SESSION 605

Insurance, Indemnity and Waiver Clauses in Commercial Leases – Properly Allocating Risk

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A. Introduction

With the concurrent ownership of estates in the same property, with the reversionary interest that the landlord holds and with the common situation in multi-tenant properties of the landlord's management and operation of common areas at the same time as the tenant's management and operation of its leased premises, the rights and interests of a landlord and tenant are closely integrated and their respective risks of property damage and of general liability claims by third parties are often shared or otherwise arise from the same act or occurrence. A well-drafted lease will include an allocation of each party's obligation to maintain both property insurance and liability insurance, with corresponding waiver provisions (which relate to the property insurance) and indemnification provisions (which relate to the liability insurance) to assure: (i) that insurable third party liability claims are insured under a reasonably sufficient liability policy carried by one of the parties that insures the interests of both parties, without the incidence of coverage disputes between the respective liability insurers for the parties; and (ii) that either party will be adequately compensated for any property damage it may incur and that, in such event, the other party shall not thereafter be exposed to a subrogation claim that attempts to assert its liability for such property damage.

B. Liability Insurance and Indemnification Provisions

1. Overview.

When drafting an indemnification provision, it is helpful to first consider those indemnification obligations of the parties that already exist at law and in the absence of the provision being drafted. An indemnification provision that simply creates contractual indemnification obligations that "mirror" those that exist at common law are essentially redundant. In Minnesota, we have a modified comparative fault jurisdiction that generally allocates liability based on a fact-finder's allocation of fault. So, a "fault-based" indemnification in a lease may simply be redundant.

In a commercial lease, indemnification provisions typically concern third-party claims (i.e., claims by third parties against the landlord, or the tenant, or both) arising from personal injury or property damage occurring in or around the leased premises or the property upon which the leased premises is situated (e.g., trips and falls in the leased space or in the parking lot). These sorts of claims are typically insured under commercial general liability insurance policies (which are referred to as "CGL policies"), and both the landlord and the tenant are typically required by the terms of their lease to each maintain a separate CGL policy. If well drafted, the lease will include both: (i) the requirement that both the landlord and the tenant maintain its own CGL policy; and (ii) an indemnification provision that allocates the risk of third-party claims to the party that is obligated to insure those risks.

The object of the indemnification provision should be to allocate insurable risks of third-party claims to the party that is obligated to

insure those risks; neither party is well served by efforts by one party to expand an indemnification provision to create an uninsured general liability risk for the other party which such party would not otherwise have at law.

2. CGL Policies.

A CGL policy is a contract of indemnitee – it transfers risks of liability to the indemnitor (the insurer) for the negligence of the indemnitee (the insured). Many liability insurers issue CGL policies on standard industry forms (promulgated by the Insurance Services Office, Inc.). This wide acceptance of "standard" CGL forms and provisions can be helpful to real estate lawyers who can get fairly clear direction about the scope and effect of policy provisions, exclusions and endorsements from colleagues who regularly litigate coverage issues under CGL policies.

Commercial leases commonly provide a requirement that the tenant maintain a CGL insurance policy that insures both the landlord and the tenant against claims by third parties for personal injury or property damage. Such leases also frequently require that the landlord maintain a separate policy (although under a net lease, the cost of the landlord's policy is typically "passed through" to the tenants). A typical provision with respect to the requirement that the tenant maintain such coverage is as follows:

"Tenant shall, at its sole cost and expense, maintain in effect at all times during the Lease Term a "Commercial General Liability Insurance" policy, on an "occurrence" rather than on a "claims made" basis, with a total policy limit of at least $3,000,000.00 (each occurrence/aggregate), which policy shall include, but not be limited to, coverages for Property Damage, Personal Injury and Contractual Liability (applying to this Lease). Tenant's liability insurance coverage may be subject to a "deductible," "retention" or "participation" (or other similar provision) requiring the Tenant to remain responsible for a stated amount or percentage of each covered loss; provided, however, that such amount shall not exceed $2,000.00 each occurrence. Such policy shall name Landlord as an Additional Insured thereunder."

The tenant should request similar language with regard to the landlord's obligation to maintain a separate CGL policy covering the common areas, although many landlords with sufficiently strong bargaining positions will resist specific requirements in this regard.

Some of the notable features in the descriptions of these policies, and some of the issues raised thereby, are as follows:

(a) Policy Limits. Besides the obvious business issue of reasonably sufficient policy limits (which will vary by the nature and scope of the use, and

which may need an escalator-type provision in a long term lease), it is important to be familiar with the manner in which those policy limits are expressed. Current CGL policies no longer express policy limits as a "combined single limit." Instead, policy limits are now most commonly expressed separately for "each occurrence" and "aggregate"). The "each occurrence" limit is the amount of coverage available in connection with a single covered act or occurrence. The "general aggregate" limit is the maximum amount the policy will cover for multiple covered acts or occurrence during the policy period (typically 12 months).

(b) Claims Made/Occurrence Based. CGL policies have a designated policy period (again, typically 12 months) and are typically either "claims made" or "occurrence based." Historically, public liability policies were once typically written on a "claims made" basis, which limited coverage to claims for injury or damage that were actually brought to the insurer under the policy during the 12-month policy period. This product was widely viewed as insufficient or incomplete because of the risk that acts or omissions that occurred during the policy period might not be covered because, due to available statutes of limitation, claims arising from such acts or omissions may not be known or asserted until after the expiration of the policy period. As a result of these limitations of the "claims made" policy form, most commercial general liability policies today are written on an "occurrence" basis. Occurrence-based policies extend coverage for covered claims for liability or damage that arise from acts or omissions during the policy period, irrespective of when the claim is made.

(c) Contractual liability. One consideration for both parties to a lease is whether the indemnity being provided to it by the other party to the lease is, itself, insured under the indemnitor's CGL policy. As a general rule, liability policies only cover claims arising from the insured's tortious conduct. Liability insurance is generally not intended to insure against claims or liabilities arising from an insured's breach of a contractual obligation, and most CGL policies therefore exclude claims for the "assumption of liability in a contract or agreement." With respect to indemnification provisions in a lease (or other agreement) in which an insured indemnitor assumes liability for the tortious conduct of another party, most CGL policies include coverage for an "insured contract" which has the effect of extending policy coverage over such an indemnification agreement. The issue of whether an insured's indemnity agreement qualifies as an "insured contract" has been addressed in Minnesota in Soo Line Railroad Company v. Brown's Crew Car of Wyoming, 694 N.W.2d 109 (Minn. App. 2005) where it was held that "a general indemnity agreement that includes an assumption of tort liability constitutes an insured contract." (Id. at 694 N.W.2d 114).

(d) Additional Insured Status. It is not unusual for an indemnitee under a lease, typically the landlord, to require that it be designated as an "additional insured" under the indemnitor's CGL policy. This is another way to

confirm that claims made by the indemnitee under the lease's indemnification provision will be covered by the policy and is sometimes seen as redundant due to the availability of such coverage under the contractual liability coverage provided by the policy. Additional insured status, however, can also provide other benefits. For example, if there is a coverage dispute with the insurer, the additional insured would have the benefit of contractual privity with the insurer to strengthen its standing to directly contest the insurer's position in that dispute. In addition, a party's status as an "additional insured" may be a factor that determines whether the indemnitor's CGL policy was intended to be "primary," and not "participating," with a separate CGL policy held by the indemnitee that is the additional insured. As to the effect of the designation of an "additional insured," as a general rule, all of the provisions of the policy that apply to "insureds" will also apply to "additional insureds," unless otherwise designated in the applicable additional insured endorsement. A savvy practitioner representing a party obtaining status as an Additional Insured will review the language of the Additional Insured endorsement to confirm the scope of coverage, because there is an apparent trend among underwriters to restrict the scope of coverage available for Additional Insureds.

(e) Primary/Secondary and Non-Contributory. It is also not unusual for an indemnitee under a lease – again, typically the landlord – to require that the liability coverage provided by the indemnitor's CGL policy be "primary," and not "participating," with liability coverage that may be provided under a CGL policy maintained by the indemnitee. A lease provision that requires the indemnitor's liability policy to be primary will not be binding on the indemnitor's insurer. One way to confirm that the indemnitor's policy is primary is to include language to that effect in the additional insured endorsement, if the insurer will permit that inclusion. Alternatively, the "Other Insurance" provision in most CGL policies provides that the insurance provided under the policy "is excess over…any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured…." This provision would likely be construed to render the indemnitor's CGL policy primary vis-à-vis the CGL policy of the indemnitee.

(f) Evidence of Insurance. Most leases will require that the party required to maintain insurance coverage provide evidence of compliance. A certificate of insurance, which is typically supplied with an ACORD form, is typically delivered and accepted for this purpose ("ACORD" is an acronym for Association for Cooperative Operations Research and Development, which is an insurance industry group). ACORD promulgates many forms and, of course, the forms change over time. For commercial leases, the ACORD 25 is commonly used as evidence of liability insurance, and the ACORD 28 is commonly used for evidence of property insurance. In both cases, such "certificates" or "binders" have significant limitations. First, the ACORD forms themselves usually contain language to the effect the "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not

amend, extend or alter the coverage afforded by the policies below." For a while, savvy landlords and lenders would insist on a certificate for property insurance in the form of the 2003 ACORD 27, which provided that it was "evidence that insurance as identified below has been issued, is in force, and conveys all rights and privileges afforded under the policy." That 2003 ACORD 27 is typically no longer available and has been replaced by a revised ACORD 28 which includes the old "information only" language. The old ACORD 27 also provided, that the issuer would give notice to the landlord before cancellation of the policy. These sorts of commitments by insurers in certificates to provide notice of cancellation are generally no longer available. In this regard, please note that Minn. Stat. Section 60A.39 confirms that a certificate of insurance does not convey contractual rights to a holder. Finally, these "certificates" are generally provided by agents, and not the underwriters themselves, and there is therefore a potential issue concerning the agent's authority in completing the certificate. Yet, despite these limitations, ACORD certificates remain the predominant means to provide evidence of insurance coverages. If a landlord or other party has serious concerns about the existence of any insurance coverages, the best practice is to get an actual certified copy of the policy that has been endorsed to reflect such party's interests under the policy.

(g) Creditworthiness of Insurer. Another consideration that is often addressed in insurance provisions are certain minimum requirements with respect to the credit worthiness of a party's insurance company. These are typically drafted with reference to minimum ratings that are published, from time to time, by nationally recognized private rating agencies, such as A M. Best, Moodys or Standard and Poors. Another assurance that should be considered is the requirements that the insurer be licensed to conduct business in Minnesota, which could more clearly provide access to funds in the Minnesota Insurance Guaranty Fund. See, Minn. Stat. Chapter 60C.

3. Indemnification Provisions. Indemnification provisions are the principal means of allocating risks for third party claims between the landlord and tenant. Ideally, the risks will be allocated to a party that is adequately insured for these risks, and frequently the tenant successfully argues that such indemnification provisions should be "mutual." There are two basic approaches to the forms of indemnification provisions that are typically included in a commercial lease: (i) a "fault-based" approach, in which the tenant is obligated for claims arising from its conduct and the landlord is obligated for claims arising from its conduct, regardless of where such conduct occurs; and (ii) a "geographic" approach, in which the landlord is responsible for claims arising acts or occurrences in the common areas and the tenant is responsible for claims arising from acts or occurrences in the leased premises, regardless of the fault of the indemnitor.

A fault based indemnification provision can be largely duplicative of the indemnitor's obligation at law, especially if, in a comparative fault jurisdiction, the indemnity is limited "to the extent caused" by the acts or omissions of the indemnitor. Frequently, however, even a fault based indemnity also includes on indemnification for

claims arising from acts or omissions of contractors or subcontractors of the indemnitor, which are obligations that the indemnitor would likely not have at law. An example of a mutual, fault-based indemnification provision is as follows:

> **"Subject to the waiver of claims set forth in Section (__) hereof, Tenant shall indemnify Landlord from and against any and all demands, liabilities and expenses arising from or relating to injury or loss of life to persons or damage to or loss of property to the extent arising from the acts or omissions of Tenant or Tenant's contractors. Subject to the waiver of claims provisions of Section (__) hereof, Landlord shall indemnify Tenant from and against any and all demands, liabilities and expenses for or relating to injury or loss of life to persons or damage to or loss of property to the extent caused by the acts or omissions of Landlord or its contractors. The duties to indemnify contemplated hereby include the duty to pay all reasonable and necessary attorneys' fees and costs incurred by the indemnitee in connection with any such proceedings and shall survive the termination of the Lease."**

A geographic approach may be the preferable approach due to its simplicity, the avoidance of disputes between the parties regarding their respective degrees of fault in connection with the occurrence, the "blanket" protection it provides in connection with claims made in which neither the landlord nor the tenant are at fault, and the fact that the tenant typically pays, or contributes to the payment of, the landlord's insurance premiums. The main drawback, however, to the geographic approach is the risk of allocating liability to the indemnitor that it wouldn't have at law and for which it is underinsured. This risk can be addressed by limiting the indemnity to available insurance proceeds for liabilities caused by acts or occurrences of parties other than the indemnitor. An example of a mutual, geographic-based indemnification provision is as follows:

> **"Subject to the waiver of claims set forth in Section (__) hereof, Tenant shall indemnify Landlord from and against any and all demands, liabilities and expenses arising from or relating to injury or loss of life to persons or damage to or loss of property to the extent occurring in the Premises; provided, Tenant's obligation to indemnify Landlord for injury or damage occurring in the Premises from causes other than Tenant's negligence or intentional acts shall be limited to the extent of insurance proceeds, if any, available pursuant to the terms of policies of liability insurance maintained by Tenant or required to be maintained by Tenant by the terms of this Lease. Subject to the waiver of claims provisions of Section (__) hereof, Landlord shall indemnify Tenant from and against any and all demands, liabilities and expenses for or relating to injury or loss of life to persons or damage to or loss of property to the extent caused by Landlord's negligence or intentional misconduct or occurring in the Common Area; provided, Landlord's obligation to indemnify Tenant**

for injury or damage occurring in the Common Area from causes other than Landlord's negligence or intentional acts shall be limited to the extent of insurance proceeds, if any, available pursuant to the terms of liability insurance coverages maintained by Landlord or required to be maintained by Landlord under the terms of this Lease. The duties to indemnify contemplated hereby include the duty to pay all reasonable and necessary attorneys' fees and costs incurred by the indemnitee in connection with any such proceedings and shall survive the termination of the Lease."

Some additional matters to consider when drafting indemnification provisions are as follows:

(a) Property Damage. As noted below, most well-drafted commercial leases include provisions for a mutual waiver of claims, and/or of claims asserted by way of subrogation, for property damage caused by an indemnitor. These waivers should "trump" the obligations of the indemnitor under the indemnification provision.

(b) Survival. Especially in cases in which the indemnitor maintains an occurrence-based CGL policy, the indemnity should expressly survive the expiration or earlier termination of the lease.

(c) Uninsured Risks. Be careful to confirm that a geographic-based indemnity does not expose the indemnitor to uninsured risks, such as risks associated with environmental hazards or acts of terrorism.

(d) Acts of Invitees. An indemnification for acts of invitees (or trespassers) may not be insurable, so you may want to limit the indemnitor's obligations under a geographic based approach to the acts of the indemnitor "its agents, employees, contractors, subtenants and licensees."

(e) Breach of the Lease. You will frequently see an indemnification provision in a lease form that includes an indemnity against loss from a breach of the lease. This clause always confuses me since it is wholly unrelated to the object of allocating insurable risks for third party claims of liability and because the lease will, no doubt, already include a separate section concerning remedies for defaults thereunder. I suspect the provision would confuse a judge, as well. It is an inappropriate clause and, on behalf of tenants, I typically ask that it be stricken based on my concern that a judge might conclude that the provision was intended as a basis for the judge to award consequential damages.

(f) Defense Costs. One of the critical provisions of the indemnification clause is the obligation to defend the indemnitee. Typically, the claim against the indemnitor and the indemnitee will be insured under one primary policy, the insurer will select counsel that has no conflicts with either

party and the insurer will control the terms of settlements within its policy limits. The indemnitee's counsel should be careful to include an obligation to defend the indemnitee and/or pay the indemnitees reasonable attorneys' fees and costs, and also consider the inclusion of a clause approving defense counsel, such as the following: "If any claim or cause of action is brought against indemnitee by reason of any such act or occurrence, indemnitor, upon notice from indemnitee, will defend the claim or cause of action at indemnitor's expense with counsel reasonably acceptable to indemnitee."

C. Property Insurance and Waiver Provisions.

1. Types of Property Insurance Policies. There are two basic forms of property insurance available to commercial landlords and tenants: (i) "Special Form" coverage, which covers all damage to insured property unless the cause of the damage is specifically excluded from coverage; and (ii) "Named Perils" coverage, which only covers damage to insured property caused by the specific risk or risks designated in the policy. "Special Form" coverage is the predominant form of policy in use throughout the country, having previously been referred to as an "all risk" policy (insurers do not like to refer to the form as an "all risk" form any more because, of course, the exclusions in such policies leave them covering fewer than "all" risks).

It is important to note that property insurance policy forms can differ significantly between different insurers. For example, the definition of "covered property" in different policies can differ in several ways which, of course, directly affects the scope of the insurance protection provided. With respect to commercial leasing issues, sometimes a tenant is required to be responsible for repairing or reconstructing leasehold improvements that it may have installed and that may be damaged by a fire or other casualty and, if that is the case, a tenant's counsel should endeavor to confirm that such improvements are covered by the tenant's property insurance policy.

2. Common Endorsements. The nature of the exclusions in a "Special Form" policy of property insurance are important to note and understand because they often exclude any compensation for losses that your client may wish to have covered. Coverage for such excluded items can often be procured at additional cost by adding certain endorsements to the policy. In the commercial leasing context, such endorsements often include the following:

(a) Rent Loss. Normally, commercial leases provide that the tenant's obligation to pay rent abates during periods in which the premises are untenantable as a consequence of casualty damage. In such circumstances, of course, the landlord remains obligated to pay its mortgage debt, property taxes and other operating expenses. Rent loss insurance (also known as rental income insurance) reimburses the landlord for such abated rents (including both base rent, CAM charges and other pass-throughs) resulting from a covered peril, and therefore provides the landlord the cash flow necessary to permit it to continue to service its mortgage debt and pay operating expenses during the period in which

the building is being reconstructed. This coverage, which is limited to a period of time (typically 12 months), can be of critical importance to a landlord, and mortgage lenders routinely require it. The additional cost is normally pretty low and is typically "passed-through" to tenants under net leases.

(b) Business Interruption. Although rent typically abates during any period in which the leased premises is untenantable due to a casualty, the tenant is nonetheless typically damaged by reason of its loss of business and increased costs of procuring, and moving to and from, temporary replacement space. A business interruption endorsement to a tenant's property insurance policy can address these risks. This coverage can include not only lost profits but additional expenses incurred by the tenant as a consequence of damage to its space, such as the rent to be paid at a temporary relocation space (offset by any rent abatement received by the tenant) and relocation costs. These endorsements apply when casualty damage renders the tenant's space untenantable, and can also be written to provide coverage for loss of business from damage occurring outside of the space, for example when a retailer's space is not damaged but there is substantial damage elsewhere in the shopping center that greatly reduces customer traffic. This is sometimes referred to as "contingent business interruption coverage". Depending on the creditworthiness of the tenant, landlords will sometimes require that tenants maintain business interruption coverage.

(c) Ordinance or Law. Ordinarily, "replacement cost" under property insurance policies is defined with reference to building codes in effect when the building was built. Of course, when re-built, the building will have to comply with current building codes. In the case of older buildings, the increased cost of complying with current codes can be substantial. An ordinance or law endorsement can, at relatively modest cost, provide coverage for updates required under current codes that would not be covered in the absence of the endorsement.

(d) Leasehold Interest. The leasehold interest endorsement compensates the tenant for any increased rent payable for replacement space if the lease is terminated as a consequence of casualty damage. This endorsement is relatively rare, and typically only appropriate in longer term leases in which the tenant's rental obligation is significantly below market.

(e) Endorsements to Expand Covered Perils. The above endorsements just add additional covered losses to the extent they are caused by the maturation of risks already insured against in the underlying policy, as distinguished from endorsements that expand the insured perils. Examples of common endorsements that expand the insured perils include the following: flood, earthquake, terrorism, boiler and machinery and computer equipment and media.

(f) Additional Endorsements to Add Covered Losses. Additional endorsements to expand the types of covered losses from insured perils include the following: plate glass, service interruption (for interruption in utility

services), reproduction cost endorsement (for restoring historic building), and builders' risk.

3. Allocation of Obligation to Insure. Commercial leases typically provide that the landlord insures the building shell and common areas, and the tenant insures its personal property, trade fixtures, inventory, equipment, and other contents. Most commercial leases are "net" leases and, therefore, the costs incurred by the landlord in insuring the building and common areas are typically "passed-through" to the tenants as additional rent.

Under some commercial leases, such as ground leases or leases for single tenant facilities with nationally recognized retailers, the tenant not only insures its contents but also insures the building shell. Where the tenant is purchasing the insurance for the building shell, the landlord and the mortgagee will, of course, seek to assure themselves that they have a right to participate in the adjustment of losses with the insurer and that insurance proceeds will be available and will, in fact, be used for restoration. These issues will be discussed more fully below, but, at a minimum, the landlord and mortgagee should be named on such a policy as an additional insured or loss payee, and as a mortgagee, respectively, so that they will each have direct rights against the insurer under the policy.

(a) Leasehold Improvements. The allocation of the obligation to insure leasehold improvements is an area that is sometimes overlooked during lease negotiations, and sometimes that allocation does not reflect the parties' intentions, which can result in gaps in coverage or overlapping coverages. In multi-tenant buildings, it is usually best for the landlord (or the party insuring the building shell, if not the landlord) to insure the leasehold improvements. The delineation between the building shell and the leasehold improvements is often somewhat unclear, so it is helpful to have one insurer covering both types of property so that troublesome allocation issues can be avoided. Moreover, it is generally less expensive for the landlord to insure leasehold improvements in the same policy that covers the building shell than for each individual tenant to attempt to insure its respective leasehold improvements. If a loss occurs, the rebuilding process will be much easier if one insurer has covered the building shell and the leasehold improvements, rather than a scenario in which each tenant in a multi-tenant building has a different insurer covering its leasehold improvements. **[As a practice tip, confirm that the duty to insure leasehold improvements, the right to adjust losses for damage thereto, and the right to the insurance proceeds are all held by the party responsible for repairing or restoring the damage.]**

(b) Self-Insurance. Many larger companies seek to negotiate a right to self-insure all or a substantial portion of the risk of damage to their property. Frequently, large companies address the risks of damage to their property with reserve funds or with insurance policies that have unusually large deductibles. From the landlord's perspective, the main concern is with the tenant's

creditworthiness. The landlord will want to make sure that, in the event of casualty damage, the tenant has sufficient financial capacity to restore the damaged property, resume business operations and continue paying rent. The requirement that a tenant maintains a property insurance policy addresses this concern about credit, but if the tenant is sufficiently creditworthy, there may be no need to require a property insurance policy. An issue that arises when the tenant requests a right to self-insure is the risk that the tenant's credit degrades over time. Landlords can address that risk by conditioning the right to self-insure on certain credit requirements, such as minimum net worth or minimum coverage ratio. Another issue that arises when a tenant requests a right to self-insure is the prospect of a subsequent assignment or subletting by the tenant to an entity of less substantial credit. To address this risk, the landlord may want to clarify that the right to self-insure is personal to the tenant and does not pass to the tenant's assignees or sublessees.

4. Waivers of Subrogation.

A property insurer that pays a claim to compensate its insured for property damage is subrogated to the insured's interest and can "step into the shoes" of its insured to pursue a cause of action to recover the insurer's loss against any tortfeasor who may have caused the damage. Any tortfeasor that is faced with such a subrogation claim will likely tender that claim to its liability insurer. The typical scenario, therefore, in a subrogation action is a claim by a property insurer attempting to shift its loss to one or more liability insurers. From a macroeconomic perspective, these sorts of subrogation actions are not the most efficient.

Because of this inefficiency, and because of the close and ongoing relationship between landlords and tenants and the risk that one party in that relationship may easily cause damage to the property of the other, commercial leases typically include provisions for a mutual waiver of claims for damage to property and the mutual waiver of subrogation by property insurers. These sorts of waivers, however, often cause a lot of confusion among attorneys and others involved in lease negotiations. Most of this confusion arises from a misunderstanding of the purpose and intent of the waivers.

The waivers are designed to prevent redundancy in insurance coverages, and are not intended to prevent either party from receiving compensation for damage to their property. These waivers also insulate each party from the risk of a potential uninsured liability (e.g., a landlord with adequate property insurance should be willing to grant such a waiver to its tenant so that the tenant does not face a potential subrogation action which, if not fully insured, might impair the tenant's financial capacity to perform its obligations under the lease).

Every commercial lease should include a mutual waiver of subrogation. These waivers typically require that, after they have paid a claim, property insurers bear the entire risk of loss resulting from damage to the property they are insuring, regardless of which party is at fault. Because the amount of such loss is presumed by the insurer in

underwriting the policy, the existence of these waivers typically have no effect on the amount of premiums charged by the insurer. The waivers are intended to apply regardless of the presence or absence of fault on the part of the beneficiary of the waiver, and will therefore apply even if the beneficiary's tortious conduct caused the damage. An example of such a mutual waiver provision is as follows:

> **"Notwithstanding any contrary provision herein, Tenant hereby waives any claims against Landlord relating to, and Landlord shall not be liable to Tenant for, any damage to any equipment, inventory, tenant fixture or other personal property situated in the Premises or in, on or about the Property due to any condition, design or defect in the Building or leakage of the roof, windows and pipes, or of damage from gas, oil, water, steam, smoke or electricity, or due to any other cause whatsoever, including Landlord's negligence, and Tenant assumes all risks of damage to such property; provided, the waiver and assumption contemplated by this sentence shall apply only to the extent covered by insurance in place or required to be maintained by the terms of this Lease. Landlord hereby waives any claims against Tenant relating to, and Tenant shall not be liable to Landlord for, any damage to any property occurring in, on or about the Property due to any reason, including Tenant's negligence, and Landlord assumes all risks of damage to such property; provided, the waiver and assumption contemplated by this sentence shall apply only to the extent any such damage is covered by insurance in place or required to be maintained by the terms of this Lease."**

Some additional matters to consider when drafting waiver provisions are as follows:

(a) Waivers Expressly Paramount. The lease will often include indemnification provisions that are broad enough to include property damage, as well as a variety of other provisions pertaining to the obligations of the parties to maintain and repair the property, so it is important to include language (e.g., "notwithstanding any contrary provision herein…") that expressly makes the waiver provision paramount to any conflicting provisions of the lease.

(b) Expressly Include Negligence. There are cases construing waiver provisions, usually in other contexts, in which the provision is not construed to include a waiver of claims for negligent acts or omissions unless negligence is expressly included in the waiver provision itself. Just to be sure, I would expressly include claims of negligence in each waiver provision.

(c) Implied Waivers. Tenants without effective counsel that sign landlord oriented lease forms can find themselves without the benefit of a waiver of subrogation. When these unfortunate tenants tortiously cause substantial damage to the building, they can face potential ruinous subrogation claims.

Courts in a variety of jurisdictions facing claims of that nature have adopted an approach in which the tenant is found to be equitably implied as a co-insured under the Landlord's property insurance policy for the sole purpose of supporting the existence of a waiver of subrogation. Especially in net leases under which the tenant directly contributes to the payment of the insurance premiums, these courts conclude that this cost-sharing presumes coverage for the mutual benefit of the parties, and, since the tenant is a co-insured, the waiver exists because there can be no right of subrogation by an insurer against its insured. See Minn. Stat. §60A.41. In Minnesota, this doctrine of implied waivers is now determined on a case-by-case approach and will depend on the reasonable expectations of the parties as to whether Tenant should be liable for subrogation claims. RAM Mutual Insurance Company v. Rohde, 820 N.W.2d 1 (Minn. 2012). As tenant's counsel, I would never rely on an implied waiver, and would always insist on an express waiver, but the existence of the implied waiver doctrine is worth noting.

(d) Is Insurer Bound by Waiver? Current forms of standard ISO property insurance policies allow a waiver of subrogation prior to a loss, and there are cases in a variety of jurisdictions that have found policy provisions that purport to abrogate coverage as a consequence of any waiver of subrogation unenforceable. Property insurance forms vary widely, however, so each particular policy would have to be reviewed to confirm if waivers of subrogation are permitted. On the theory that a party that acquires subrogation rights cannot acquire more rights than its insured had, some attorneys seek to enhance the enforceability of the waiver provision by including both a direct waiver of claims and a waiver of subrogation. Another common means of addressing this concern is to provide an obligation of the insured to obtain an express waiver of subrogation from its insurer, either evidenced by a specific provision in the subject policy or by a specific endorsement to that policy.

(e) Additional Insured. As tenant's counsel, you will sometimes encounter a landlord requesting to be named as an additional insured under the tenant's property insurance policy. Under normal circumstances, I presume this request is intended as a quick and easy way to confirm that the landlord has the benefit of a waiver of subrogation (because, as noted above, an insurer cannot pursue subrogation against its insured). In the event of such a requirement, consider whether the lease should also confirm that such additional insured status exists solely for the establishment of such waiver of subrogation and that it does not also create any right of the landlord to adjust losses, or collect proceeds, under such policy.