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Are There Holes In Your Bullet-Proof Vest?: Insurance And Indemnity In Commercial Leases

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I. INTRODUCTION

Why is insurance important in lease negotiations? Negotiating a commercial lease often involves allocating certain risks to one party or the other. However, it is not uncommon in these negotiations for there to be a risk that neither party wants to take. One way to resolve these sorts of issues is to place the risk on the party that can (or can most easily) insure against the risk. This framework can help to solve many thorny issues.

Some practitioners disagree with this approach, arguing that risk allocation should be determined first, and that insurance requirements should simply follow the distribution of risk. They reason that, as lawyers and not insurance professionals, we do not always fully understand what is covered by the insurance policies, which can be quite complex, and that this makes it dangerous to make risk allocation decisions based on merely an attorney's understanding of insurance coverages. In fairness, there is some truth to this. Take business interruption insurance as an example. There has long been a requirement for tenants to carry this coverage in most commercial leases, and pre-pandemic, it was widely assumed that this insurance would protect tenants from almost any type of business interruption outside of a tenant's control, including in a government shutdown situation. However, in the flood of litigation following the pandemic, most courts across the country have held that there is no coverage under business interruption policies for closures and other business losses relating to the COVID-19 pandemic. These

courts reason that, because business interruption coverage is a species of property insurance, property insurance policies require that there be physical damage as a prerequisite to recovery (clever claims that the presence of a virus on surfaces constitutes physical damage have largely, if not universally, been rejected by courts that have considered the issue).

However, the "lack of knowledge" issue is just as dangerous if we work through the risk allocation exercise before considering insurance, as we then run the risk of failure to make sure that our clients have the insurance necessary to cover the risks as distributed. At the same time, the "risk allocation first" approach makes the task of negotiating leases more difficult. Determining distribution of risk without consideration of insurance will usually come down to arguments about fault. Having each side focus on all of the ways that the other might be a bad actor can make for very contentious discussions. That being the case, there is little benefit to forswearing the use of insurance as a tool to resolve differences of opinion as to the proper distribution of such risks, especially since certain types of insurance apply regardless of fault, which can provide a way around a potential roadblock.

Regardless of whether one considers risk allocation or insurance coverages first, the best course of action is to make sure that we, as lawyers, have a good understanding of this subject. However, we are unlikely to ever have the detailed knowledge of a dedicated risk manager or insurance consultant. We should not be afraid to turn to these experts if we find ourselves in over our heads.

II. INSURANCE

A. Why Insurance Matters

From the landlord's perspective, a requirement that the tenant carry liability insurance is important in order to maximize the likelihood that the tenant will be able to pay a claim that might otherwise be ruinous and still remain in business, paying its rent, and operating in the landlord's building or shopping center. In addition, such coverage can also be used to ensure that the tenant will have the ability to pay a claim brought by the landlord (and still remain open and operating, and paying its rent, as noted above). Further, because the landlord will be named as an additional insured, the tenant's commercial general liability policy will also provide some measure of direct protection to the landlord against claims by third parties.

Property insurance is also important from a landlord's perspective. At minimum, a tenant should be required to insure its own personal property. If the lease contains proper waiver language (discussed below), this requirement will protect the landlord from claims by the tenant relating to damage to the tenant's personal property. Many leases go further and require the tenant to carry property insurance covering some or all of the leasehold improvements. If this requirement is present, it will work similarly with the waivers to protect the landlord from claims

by the tenant relating to damage to the applicable leasehold improvements, and will also provide the funds for restoring the leasehold improvements in the event of a casualty (also discussed below).

With respect to property insurance relating to leasehold improvements, landlords will sometimes elect to obtain their own policies (together with any coverage that the landlord may maintain as to the basic structure of the building or center), and pass on the premium costs as part of shared operating expenses or common area maintenance costs (the "triple net" lease structure, for example, typically requires the tenant or lessee to promise to directly pay all the expenses of the property, including real estate taxes, building insurance, and maintenance, although there are frequently exceptions and limitations). Whether this is wise or fair arguably depends on the circumstances. For example, if a building has only a single tenant, the landlord may be more inclined to allocate the responsibility for casualty repairs solely and completely to the tenant, and to therefore have the tenant bear the responsibility of obtaining property insurance. This has the advantage of getting the landlord "out of the way" in a casualty situation, which may allow for repairs to proceed more efficiently. Conversely, in a multi-tenant building or center, the landlord may want more control, and may be in a better position not only to accurately determine the value of the property as a whole, but to coordinate repairs that may affect multiple tenants' spaces. In this case, the landlord may purchase the insurance and pass through the costs to the tenants. However, even in a multi-tenant building or center, a landlord may consider whether some or all of the tenants have unique or specialized buildouts which may be expensive to insure. If so, it may not be fair to spread the cost of insuring such improvements among the tenants of the building or center generally (plus, the tenants that have unique or specialized buildouts are likely to be in the best position to restore them after a casualty loss).

From the tenant's perspective, a tenant cares if its landlord carries insurance for many of the same reasons. In addition, it can be particularly important to a tenant that its landlord carry rental interruption insurance, as this can allow the tenant to make an argument for rental abatement in certain circumstances, as discussed below. If a tenant has significant leverage, it is customary and market to insist on having landlord's insurance requirements spelled out in the lease. However, if the tenant lacks leverage, as a practical matter, it may not be absolutely critical to require the landlord's insurance requirements to be expressly set forth in the lease. Any institutional owner is almost certainly always going to carry reasonable levels of insurance. Furthermore, if there is debt on the property, the lender will also require that the landlord carry reasonable and proper insurance coverages. If a tenant does not have the leverage to require its landlord to maintain insurance coverage in the lease, it is important to consider who the landlord is—and what sort of entities are likely to succeed to the landlord's interest in the future. At a very small property that is, or that could be, owned by an individual or a small, unsophisticated owner, it becomes more

important to have these requirements expressly set forth in the lease, whereas a large, first class shopping center, or ground-level retail space in a skyscraper, for example, will likely always be owned by a relatively sophisticated party. Unfortunately, when dealing with smaller owners, the owner's very lack of sophistication may make it more difficult to negotiate this point.

B. Types of Insurance

While there are many types of insurance coverage, including policies or endorsements covering specific types of losses, in lease transactions typically there are two broad categories of insurance that are considered: (1) liability insurance; and (2) property insurance.

i. Liability Insurance

Liability insurance is "third party" insurance meaning that it pays claims (whether for personal injury, property damage, or other types of losses) to the injured party (who is a "third party" as to the insurance company and its insured). General liability insurance – which is typically contained within a commercial general liability policy ("CGL") – also usually covers defense costs to defend against claims by a third party. As discussed below, landlords will ask to be included as additional insureds on their tenant's CGL policy, meaning that a tenant's CGL policy will also provide some measure of direct protection to the landlord against claims by third parties (typically in situations relating to the negligence or misconduct of the tenant). Encompassed within the "liability insurance" category are: (1) workers compensation / employers liability insurance; and (2) automobile liability, each of which also provides third party coverage and is generally required in commercial leases.

ii. Property Insurance

Unlike liability coverage, property insurance is "first party" insurance that pays claims directly to the insured party for losses suffered by such party. Property insurance provides coverage against many risks to the property, including fire and weather damage. Without additional endorsements, property coverage typically excludes flood, earthquakes, and hazardous waste coverage. "Special form"[1] (which was formerly known as "all risk") policies are a popular and readily available form, and it is very common to see them required in leases (although there is some variability as to the items that they are required to cover, as set forth above).

As noted above, business interruption/business income insurance (typically carried by tenants) and rental interruption insurance (typically carried by landlords) are considered to be a species of property insurance. Business interruption/business income insurance covers loss of income suffered by a business when damage to its premises by a covered cause of loss causes a slowdown or suspension of the business's operations during the

[1] Sometimes also seen described in leases as "special causes of loss form," or similar phrasing.

time required to repair or replace the damaged property (it can sometimes also be extended to apply to loss suffered after completion of repairs for certain period of time to allow the insured sufficient time to resume operations at full capacity). Rental interruption insurance will cover lost rental income when a covered event occurs that makes rental property unusable or untenantable. Typically the "covered event" will be some type of casualty or physical loss at the property itself. However, some large owners (typically institutions which own a large volume of commercial real estate and therefore have some degree of leverage over the insurance companies) can have manuscript policies that extend to other circumstances. For example, in leases that require a landlord to grant a rent abatement to a tenant for any interruption of utility service, even if not due to the fault of the landlord or to any casualty or loss occurring at the property, a landlord with this type of leverage may be able to require its insurer to cover rental loss resulting from such contractual abatement obligation (but, even then, this will likely only be under certain circumstances).

iii. **Other Types of Insurance**

Liability and property insurance are absolutely critical. In addition to liability and property insurance, landlords and tenants should, depending on their circumstances, consider additional types of coverage that may be appropriate, which may be purchased separately or endorsed onto existing policies. A particularly critical consideration is umbrella insurance. Umbrella policies sit on "top" of the primary policies and behave similarly to simply purchasing a higher-limit primary policy. These types of policies protect against a black swan event and financial ruin, but are inexpensive because they supplement other policies (*i.e.,* they do not pay out until the limits of the primary policy have been reached, making a payout by the insurance company less likely).

In addition, recent events highlight consideration of policy enhancements for looting, vandalism and riots, such as:

- Vandalism insurance providing coverage for willful and malicious damage to the insured's property;
- Riot and Civil Commotion insurance;
- Business interruption insurance (see above);
- Rental interruption or rental income insurance (different from business interruption insurance; see above);
- Civil authority coverage; and/or
- Plate glass insurance covering all plate glass in the premises.

Likewise, changing environmental conditions or the specific environmental condition or the intended use of a property could cause a landlord or tenant to consider insurance such as:

- Pollution legal liability insurance; or

- Specific insurance coverage for flood and earthquake damages.

Additional coverages that may also be considered include:

- Leasehold interest insurance;
- Insurance coverages and/or bonds related to the operation of the parking areas;
- Liquor legal liability coverage (also known as dram shop insurance);
- Products liability insurance; and/or
- Comprehensive boiler and machinery coverage, including electrical apparatus.

C. Typical Lease Insurance Requirements

Commercial leases will typically require that a tenant (and possibly the landlord, depending on the leverage of the tenant, as noted above) carry specific types of insurance and that such insurance meets specific requirements. The attached Appendix A contains a sample insurance provision from a commercial lease. *This provision is merely an example, and should not be used without discussion with your client and its risk manager or insurance consultant*. Every property is unique (and, to some extent, every individual lease is unique), and the lease insurance requirements should be tailored to fit the particular property and/or lease transaction.

To summarize, an insurance provision will generally contain requirements for:

i. **Types of insurance and Minimum Limits**

1. Types of insurance described in Section II.B, above.
2. With respect to limits, these should be determined by the landlord in consultation with its risk manager/insurance consultant. Lawyers can provide insight and perspective as to what we see in the market.
    a. If a tenant objects to the cost of a certain level of liability coverage, one compromise might be to keep the landlord's preferred minimums, but allow the tenant to hit the required limits using a combination of primary and umbrella policies.
3. With respect to property insurance, leases often require insurance to be in amounts not less than 100% of the full insurable replacement cost values (without deduction for depreciation), with an agreed amount endorsement or without any coinsurance provision. Note that many properties are undervalued after COVID. Landlords should consider whether the policies they require are caught up to post-COVID valuations.

ii. **Additional Insured / Loss Payee Requirements**

1. Most landlord form leases require that the landlord (and sometimes others, such as the landlord's lender and/or property manager) be named as additional insureds on the tenant's liability policies.
2. Additional insured vs. named insured
    a. A named insured is exactly what it sounds like, the holder of the policy that is entitled to the full benefits of the policy.
    b. An additional insured is another party added to the policy that will be entitled to protections, but there are some limits. Most critically, the coverage will only apply to incidents that are related to the primary policy holder's work and responsibilities. ISO CG 20 10 and CG 20 37 are commonly requested additional insured endorsements.
    c. Attention should be paid to the specificity with which the landlord (or tenant) is required to be named as an additional insured, as courts will strictly construe additional insured requirements. For example, an Illinois court held that a paragraph of agreement that provided: "[a]ll insurance that may from time to time be required shall be obtained in such manner as the parties hereto agree" did not create an obligation for insurance coverage to satisfy the requirements under an additional insured endorsement. *Clarendon America Ins. Co. v. Aargus Sec. Systems, Inc.,* 374 Ill.App.3d 591 (1st Dist. 2007). Another court similarly concluded that a contract did not confer additional insured status where the contract that required one party to name the other party as an additional insured on a certificate of insurance (as opposed to a policy of insurance). *West Bend Mutual Ins. Co. v. Athens Construction Co*., 2015 IL App (1st) 140006.
3. Loss Payee
    a. Many landlord form leases require that the landlord be named as the loss payee on the tenant's property insurance policies. A loss payee is the party to whom the claim from a loss is to be paid—i.e., the claim will be paid to the loss payee *instead* of the primary policyholder. This is only

appropriate to the extent that the tenant is carrying insurance on the landlord's property (e.g., leasehold improvements and other fixtures). A landlord should never be a loss payee on a tenant's insurance policy covering the tenant's personal property, movable trade fixtures, etc.

iii. **Requirements for Insurance Company Size/Strength**

1. Consider the impact of such requirement.
2. For example, a requirement that an A.M. Best A++ insurance company is used will significantly limit options and could increase premiums or deductibles, without much added advantage from insuring through such company. Conversely, too liberal a requirement may result in use of a "fly by night" insurance company lacking the ability to pay a significant claim.

iv. **Notification to the Landlord of Cancellation / Change**

1. Tenants frequently claim that their insurance companies will not agree to this. According to several insurance brokers that we contacted, this is not accurate. Insurance companies would prefer not to be required to give such notices, but will generally agree to do so if their client pushes the issue.
2. If a landlord agrees to delete this requirement, it should at least require the tenant to give the landlord notice of any cancellation or change in coverage.

v. **Maximum Deductibles**

1. This can be a contentious point with larger tenants. As the insurance market hardens, deductibles are increasing and older leases that have a "standard" deductible of a lower amount (*e.g.,* $25,000 or $50,000) may be practically impossible.
2. Self-insurance is not uncommon as a resolution. This can be complex. A sample self-insurance provision is attached to these materials as Appendix B, but these are often heavily negotiated.

vi. **Per Location Endorsements**

1. Without such an endorsement, if a tenant with multiple locations suffers a loss at another location, there may be insufficient insurance coverage left to respond to a claim at the landlord's property.
2. If a tenant will not agree to this, consider requiring significantly higher minimum limits. This is not a perfect solution, but it will at least reduce the chances of a tenant suffering "hits" at several locations within the same policy year, leaving no coverage left for the landlord's property.

vii. **Primary and Non-Contributory**

1. A requirement that the tenant's insurance be primary and non-contributory, and provide that any "other insurance" clause in the insurance policy shall exclude any policies of insurance maintained by landlord and the insurance policy shall not be brought into contribution with insurance maintained by landlord.
2. This means that, if both the landlord's and tenant's insurance policies would provide coverage, the tenant's insurance policy is used first.

viii. **Certificates of Insurance**

1. **I**nsurance Provisions often provide that a Certificate of Insurance will be furnished.
2. ACORD Standard Certificate of Insurance Forms, however, contain the following disclaimer: "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below."
3. Courts will enforce this disclaimer language, but providing policies for every lease can be impractical. *See, e.g*. *Greenway Run Condo Assoc. v. K. Hovnanian at Howell, LLC, et al.*, No. A-0939-21, 2022 WL 2132263, at *2 (N.J. Super. Ct. App. Div. June 14, 2022) (citing disclaimer language in holding that a homebuilder and a condominium association did not present enough information to serve a paving company's insurer instead of the company itself where the only evidence of insurance was a certificate of insurance).
4. Language providing that copies of policies will be provided upon request may be a workable compromise, but, in our experience, many tenants simply will not agree to provide copies of their policies, and landlords will often accept the certificate,

notwithstanding the disclaimer. This practice is likely to continue until a landlord gets burned in a high-profile case.

III. INDEMNITY

Indemnity provisions are not insurance agreements, but no discussion of insurance in leases would be complete without touching on this topic, as insurance and indemnity clauses in leases often go hand in hand. Indemnity provisions in leases require one party to hold the other harmless from injuries or damages caused by the other party, its agents, employees, invitees or third parties (however, remember that leases may also have exculpatory or other waiver clauses protecting one or both of the parties—even as to claims arising from the protected party's own negligence—and that such provisions may, and sometimes should, govern over the indemnity; see below re waivers of subrogation, for example). Landlords generally prefer broad indemnity provisions, including an indemnity for the landlord from the consequences of landlord's own negligence (to the extent permitted under the laws of the applicable state—see below). The rationale is that the tenant is occupying the space and carrying on day-to-day business. The landlord thus may try to shift the risk of mishaps onto the tenant, even covering scenarios where the landlord is also at fault. An examples of the sort of indemnity provision and accompanying landlord-exculpation often found in commercial leases is set out in Appendix C.

A. The Intersection of Indemnity and Insurance

Through indemnity provisions, landlords typically shift liability to the tenants who conduct business on the premises daily. From a practical standpoint, if the lease shifts liability for "any and all" claims to the tenant, it becomes incumbent upon the tenant to insure against those claims for which it has assumed liability. From the insurance perspective, generally-speaking, standard commercial general liability coverage will 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. This is done through a combination of two provisions. First, most commercial general liability policies contain an exclusion for contractual liability coverage as follows:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

Second, in this exclusion there is an exception for liability assumed under an "insured contract." Leases are generally considered to be "insured contracts" under standard general liability provisions such as the following:

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

B. Enforcement of Indemnity Provisions

When attempting to secure indemnity rights in a commercial lease agreement against a landlord's own negligence, landlords should be mindful of the particular state requirements regarding indemnity in such circumstances. Courts will generally broadly interpret contracted-for indemnity, with some limitations. Many courts, for example, will permit a party to contract to indemnify another party for that other party's own negligence unless

such intention is expressed in clear and unequivocal terms. *See, e.g.*, *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166, 171 (S.C. Ct. App. 2018) (citation omitted). In New York, courts have held that a statute providing that landlords cannot be relieved of their responsibility for damages cause as a result of their 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 procurement requirement. *Castano v. Zee-Jay Realty Co.*, 55 A.D.3d 770, 866 N.Y.S.2d 700 (2d Dep't 2008). *See also Rodriguez v. 5432-50 Myrtle Ave*., LLC, 148 A.D.3d 947, 50 N.Y.S.3d 99 (2d Dep't 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 exemption from liability for damages or injuries caused by the lessor's own negligence does not prohibit indemnity). Tenants as well should be mindful that these provisions are likely to be enforced.

IV. WAIVER OF SUBROGATION

The lease provision commonly referred to as the “waiver of subrogation” is directly tied to insurance issues. Preliminarily, it should be noted that “waiver of subrogation” is really something of a misnomer for these provisions. This paragraph in a commercial lease typically addresses two separate (if related) concepts: (1) a waiver of claims for losses covered by the injured party’s insurance (see below for more detail); and (2) a requirement for each party to have its insurance company waive its subrogation rights. The critical part of the provision is the first concept—the waiver of claims, not the waiver of subrogation. With a properly-worded waiver of claims for losses covered by the injured party’s insurance, 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 the rest of these materials will use that term.

The waiver of subrogation is a key provision in a commercial lease. It 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. The goal is to minimize the 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.

The particular phrasing of a waiver of subrogation can be very important if the provision is to work as intended. First, in order to be fair, the provision must be mutual. Fortunately, this usually isn’t an issue that must be argued, as many landlord form leases already include mutual language. Second, it must be clear that the waiver

of subrogation governs and controls over anything else contained in the lease to the contrary. Otherwise, the waiver may simply be in conflict with other portions of the lease (indemnity, repair and maintenance, etc.). Third, the waiver should apply to the greater of: (1) losses covered by the insurance actually carried by the injured party; or (2) losses which the lease requires the injured party to insure. The second prong of the waiver is important, as, without it, a party could defeat the waiver by breaching the lease and not carrying the required insurance. Finally, the provision should not say that, if the insurance company won't waive subrogation, then the waiver is void. This essentially lets the insurance company override the waiver, protecting its own interests by shifting the loss back to the party "at fault" and off of the insurance company. As noted above, even if the insurance company won't waive subrogation, if the waiver of claims is worded properly, the insurance company's subrogation rights won't be effective anyway.

It should be noted that a great many waiver of subrogation provisions do not address the treatment of deductibles. It could be argued that an amount payable by an injured party isn't actually covered by insurance, so the waiver doesn't apply and, if the other party under a lease is at fault for the loss, the injured party should be permitted to recover from the wrongdoer any amount paid as a deductible. Some leases, however, expressly state that any amounts payable by a party as a deductible under such party's insurance will be treated as if it were covered by insurance for purposes of the waiver of subrogation. The rationale is that (subject to any maximum deductible requirements in the lease), each party, in deciding the level of deductible that it will carry, is making a decision about the amount of risk that it will bear, and that it would be unfair to allow one party that decides to bear an increased risk to then be able to avoid the waiver and shift that risk to the other party.

The waiver of subrogation provision is often overlooked, and often misunderstood, but it can be a powerful tool to defend your client against many claims. However, if your client is the party injured due to the fault of the other party, it may be surprising for your client to learn that it doesn't have a claim against the wrongdoer. This often just "feels wrong," as the human "gut instinct" is to seek redress for a wrong from the wrongdoer. It can often be difficult to explain to a client that has suffered a loss that the client must look to its own insurance (and possibly face increased premiums in the future as a result). In these situations, we must act in our capacity as counselors to help our clients to understand that the waiver is mutual, and, in different circumstances, would serve to protect the client from claims by the other party.

Bear in mind that state law limitations on waivers of liability can impact the waiver of subrogation, and may keep it from working as intended. As always, it's important to be familiar with the law in the applicable jurisdiction.

V. OTHER LEASE PROVISIONS

There are a number of other provisions typically contained in commercial leases that impact or are impacted by insurance considerations, including:

A. Use Clause

A tenant should not be permitted to make any use of the property that would cause a cancellation of the landlord's insurance, or an increase in the insurance premiums. However, with respect to the "increase in premiums" issue, a not uncommon compromise is to remove the prohibition but require the tenant to reimburse the landlord for the increase.

B. Casualty

It is critical that the casualty provisions in leases be structured so that the party with the restoration obligations is the party that carries (or will receive) the insurance proceeds covering the loss. Unfortunately, nonalignment of the insurance and casualty provisions is a very common mistake in landlord form leases. Consider: if the tenant insures any of the leasehold improvements and the lease is terminated, what should happen? Many tenants will argue that they should receive the insurance proceeds, but this is almost always objectively incorrect if the landlord is entitled to require the tenant to surrender the leasehold improvements with the premises at the end of the term. If the lease is structured in that manner, then the landlord must receive either the improvements or the insurance proceeds covering the loss of those improvements. Interestingly, when a lease casualty provision addresses this subject (many don't), tenants will oftentimes fight hard for the right to retain these proceeds—notwithstanding the fact that they will have agreed in the insurance provision to name the landlord as the loss payee on the policy. Those two positions cannot be reconciled.

C. Rental Abatement Provisions

Although usually a negotiated point, it is not unusual for a tenant with any degree of leverage to successfully require a landlord to provide rental abatements in certain circumstances, such as casualties, interruption of services, and, less frequently, force majeure situations. Abatement of rent while a landlord fulfills its casualty repair and restoration obligations usually isn't contentious—many landlord form leases grant this. This is because the landlord's rental interruption insurance will almost certainly cover this abatement, as a casualty loss involves physical damage.

Landlords will often at least attempt to resist other contractual abatement rights but some (such as the interruption of services abatement) are granted relatively often. Tenants with clever leasing counsel will often argue that the landlord's rental interruption insurance will cover these contractual abatements, and even many

sophisticated landlords will accept this argument and accede to the tenant's position. However, it may not be true that the landlord's rental interruption insurance will provide coverage. As noted above, rental interruption insurance is a type of property insurance, and so typically only applies in situations where there has been a physical loss to the applicable space. Therefore, a contractual abatement granted to a tenant under a lease provision in connection with, for example, an interruption of utilities, may not actually be covered by the landlord's rental interruption insurance if the utility interruption is not caused by physical damage at or to the landlord's property. As noted above, some owners of very large national portfolios of commercial properties may have enough leverage over their insurers to obtain a manuscript policy that expands the circumstances in which rental interruption insurance will apply, but we should never just assume that our clients have more than the standard coverage.

VI. CONCLUSION

Describing insurance as a "bullet-proof vest," as in the title of this presentation, is certainly a bit of an exaggeration in many respects, but, in some ways, the comparison is apt. Just as the vest does not provide protection for the entire body, insurance is not going to provide either party in a lease with an impregnable shield to protect against all claims. However, also like a well-designed and constructed bullet-proof vest, well-designed and constructed insurance language does provide significant protection against many risks—especially when combined with other provisions in a well-drafted lease that properly complement and work with the insurance requirements. It is our hope that this presentation will give you the tools that you need to ensure that your leasing clients are properly protected, and also help you in negotiating areas of a commercial lease that can often be a trap for those that are ill-prepared.

APPENDIX A

Sample Lease Insurance Provision

__ Landlord's Insurance. Landlord shall, from and after the Commencement Date and throughout the Term, provide and keep in force or cause to be provided or kept in force:

(a) Commercial general liability insurance with respect to Landlord's operation of the Building for bodily injury or death and damage to property of others; and

(b) Property insurance (including special cause of loss form) in respect of the Building, except that Landlord shall not be required to carry such insurance on Tenant's Property, or any other trade fixtures, equipment, personal property, or on any alterations or leasehold improvements in the Demised Premises, or on any systems exclusively serving the Demised Premises;

together with such other insurance as Landlord, in its sole discretion, elects to obtain. Insurance effected by Landlord shall be in amounts which Landlord shall from time to time determine reasonable and

sufficient, shall be subject to such deductibles and exclusions which Landlord may deem reasonable and shall otherwise be on such terms and conditions as Landlord shall from time to time determine reasonable and sufficient. Tenant acknowledges that Landlord's insurance may provide that no insurance proceeds will be payable thereunder in the case of destruction or damage caused by any occurrence other than risks included in the special cause of loss form.

__ Tenant's Insurance.

(a) During the Term, Tenant shall maintain, at its expense, the following minimum insurance coverages:

(i) Commercial general liability insurance policy on an occurrence (not claims made) form for the Demised Premises (the "**CGL Policy**"), which includes a "Per Location Aggregate," providing for coverage for liability arising from premises operations, bodily injury or death, damage to property of others and personal injury and advertising injury with minimum limits of liability of:

Each Occurrence Limit:	$1,000,000.00
General Aggregate Limit:	$2,000,000.00
Personal & Advertising Injury Limit:	$1,000,000.00
Fire Damage Legal Liability Limit:	$100,000.00
Medical Expenses Limit:	$5,000.00

(ii) Commercial umbrella insurance policy on an occurrence (not claims made) form for the Demised Premises (the "**Umbrella Policy**") with minimum limits of not less than Five Million and 00/100 Dollars ($5,000,000.00) per occurrence and in the aggregate, which shall include a "Per Location Aggregate" endorsement.

(iii) Property insurance (including special cause of loss form) for the full replacement cost of Tenant's Property, Tenant's trade fixtures, equipment and personal property, and of all alterations and leasehold improvements within or to the Demised Premises. Such insurance shall name Landlord and any other party specified by Landlord as loss-payee with respect to coverages for such alterations and leasehold improvements in or to the Demised Premises.

(iv) Workers compensation and employers liability insurance in such minimum limits as required by applicable law, but in any event not less than $1,000,000.00 bodily injury by accident for each accident, $1,000,000.00 bodily injury by disease policy limit, and $1,000,000.00 bodily injury each employee.

(v) Commercial hired/non-hired automobile liability coverage with a combined single limit of not less than $1,000,000.00 for each accident.

(vi) Business interruption insurance in an amount sufficient to cover the loss of twelve (12) months of gross profits and continuing expenses during the period of partial or total shutdown of Tenant's business and six (6) months of extended period of indemnity until Tenant's business is back to the level where it would have been had there been no shutdown.

(vii) Product liability coverage, including, without limitation (if this Lease covers Demised Premises in which food and/or beverages are sold and/or consumed), liquor liability coverage (if applicable to Tenant's business) and

coverage for liability arising out of the consumption of food and/or alcoholic beverages on or obtained at the Demised Premises, of not less than Three Million and 00/100 Dollars ($3,000,000.00) per occurrence for personal injury and death and property damage.

(b) Tenant shall either require its concessionaires, licensees, subtenants and food hall service providers to maintain the above referenced coverages, or Tenant's CGL Policy shall expressly name such concessionaires, licensees, subtenants and food hall service providers as additional named insureds. Tenant shall also require any contractor of Tenant performing work or alterations in the Building, to procure and keep in effect the coverages set forth in subsections (a)(i), (a)(ii), (a)(iv), and (a)(v) above, as well as "all risk" builder's risk insurance upon all alterations and improvements to the full insurable value thereof, and Professional Liability or Errors and Omissions insurance for all architects and engineers covering the liability for loss due to error, omission or negligence of employees and machine malfunction. Tenant's contractor's CGL Policy must include a "Per Project Aggregate" endorsement. From time to time, Tenant shall increase the limits of the CGL Policy to, and any contractor of Tenant shall be required to carry a CGL Policy with, such higher limits as Landlord shall reasonably require.

(c) The CGL Policy and Umbrella Policy shall: (i) name Landlord, the Property Manager, Landlord's facilities manager, and its mortgagee(s) as additional named insureds, (ii) specifically include the liability assumed hereunder by Tenant, and (iii) provide that Landlord shall receive thirty (30) days' notice (ten (10) days for non-payment of the premium) from the insurer prior to any cancellation or change of coverage.

(d) Insurance required by Tenant hereunder shall: (i) be in companies rated A-Class VII or better in "Best's Insurance Guide," (ii) have deductibles no greater than $25,000.00, and (iii) provide that it is primary insurance as to all claims thereunder and not excess over or contributory with any other valid, existing and applicable insurance in force for or on behalf of Landlord, the Property Manager or Landlord's facilities manager. Landlord reserves the right to require additional coverage and increase limits as industry standards change.

(e) Tenant shall deliver certificates evidencing the coverages required pursuant to this Section ____ (or, at Landlord's election, copies of the policies of insurance required pursuant to this Section ___) to Landlord prior to the Commencement Date (or such earlier date upon which Tenant or its contractors enter the Demised Premises for any reason), and thereafter at least thirty (30) days before the expiration dates of expiring policies, or any time as reasonably requested by Landlord. In no event shall Tenant or any contractor of Tenant be permitted to enter the Demised Premises for any purpose unless and until the policies or certificates required under this Section ____ have been delivered to Landlord.

(f) If Tenant shall fail to procure and maintain the insurance required under this Section ____, Landlord may, but shall not be required to, procure and maintain the same, and any amount so paid by Landlord for such insurance shall be additional rent which, together with interest thereon from the date paid, shall be due and payable by Tenant on demand. Carrying by Landlord of any such policy, shall not be deemed to waive or release the event of default of Tenant with respect thereto.

(g) Failure by Landlord to demand any certificate, endorsement or other evidence of full compliance with these insurance requirements or failure by Landlord to identify and/or notify Tenant of any deficiency hereunder shall not be construed as a waiver of Tenant's obligations to maintain such insurance. Tenant agrees that the obligation to provide the insurance cannot be waived by any conduct, action, inaction, or omission by Landlord.

Furthermore, the foregoing insurance coverage amounts are understood to be minimum requirements and are not intended to in any way limit any liability of Tenant under this Lease. If Tenant or Tenant's contractor carries liability insurance coverage with limits higher than the limits required in this Lease, the full amount of the insurance coverage actually carried by Tenant or Tenant's contractor will be available to respond to a covered loss or occurrence, and the coverage afforded to Landlord as additional insured under such policy or policies will not be limited by the minimum coverage limits specified in this Lease but will be deemed increased to the amounts actually carried by Tenant or Tenant's contractor.

APPENDIX B

Sample Self-Insurance Lease Provision

__ Self-Insurance.

(_) Tenant shall have the right to self-insure, *[up to the maximum deductible or self-insured retention set forth above]*, for the risks which would otherwise be covered by the Special Form Insurance required by Paragraph ___ and the Commercial General Liability Insurance required by Paragraph ___ above, subject to:

(i) "Self-Insure" shall mean that Tenant is itself acting as though it were the insurance company providing the insurance required under the provisions hereof and Tenant shall pay any amounts due in lieu of insurance proceeds because of self-insurance, which amounts shall be treated as insurance proceeds for all purposes under this Lease. Without limiting the generality of the foregoing, for purposes of the waivers set forth in Paragraph ___ of this Lease, all loss or damages resulting from risks for which Tenant has elected to self-insure shall be deemed to have been covered by insurance carried by Tenant.

(ii) All amounts which Tenant pays or is required to pay and all loss or damages resulting from risks for which Tenant has elected to self-insure shall not limit Tenant's indemnification obligations set forth in Paragraph ___ hereof.

(iii) Tenant's right to self-insure *[to such extent]* and to continue to self-insure *[to such extent]* is conditioned upon and subject to:

(A) Tenant having a net worth of at least _____ Million Dollars ($_____). The amount of Tenant's net worth requirement shall be increased by _____ Dollars ($_____) at the beginning of each Extended Term of the Lease;

(B) Tenant providing a financial statement certified by its Chief Financial Officer, prepared in accordance with generally accepted accounting principles, to Landlord by March 31 of every year which establishes and confirms that Tenant has the required net worth; and

(C) No events occurring that make it apparent that such net worth has been diminished below the required level (such as the bankruptcy of Tenant).

(iv) In the event Tenant fails to fulfill the requirements of Paragraph ___(_)(iii), then Tenant shall immediately lose the right to self-insure for the increased deductible or self-insured retention provided by this Paragraph ___ and shall be required to provide the insurance required under this Paragraph ___, with a deductible not in excess of $_____ for Special Form Insurance and $_____ for Commercial General Liability Insurance.

(_) If an event or claim occurs for which a defense and/or coverage would have been available from the insurance company but for Tenant's decision to Self-Insure *[to such permitted extent]*, Tenant shall:

(i) undertake the defense of any such claim, including a defense of Landlord, at Tenant's sole cost and expense, and

(ii) use its own funds to pay any claim or replace any property or otherwise provide the funding which would have been available from insurance proceeds but for such election by Tenant to Self-Insure *[to such extent]*.

(_) The right to Self-Insure *[to such extent]* is personal to Tenant and no subtenant or assignee shall be entitled to Self-Insure *[to such extent]* under this Paragraph ___.

APPENDIX C

RELEASE AND INDEMNIFICATION

Section 10.01. Release and Indemnification. TENANT AGREES TO USE AND OCCUPY THE PROPERTIES AT ITS OWN RISK AND HEREBY RELEASES LANDLORD AND LANDLORD'S AGENTS AND EMPLOYEES FROM ALL CLAIMS FOR ANY DAMAGE OR INJURY TO THE FULLEST EXTENT PERMITTED BY LAW. TENANT AGREES THAT LANDLORD SHALL NOT BE RESPONSIBLE OR LIABLE TO TENANT OR TENANT'S EMPLOYEES, AGENTS, CUSTOMERS, LICENSEES OR INVITEES FOR BODILY INJURY, PERSONAL INJURY OR PROPERTY DAMAGE OCCASIONED BY THE ACTS OR OMISSIONS OF ANY OTHER TENANT OR ANY OTHER PERSON OTHER THAN LANDLORD OR ITS AGENTS. TENANT AGREES THAT ANY EMPLOYEE OR AGENT TO WHOM THE PROPERTIES OR ANY PART THEREOF SHALL BE ENTRUSTED BY OR ON BEHALF OF TENANT SHALL BE ACTING AS TENANT'S AGENT WITH RESPECT TO THE PROPERTIES OR ANY PART THEREOF, AND NEITHER LANDLORD NOR LANDLORD'S AGENTS, EMPLOYEES OR CONTRACTORS SHALL BE LIABLE FOR ANY LOSS OF OR DAMAGE TO THE PROPERTIES OR ANY PART THEREOF (EXCEPT FOR LOSS OR DAMAGE ARISING OUT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD). TENANT SHALL INDEMNIFY, PROTECT, DEFEND AND HOLD HARMLESS EACH OF THE INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL LOSSES (EXCLUDING LOSSES SUFFERED BY AN INDEMNIFIED PARTY ARISING OUT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF SUCH INDEMNIFIED PARTY) CAUSED BY, INCURRED OR RESULTING FROM TENANT'S OPERATIONS OR BY TENANT'S USE AND OCCUPANCY OF THE PROPERTIES, WHETHER RELATING TO USE BY TENANT OR ANY PERSON (OTHER THAN LANDLORD OR ITS AGENTS) THEREON, SUPERVISION OR OTHERWISE, OR FROM ANY BREACH OF, DEFAULT UNDER, OR FAILURE TO PERFORM, ANY TERM OR PROVISION OF THIS LEASE BY TENANT, ITS OFFICERS, EMPLOYEES, AGENTS OR OTHER PERSONS. IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT TENANT'S OBLIGATIONS UNDER THIS SECTION SHALL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS LEASE FOR ANY REASON WHATSOEVER.

Section 10.02. Non-Recourse to Landlord. Anything contained herein to the contrary notwithstanding, any claim based on or in respect of any liability of Landlord under this Lease shall be enforced only against the Landlord's interest in the Properties and not against any other assets, properties or funds of (i) Landlord, (ii) Landlord's members, and any entity controlling, controlled by, or under common control with Landlord or Landlord's members, any director, officer, general partner, shareholder, limited partner, beneficiary, employee, attorney, consultant, contractor or agent of Landlord or any general partner of Landlord or any of its general partners (or any legal representative, heir, estate, successor or assign of any thereof), (iii) any predecessor or successor limited liability company, partnership or corporation (or other entity) of Landlord or any of its members, managers, general partners, shareholders, officers, directors, employees or agents, either directly or through Landlord or its general partners, shareholders, officers, directors, employees or agents or any predecessor or successor partnership or corporation (or other entity), (iv) any Lender, and any lender to a Person holding an interest in Landlord, (v) any Person affiliated with any of the foregoing, or any director, officer, employee or agent of any thereof; or (vi) the heirs, successors, personal representatives and assigns of any of the foregoing.