake of Destruction Event:

The first 24 to 48 hours following any destruction event are the most critical in terms of proper response and risk mitigation. The following is a non-exhaustive list of some of the critical issues that will need to be handled within this vital time frame. Proper advance planning on a response to any destructive event, scalable as to size and impact of the event on your operations, will assist in ensuring a quick and appropriate response:

- *Ensure the safety of all people.* This goes without saying perhaps, but evacuation drills are important and the calm but quick evacuation of your premises can save lives.
- *Ensure the security of your premises:* Know in advance whether landlord or tenant is responsible for security of premises, buildings or shopping centres and ensure security protocols are being followed. Access should be tightly controlled for many reasons including, but not limited to, health and safety, confidentiality, avoidance of theft or evidentiary reasons.
- *Controlled communications:* The timing of communications is key, requiring information to be relayed to all stakeholders in an appropriate, timely fashion.
- *Task Management:* Centralized management of response to the event will ensure the right people are responding to the right issues and allow for a measure of control over the event response. Depending on the size of the event, the central management may only be required at ground level, or it may be required at ground level and at an upper management, business-continuity level within an organization. For larger events, a central management team at a higher level within the organization should include at minimum the following roles:
  - Business continuity management team, if you have one
  - Operations
  - Security
  - Insurance
  - Legal
  - Health & Safety
  - Communications (internal & external)

#### Managing the Ongoing Response to the Event

After the 48 hour initial response period has passed, an organization must be prepared to move into a cleanup phase, literally on the ground and in terms of dealing with the multitude of issues which will then emerge as a result of the event. Some common issues dealt with during the aftermath of a destruction event include the following:

- *Determine how many employees were working in the premises and where everyone worked:* Keeping accurate employee manifests is central to avoiding problems post-evacuation. Limited access to the premises may mean employees are unable to retrieve personal items left at their workstation and customer property may also remain on-site. All items left on site may have been damaged or contaminated during the event. Whether a remediation specialist is engaged or not, careful tagging and storage of personal property will be necessary while determinations are made regarding the possibility of cleaning and returning items or investigating insurance coverage options for severely damaged property.
- *Business Interruption Plans:* Ensure continuity of your business operations by making it possible in advance for employees to work from home, or from a redundant or dark space. Depending on

the length of time before re-occupation is possible, new space may need to be leased for a short term, in which case sourcing furniture and equipment will be necessary.

- *Read your lease*: Review key lease clauses, such as damage and destruction (rent abatement rights, termination rights, timelines for provision of architect certificate on damage, repair obligations), insurance, and environmental for tenant and landlord rights and obligations and ensure central management team is aware of all such provisions.
- *Communications*: Even small events require planned communication with customers, employees and management. Larger events will require regularly scheduled updates from key personnel for each of the foregoing stakeholder groups.
- *Consultants and Specialists*: Awareness of an organization's limitations in responding to an event ensures you retain appropriate specialists to handle some areas, such as forensic accounting services, remediation specialists, environmental specialists, engineering consultants or architectural consultants. Independent analysis by specialists may also be necessary should claims arise relating to the event.

Every such destructive event has the power to test an organization's resiliency. Having a plan, and making sure that everyone on the team knows how to implement the plan will allow your organization to weather any unforeseen circumstance with a much more effective response. As the saying goes, those who fail to plan should plan to fail. But then again, those who fail to plan wouldn't think that far ahead anyway.