

Analyzing Liability and Insurance Issues in Retail Leases
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I. Introduction—The Framework.

In evaluating (or attempting to evaluate) insurance, indemnity, waiver and liability issues, our clients have two overriding questions: the first question is “What is my exposure?” and the second is the inevitable follow-up question, “Isn’t that covered by insurance?”. As their lawyers and advisors, they look to us to make those issues meaningful to them so that they can make the important business decisions that need to be made in this cluster of issues. Abstract terms like “negligence”, “gross negligence”, “concurrent negligence” and “intentional misconduct” are no more meaningful to our clients than they are to us. Also unhelpful are responses like “you’ll have to talk to your insurer” or “it is probably covered, but I’m no insurance expert”. This article is intended to help us provide meaningful answers to our business people’s questions and also to provide a framework for analyzing those issues, for discussing them with our counterparts and, ultimately, for discussing them in all hands meetings if reasonable compromises cannot be reached by the lawyers alone.

Most clients understand that they will be responsible for all that happens to them unless the particular matter is covered by a common law tort claim against someone else, their own insurance or an indemnity from another contracting party. They further understand that their own contract breach claims will be governed according to the terms of the default and remedies section of the lease (or, in the absence of such a section, according to common law principles of damages and other remedies). What they are less familiar with is how those risks get expanded or contracted through contractual risk transfer mechanisms such as indemnities, waivers and insurance and what the practical effect of that transfer is in terms of real world exposures. This paper will discuss “real world” exposures shortly, but first it is important to understand how those different risk transfer mechanisms relate to each other. The relationship is as follows:

A party is liable for things that happen to another party if (a) the matter is covered by an indemnity given to the other party or (b) the matter gives rise to a tort or a lease breach claim, AND, in either case, the claim (i) has not been waived by the other party and (ii) is not covered by insurance carried by or on behalf of the party that is to be held responsible.

Thus, to answer the questions posed by the client above, her lawyer must review and understand each of the lease provisions relating to indemnities, waivers and insurance. The above framework shows how each of those provisions interrelate and emphasizes that none of those provisions should be approached without understanding each other provision. This paper addresses each of those components in turn. This paper is not intended to be a guide to drafting any of those provisions but rather to be a guide to help the lawyer and her client analyze the provisions they are considering agreeing to.

II. Liability/Risk Exposure.

The next step in making these issues meaningful to clients is to make the claims less abstract. Although the potential universe of legal causes of action is limited only by the creativity of our courts and legislatures, below is a thorough, but not exhaustive, list of potential causes of action for which a person may be liable to another person:

“Exposure”

<ul style="list-style-type: none"> ▪ Battery ▪ Assault ▪ Products liability (for restaurants, usually inadequate warning (of allergens), food poisoning and foreign objects) 	<ul style="list-style-type: none"> ▪ Nuisance 	<ul style="list-style-type: none"> ▪ False imprisonment ▪ Malicious Prosecution (and abuse of process?) ▪ Wrongful eviction ▪ Defamation ▪ Invasion of privacy ▪ Use of another’s advertising idea in one’s advertisements 	<ul style="list-style-type: none"> ▪ Intentional infliction of emotional distress ▪ Trespass to land or chattels (other than by the owner or landlord thereof) ▪ Conversion ▪ Fraud or negligent misrepresentation ▪ Interference with contractual relations ▪ Breach of contract claims ▪ Non-tortious injuries (purely economic losses, bad marketplace, etc.)
<ul style="list-style-type: none"> ▪ Negligence (including land occupant liability) ▪ Strict liability (animals, ultrahazardous activities) 		<ul style="list-style-type: none"> ▪ Infringing on another’s copyright, trade dress or slogan in one’s advertisements 	

(The organization of claims into the rows above will become relevant in the discussion of insurance below.) A client is much more likely to understand and appreciate the likelihood and potential damages it might suffer as a result of an assault and battery claim, for example, than she is to understand and appreciate the likelihood that an act of “intentional misconduct” will occur. But, we can do better still at making these exposures meaningful – we can discuss actual, likely fact patterns that underlie those claims, based on actual loss histories and our own experiences and expectations. In the retail leasing context, the most common fact patterns underlying legal claims are slip, trip and fall, defamation (arising when a customer is notified that his credit card has been declined, for example), false imprisonment, assault and battery (when a customer is detained or excluded for being disruptive or attempting to steal) and premises liability (for failing to discover and remedy hazardous conditions). Where the Landlord or one of its tenants provides valet parking services, additional exposures arising from auto accidents and damage to customer automobiles are present. In addition, each tenant type will carry with it idiosyncratic exposures. For example, restaurant tenants face increased

risks of slip, trip and fall due to the floor coverings they use and due to the virtual certainty of food and drink spills. Other restaurant-specific risks include “products liability” claims (foreign objects, food poisoning and failure to disclose allergens) and, if alcohol is served, Dramshop liability claims. By contrast, the typical office tenant will have very few customers on its premises and will, thus, be less exposed to customer-related claims. As discussed below, nearly all of those exposures are either already addressed in basic liability policies or can be addressed by additional stand-alone policies or endorsements.

Any additional claims that are of concern to the lawyer or the client can be added to the table above. All of those additional claims can then be analyzed using the same principles as are outlined in this paper. Throughout this paper, the above exposures are evaluated from the tenant’s perspective. However, the same principles are equally applicable in evaluating exposures from the landlord’s perspective.

III. Indemnities.

Indemnities require one party to the indemnity agreement to protect (or “insure”) the other party to the indemnity contract against liabilities that would otherwise (under existing legal principles) be borne by that person. Indemnity agreements are useful in shifting liabilities onto (i) the person who is much more likely to be responsible for that liability, thereby eliminating the need to litigate liability as between the two parties (as in the case of a “broad form” (defined and discussed below) tenant indemnity in a ground lease where a landlord is expected to have very little (if any) interaction with the property being leased); (ii) the person better able to eliminate or reduce the likelihood of the applicable risk (as in the case of an indemnity from a tenant for all that happens within a tenant’s premises under a lease that gives the tenant full (or nearly full) authority to control access, maintenance, construction, etc. of those premises, and in the analogous case of an indemnity from a landlord for all that happens in the common areas of a multi-tenant shopping center under a lease that reserves to the landlord full (or nearly full) authority to control access, maintenance, construction, etc. of those common areas); (iii) the person better able to absorb the risk or who has the ability to pass the costs associated therewith on to its customers (as in the case of an insurance contract); and/or (iv) the person better able to insure the risk (for example, where only one party has an insurable interest). In negotiating indemnities, those underlying theoretical considerations should be kept in mind and should form the basis for any arguments for or against the inclusion or breadth of a particular indemnity provision.

Of course, an insurance contract is one type of indemnity contract. However, insurance will be more fully-discussed below. The focus of this section is on the indemnities typically agreed to by landlords and tenants in commercial leases.

A. The Basic Elements of an Indemnity Provision.

Every well-drafted indemnity has five or six basic parts, each of which is negotiable: [1] identification of the indemnitor, [2] the scope of the indemnity obligations, [3] identification of the indemnitee(s), [4] the coverage trigger, [5] the matters for which the indemnity provides coverage, and, often [6] exclusions from the coverage of the indemnity. Those elements are identified in the following example indemnity provision:

- [1] Tenant
 - [2] must indemnify, defend (with counsel reasonably acceptable to Landlord) and hold harmless
 - [3] Landlord, the agents, contractors and employees of Landlord, and all persons to whom Landlord owes a contractual indemnity obligation (collectively, "Landlord Indemnitees")
 - [4] from and against any and all legal actions, damages, claims, demands, losses, penalties, proceedings, judgments, disbursements, assessments, liabilities, costs and expenses (including reasonable attorney and expert fees and expenses incurred in investigating, defending or prosecuting any action, litigation, claim or proceeding) (collectively, "Claims")
 - [5] arising from or out of (i) any acts, failures, omissions or negligence of Tenant, its agents, employees, contractors, licensees, invitees, principals, representatives, officers, managers, members, shareholders, partners, or directors or any affiliates, successors or assigns of any of the foregoing (collectively, "Tenant Parties") that occur in the Premises, Common Areas or other parts of the Shopping Center; or (ii) any occurrence within or upon the Premises or that results from Tenant's use thereof or activities in connection therewith,
 - [6] except to the extent such Claims result from the gross negligence or intentional misconduct of Landlord or its agents, contractors or employees and are not covered by insurance maintained or required to be maintained by Tenant. THE FOREGOING INDEMNITIES WILL APPLY REGARDLESS OF THE SOLE OR JOINT NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR ANY LANDLORD INDEMNITEES OR ANYONE CLAIMING BY, THROUGH OR UNDER ANY OF THEM but will not apply to the extent of the gross negligence or intentional misconduct of Landlord or any Landlord Indemnitee.
1. Identification of Indemnitor.

This must be either a party to the indemnity contract or someone on whose behalf such party is authorized to act (such as the principal of such party), as those are the only persons on whom the contract will be binding.

2. Scope of the Indemnity.

This clause identifies the scope of the indemnitor's duties. In most contractual indemnity provisions, an indemnitor is obligated not only to pay any damages that are ultimately found to be owing by the indemnified party, but also to handle the defense of the claim and to make good any other harm the indemnitee suffers as a result of the indemnified claims. However, an indemnity's scope may be limited only to holding the indemnitee harmless from any ultimate liability, with the indemnitee still remaining liable for defense costs and still being required to absorb any non-litigation-related losses.

3. Identification of the Indemnitee(s).

Generally, coverage extends not just to the original contracting party-indemnitee, but also to others for whom that person is responsible. The language recited at [3] in the example language above identifies both the original contracting party indemnitee and those for whom that party is potentially or actually contractually responsible (or those for whom that party would likely provide indemnification and defense even in the absence of contractual liability to them—as in the case of an employee who is sued for actions taken on the job). It is important that the indemnity cover all claims for which the indemnitee is contractually liable in order to provide the full coverage that is likely expected by the indemnitee. However, this language could be narrowed to the contracting party indemnitee alone or broadened to include, for example, the agents, licensees, invitees, principals, representatives, officers, managers, members, shareholders, partners, or directors or any affiliates, all of their successors or assigns and all of those to whom Landlord owes a contractual indemnity obligation.

4. Coverage Trigger.

In general, it is the parties' expectation that the indemnity will become operative the moment a claim is filed or an allegation is made. It is unlikely that either party expects coverage to begin only after a judgment is obtained and the damages ascertained. Accordingly, it is important that the indemnification clause be triggered by mere "claims" and, thus, that the indemnitee not have to wait until "damages" are determined or a "suit" is commenced.

5. Indemnified Matters.

There are two basic types of indemnities that appear in commercial shopping center leases. The first is a "geographic indemnity". A geographic indemnity provides coverage to the indemnitee for everything that happens in a defined geographic area. Thus, often a landlord will agree to indemnify its tenant against everything that happens

in the common areas, while the tenant agrees to indemnify its landlord against everything that happens in its leased premises. The second type of indemnity is an “acts indemnity”. An acts indemnity provides coverage for everything that arises as a result of the acts or omissions of the indemnitor or some group of persons for whom the indemnitor is responsible. Thus, often landlord and tenant will each indemnify the other against all matters arising as a result of the acts or omissions of the indemnitee and all of those for whom the indemnitee is responsible.

In many landlord-drafted forms, both geographic and acts indemnities from the tenant are included. That approach leads to an unfair allocation of risks and, if made reciprocal, would lead to overlapping and conflicting coverage (for example, when landlord acts negligently while on the leased premises). Those two types of indemnities are based on different and often conflicting theories of risk allocation. The geographic indemnity is based on the theory that the indemnitee, who has near total control over and responsibility for maintaining and insuring the particular geographic area, is much more likely than the indemnitor to be responsible for the applicable claim and that it is just not worth the litigation costs that would have to be incurred to otherwise allocate liability just to deal with the relatively few situations in which the indemnitee is actually at fault. The acts indemnity is based on the theory that the purpose of the contractual indemnity is to expand existing common law indemnities to cover not just the amount of the judgment (which common law indemnity and contribution principles would supply) but also litigation expenses, attorneys fees and other items of expense that are not provided by common law indemnity and contribution principles. The acts indemnity does not seek to fundamentally alter underlying common law liability principles as between the indemnitee and the indemnitor. As long as the acts indemnity remains, it will generally be necessary (for claims lying outside the area covered by the geographic area) to determine fault as between landlord and tenant as a preliminary to actually defending the claim. Although that litigation might be valuable to the respective parties’ insurers, its value to the landlord and tenant should be carefully evaluated.

As a drafting note, if a tenant is to agree to a geographical indemnity, the coverage should be limited so that it does not commence until after exclusive possession is delivered to tenant. Otherwise the tenant could be agreeing to indemnify against claims that the tenant is powerless to guard against and, thus, for claims to which the theoretical basis of the geographic indemnity has no application.

There are also many indemnities scattered throughout a typical lease to deal with specific matters such as environmental matters, mechanics liens and holdover tenancies. With the one exception discussed below, this paper does not discuss those, although the same principles that apply to the general indemnities are equally applicable in those specific contexts. Practitioners should note one further type of indemnity that is often used in the environmental matters context. I refer to that type of indemnity as a “chronological indemnity”. A chronological indemnity allocates risk based on the timing of the occurrence that gives rise to the indemnity obligation. Thus, in addition to acts and geographical environmental indemnities, landlords are often expected to indemnify

tenants for hazardous materials that existed on the shopping center before the leased premises were delivered to tenant regardless of who left them there or where on the shopping center they were left.

6. Exceptions from the Coverage of the Indemnity.

Typically, an indemnity will exclude certain matters from its coverage. Contracting parties are almost always willing to exclude matters that arise as a result of the gross negligence or willful or intentional misconduct of the party being indemnified. What is usually more controversial is whether and to what extent the simple negligence of the indemnified party will be excluded. The scope of coverage afforded for the negligent acts and omissions of the indemnified party will cause the indemnity to be classified into one of three (3) basic categories: broad form (this is the type of tenant-provided indemnity contained in most landlord-drafted forms), intermediate form and limited form.

Broad Form. In a broad form indemnity, the indemnitor is responsible for all matters coming within the indemnity's coverage, even if the matter arose partially or even exclusively out of the negligent acts or omissions of the indemnitee. The indemnity example provided above indemnifies the indemnitee for the indemnitee's own simple negligence and, therefore, is a broad form indemnity.

Intermediate Form. In an intermediate form indemnity, the indemnitor is responsible for all matters coming within the indemnity's coverage, unless those matters arose out of the sole negligence of the indemnitee. This form of indemnity would include an exception such as: ". . . unless such Claim results from the sole or gross negligence or intentional misconduct of Landlord or its agents, contractors or employees. THE FOREGOING INDEMNITIES WILL APPLY REGARDLESS OF THE JOINT NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR ANY LANDLORD INDEMNITEES OR ANYONE CLAIMING BY, THROUGH OR UNDER ANY OF THEM but will not apply to the sole or gross negligence or intentional misconduct of Landlord or any Landlord Indemnitee." (All-caps language should be used here or in a broad form indemnity to call attention to the fact that the indemnitee would be responsible even for the negligence of the party being indemnified. Such language is required in the majority of states that follow the "express negligence" doctrine and is helpful in making the indemnity enforceable even in states that do not follow the express negligence doctrine. See IRMI Publication (defined below) § IV.F.1.)

Limited Form. In a limited form (also called comparative negligence form) indemnity, the indemnity does not cover the indemnitee to the extent of the indemnitee's comparative negligence. This form of indemnity would include an exception such as: ". . . except to the extent arising from the negligence or intentional misconduct of Landlord

or its agents, contractors or employees.” (Note the all-caps language is not needed here, unless, perhaps, the parties intend to include strict liability claims within the indemnity.)

One additional variable that may be used in limiting or expanding the above exclusions is the respective insurance coverage of the indemnitor and the indemnitee. In either the broad or intermediate forms, it seems especially unfair to deprive the tenant of the benefits of the liability insurance carried by the landlord given that the tenant paid for that coverage to cover those very kinds of risks through its triple-net expense reimbursements. Thus, even a tenant in a weak bargaining position should insist on an exception from broad or intermediate indemnity forms for matters covered by insurance maintained by the landlord. Thus, the example indemnity provided above could be revised as follows to accomplish that: “. . . except to the extent such Claims either result from the gross negligence or intentional misconduct of Landlord or its agents, contractors or employees ~~and~~ are ~~not~~ covered by insurance maintained or required to be maintained by ~~Tenant~~Landlord.”

By contrast, any of the indemnity forms may also be limited by excepting from the exceptions claims covered or required to be covered by the indemnitor’s insurance. An example of such an exception to the exception is provided in [6] of the example provision provided above. The theory supporting such an exception is that it is a material part of the deal that the indemnitor maintain certain types of insurance and, thus, in order to realize fully the benefit of the indemnitee’s bargain the indemnitee should benefit from any coverage afforded by the indemnitor’s insurance. In addition, to the extent the claim is in fact covered by such insurance there is no additional financial burden placed on the indemnitor. (Note that those same arguments can also be made in support of the change suggested in the immediately preceding paragraph.) Those arguments are not very persuasive if the indemnitor is the tenant. In fact, loss history and prior claims are important factors in the underwriting process and, thus, there would likely be an additional financial burden on the indemnitor even as to claims covered by the indemnitor’s insurance. Moreover, to the extent the indemnitor maintains deductibles or retentions under such policies there would be a direct additional financial burden, and any claims paid by the insurer would eat away at the indemnitor’s policy limits. And, in contrast to the exception for matters covered by a landlord-indemnitee’s insurance discussed above, it cannot be said here that the landlord is paying for the tenant’s insurance policy. Thus, even a tenant in a weak bargaining position should resist an indemnification provision that requires coverage for its landlord’s sole or gross, as applicable, negligence or intentional misconduct even if the matter is covered by the tenant’s insurance. Rather, it should insist that the change described in the immediately preceding paragraph be made.

As an additional note on this subject, there are many technicalities that need to be observed in drafting indemnity provisions and those technicalities vary dramatically among the various jurisdictions. The example indemnity provision provided above generally complies with all of those technicalities. An excellent general summary of those technical requirements is provided in Neil S. Kessler and Julie A.S. Williamson,

Basic Insurance Issues for Commercial Real Estate Attorneys Including Indemnity, Hold Harmless and Subrogation, U.S. Shopping Center Law Conference, 68 (International Conference of Shopping Centers (“ICSC”) October 2006). In addition, a state-by-state description of standards of interpretation as to indemnification of the indemnitee for its own negligence can be found in International Risk Management Institute, Inc., Contractual Risk Transfer (the “IRMI Publication”), § IV.F.1 (1995).

B. Effect of Indemnity Exceptions on Tenant-Client’s Exposure.

Even assuming the tenant/indemnifying party is unable to obtain any exceptions from the indemnity other than for the gross negligence and intentional misconduct of the landlord/indemnified party, the exposure to assumed liabilities is nonetheless dramatically decreased. Thus, after striking through all assumed liability claims that include intent as an element, the “exposures” table introduced in Section II of this paper looks like this:

Intentional Torts Omitted

<ul style="list-style-type: none"> ▪ Battery ▪ Assault ▪ Products liability 	<ul style="list-style-type: none"> ▪ Nuisance involving property damage (“PD”) based on negligence theory ▪ Nuisance involving PD based on intent theory 	<ul style="list-style-type: none"> ▪ False imprisonment ▪ Malicious Prosecution (and abuse of process?) ▪ Wrongful eviction from, entry onto or invasion of premises by the owner or landlord of that premises ▪ Defamation as to public persons or that are of public concern 	<ul style="list-style-type: none"> ▪ Intentional infliction of emotional distress ▪ Trespass to land or chattels (other than by the owner or landlord thereof) ▪ Conversion ▪ Invasion of privacy other than by publication (intrusion onto seclusion)
<ul style="list-style-type: none"> ▪ Negligence (including land occupant liability) ▪ Strict liability (animals, ultrahazardous activities) 	<ul style="list-style-type: none"> ▪ Defamation as to purely private matters ▪ Invasion of privacy by publication (appropriation, false light, private facts) ▪ Use of another’s advertising idea in one’s 	<ul style="list-style-type: none"> ▪ Defamation as to public persons or that are of public concern ▪ Defamation as to purely private matters ▪ Invasion of privacy by publication (appropriation, false light, private facts) ▪ Use of another’s advertising idea in one’s 	<ul style="list-style-type: none"> ▪ Fraud or negligent misrepresentation ▪ Interference with contractual relations ▪ Nuisance not involving PD based on negligence theory ▪ Nuisance involving PD based on intent theory ▪ Breach of contract claims ▪ Non-tortious

	advertisements ▪ Infringing on another's copyright, trade dress or slogan in one's advertisements	injuries (purely economic losses, bad marketplace, etc.)
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IV. Waivers.

The discussion of legal causes of action and contractual indemnifications above defines the maximum scope of potential liability for harm suffered by another. This section and the one on insurance which follows it introduce limitations and insurance coverages that reduce that exposure. To the extent a claim is waived by an injured party, the other party will have neither a common law nor a contractual indemnity obligation to remedy or indemnify against that injury.¹ Thus, the next step after determining that liability exists is to determine whether that liability has been waived. A lease generally contains many specific waivers and each of those will have to be considered. However, there are three waivers that are found in virtually all commercial leases and that apply across a broad range of circumstances: a general claims waiver, a subrogation waiver and a landlord exculpation clause. Each of those is discussed below.

Each of those waivers has the same basic elements. Those elements are: [1] the identity of the waiving party, [2] the waiver, [3] the identity of the beneficiary of the waiver, [4] a description of the claims being waived, and, often [5] exceptions from that coverage.

A. General Claims Waivers.

Following is an example of a typical general claims waiver from a negotiated lease form (the defined terms used here are the same as those that are defined in the example indemnity provided above), which is broken into its five basic parts:

[1] To the fullest extent permitted by law, Tenant, on behalf of all Tenant Parties,

¹ See Nodaway Valley Bank v. E.L. Crawford Construction, Inc., 126 S.W.3d 820 (Mo. App. 2004); Federal Ins. Co. v. Awicker Ele. Co., Inc., 144 A.D.2d 632 (N.Y. App. Div. 1988); Tokio Marine and Fire v. Employers Ins. of Wasau, 786 F.2d 101 (2d Cir. 1986); Trump-Equitable Fifth Ave. Co. v. H.R.H. Const. Corp., 106 A.D.2d 242 (N.Y. App. Div. 1985). The fact patterns in those cases were very similar. The courts interpreted construction contracts that contained indemnity provisions covering the negligence of the contractor in favor of the building owner. Those contracts also contained waivers by the building owners of all claims against the contractor that were covered by the building owners' property insurance policies. In construing those contracts, the courts found no conflict between the two provisions. The indemnity provisions were broad enough to cover both the claims of the owner and of third parties, whereas the waiver applied only to claims of the owner. Thus, the two provisions could be construed consistent with each other to provide an indemnity only as to claims not waived under the waiver provision, including both uninsured claims and claims that might be asserted by third parties. I found no cases that construed together apparently conflicting general waiver (versus the special case of subrogation waivers) and indemnity provisions. Although the presence of insurance coverage was a factor cited by each of the courts in the above cited cases, I do not believe its absence would change their decisions. The conclusion they reached is the only one that gives effect to both provisions of the contract and therefore satisfies the requirement that contracts be construed to give effect to all of their provisions. See Trump Equitable, 106 A.D.2d at 244. Nonetheless, best practice requires the parties to specify the interactions of the various waivers, indemnities and insurance provisions or to use conflict resolution language ("subject to" or "notwithstanding") as appropriate to ensure that a court interprets the provisions as intended.

- [2] knowingly and voluntarily waives all Claims
- [3] against Landlord and its agents, contractors and employees (collectively, the “Landlord Representatives”)
- [4] arising from any of the following: (i) any personal injury, bodily injury, or property damage occurring in or at the Premises; (ii) any loss of or damage to property of a Tenant Party located in the Premises or other part of the Shopping Center by theft or otherwise; (iii) any personal injury, bodily injury, or property damage to any Tenant Party caused by other tenants of the Shopping Center, parties not occupying space in the Shopping Center, occupants of property adjacent to the Shopping Center, the public or by the construction of any private, public, or quasi-public work occurring either in the Premises or elsewhere in the Shopping Center; (iv) any interruption or stoppage of any utility service or for any damage to persons or property resulting from such stoppage; (v) business interruption or loss of use of the Premises suffered by Tenant; (vi) any latent defect in construction of the Premises; (vii) damages or injuries or interference with Tenant’s business, loss of occupancy or quiet enjoyment and any other loss resulting from the exercise by Landlord of any right or the performance by Landlord of Landlord’s maintenance or other obligations under this Lease; (viii) any bodily injury to an employee of a Tenant Party arising out of and in the course of employment of the employee and occurring anywhere in the Shopping Center; or (ix) the negligent acts or omissions or the strict liability of Landlord or one or more Landlord Representatives.
- [5] Notwithstanding the foregoing, neither Tenant nor any Tenant party waives any Claims pursuant to this grammatical paragraph to the extent those Claims arise out of the strict liability, negligence or intentional misconduct of Landlord or any Landlord Party.

Clause [5] of the foregoing waiver makes this waiver a limited form waiver. In its limited form, very little, if anything, is actually being waived. However, both broad and intermediate form waivers are common in retail leases, and those forms would make the waiver much more valuable to the recipients thereof and much more controversial to the waiving party. In addition, as with indemnification provisions, insurance coverage of either party may be introduced as an additional variable.

One important item to note is that there is nothing inconsistent in having in the same lease a broad or intermediate form general claims waiver and a limited form indemnification provision. That results in a waiver of claims held by the waiving party but also provides protection to that waiving party against third-party claims. In general, a party should be willing to agree to broader claims waivers (which address the party’s own claims) than indemnification provisions (which also address third-party claims). It is one thing for a party to agree that he will not press his own claims that arise from the other party’s negligence, but quite another for that party to agree that he will take the next step and indemnify the other party against the consequences of that other party’s own

negligence. Thus, even if a tenant is required to agree to waivers of some negligence claims against its landlord, the tenant should strongly resist agreeing to indemnify its landlord against those claims. That is especially the case if the tenant is paying (though its triple net reimbursements) for its landlord's insurance to cover those claims.

One other consideration to keep in mind is that although the above waiver purports to waive claims "on behalf of all Tenant Parties" the tenant almost certainly does not have authority to do that. Because those Tenant Parties are not parties to the lease and because Tenant likely does not have authority to act on behalf of those Tenant Parties, the claims of those parties are not likely affected by the above waiver.

As with indemnities, although to a lesser extent, several technicalities attend the drafting of waivers and those technicalities vary from state-to-state. The local law of each jurisdiction should be checked to see what is required in that jurisdiction to make waivers effective.

B. Subrogation Waivers.

Following is an example of a typical, negotiated reciprocal subrogation waiver, which is broken into its four basic parts (there is no fifth part—an exceptions clause):

- [1] Notwithstanding anything to the contrary contained elsewhere in this Lease, neither Landlord nor Tenant
- [2] shall be liable
- [3] to the other party or to any insurance company insuring the other party or to the agents or employees of the other party by way of subrogated rights or otherwise,
- [4] for any loss or damage (including loss of income) caused by fire or any other hazard or peril to any property covered by the property and business income insurance maintained by the waiving party or that the waiving party is required to maintain under the terms of this Lease, EVEN THOUGH SUCH LOSS OR DAMAGE MAY HAVE BEEN OCCASIONED BY THE NEGLIGENCE OF SUCH PARTY OR ITS AGENTS OR EMPLOYEES. For purposes of the foregoing waiver, any deductibles, self-insurance or co-insurance maintained by the waiving party will be treated as "covered by insurance" to the same extent as though such amounts were actually paid to the waiving party by a third party insurer.

As you can see from the above clause, it does not actually waive any subrogation rights as those belong to the insurer, who is not a party to the contract. Rather, this clause waives the rights of the insured so that when the insurer "stands in the shoes" of the insured by virtue of the insurer's subrogation rights it has no claims left to assert.

The purpose of the subrogation waiver is to shift responsibility for property and business income claims onto the insurers who have been paid to take that responsibility on and to prevent those insurers from shifting their responsibilities back onto the party to the contract that is not their insured or, more likely, onto the liability carrier of that party. It also avoids disputes between the parties as to fault and liability for a casualty and, therefore, the need to involve the parties' liability carriers. Note that all of those reasons apply equally to the business income policy (discusses below) and, as such, the waiver should extend to business income losses as well as all property damage.

It is important that the waiver extend not just to the other party to the Lease, but also to all of those for whom that party might be responsible. Otherwise, the waiving party's insurer might have a claim against an employee of the non-waiving party, which the non-waiving party may feel obligated to defend against even if not contractually obligated to do so. Thus, the above waiver extends to the agents and employees of the waiving party.

The last sentence of the foregoing waiver forces each insured party to bear the consequences of the deductible, retention and co-insurance amounts that party has elected to maintain. Absent such a concept, a primary purpose of the subrogation waiver—avoiding disputes as to fault—would be undermined as the parties (and their respective liability insurers) would have to litigate to determine liability for the deductible amounts. In response, each party would have to adjust its liability insurance limits to match the deductible, retention and co-insurance amounts maintained by the other party. (This also presents a practical problem of finding out what the other party's deductible amounts are, which is often a carefully guarded secret in sophisticated insurance programs.)

C. Landlord Exculpation Clause.

The final type of waiver clause to be addressed in this section is the landlord exculpation clause. Below is a typical negotiated landlord exculpation clause:

If Landlord fails to perform any covenant, term or condition of this Lease upon Landlord's part to be performed and, as a consequence of that failure, Tenant recovers a money judgment against Landlord, that judgment may be satisfied only out of the proceeds of sale received upon the execution of such judgment and levy thereon against the right, title and interest of Landlord in the Shopping Center and out of the rent and other income from the Shopping Center that is receivable by Landlord and out of the consideration received by Landlord from the sale or other disposition of all or any part of Landlord's right, title and interest in the Shopping Center. Neither Landlord nor any of the partners, beneficiaries, officers, directors, venturers, shareholders or Affiliated entities of Landlord may be personally liable for any deficiency.

Because the elements of the landlord exculpation clause used above do not appear in the typical order for a waiver clause and because some of those elements are implied, I have not broken this clause down into its elements. However, it contains each of those elements and suffices as a waiver of claims by the tenant and limits landlord's total exposure, no matter how badly things go for the landlord to landlord's interest in the shopping center. Although strong and moderate tenants can generally convince their landlords to make the other waiver and indemnity provisions discussed above reciprocal, tenants seldom convince landlords to make this provision reciprocal, and for good reason. Landlords (and their lenders) depend very much on the creditworthiness of their tenants when deciding which ones to lease space to. The rent stream to be paid by a tenant is a primary consideration of any landlord. Thus, it makes sense that the entire financial wherewithal on which the initial leasing decision was based be available to landlord to back up the tenant's obligations. By contrast, the primary consideration of a tenant is the property. Almost any landlord that can deliver the desired property will be satisfactory to the tenant. In fact, tenants seldom ask for or evaluate landlord financials. Accordingly, the availability of any landlord assets beyond the shopping center (and therefore beyond the tenant's initial expectations) to back up landlord's obligations under the lease would be a windfall to the tenant. Thus, the non-reciprocity of the foregoing clause is reflective of the parties' different expectations.

This clause was included in this paper primarily to emphasize two points that are significant in negotiating liability-related lease provisions. First, all of the liability issues discussed in this paper should be relatively less important to a landlord (whose exposure is limited to its interest in one shopping center) than to a tenant (all of whose company assets are at stake). Second, the lease should require landlord to maintain insurance policies with generous limits as that will be the only assured source of recovery for most tenant claims, assuming, as a tenant must, that the landlord fully leverages the shopping center.

D. Effect of Waivers on Tenant-Client's Exposure.

Even assuming the tenant/indemnifying party is unable to obtain any waivers from the landlord/indemnified party other than the subrogation waiver, the tenant's exposure to assumed liabilities is nonetheless further decreased. Thus, after modifying the table to account for the limitations discussed above and the subrogation waiver given by the landlord/indemnified party, the "exposures" table introduced in Section II of this paper looks like this:

Intentional Torts and Property Damage of the Other Party Omitted

<ul style="list-style-type: none"> ▪ Battery ▪ Assault ▪ Products liability (for restaurants, usually inadequate warning (of allergens), food poisoning and foreign objects) 	<ul style="list-style-type: none"> ▪ Nuisance involving PD (<u>of 3d parties</u>) based on negligence theory ▪ Nuisance involving PD (<u>of 3d parties</u>) based on intent theory 	<ul style="list-style-type: none"> ▪ False imprisonment ▪ Malicious Prosecution (and abuse of process?) ▪ Wrongful eviction from, entry onto or invasion of premises by the owner or landlord of that premises ▪ Defamation as to public persons or that are of public concern 	<ul style="list-style-type: none"> ▪ Intentional infliction of emotional distress ▪ Trespass to land or chattels (other than by the owner or landlord thereof) ▪ Conversion ▪ Invasion of privacy other than by publication (intrusion onto seclusion)
<ul style="list-style-type: none"> ▪ Negligence (including land occupant liability) (<u>other than PD of the other party</u>) ▪ Strict liability (animals, ultrahazardous activities) (<u>other than PD of the other party</u>) 		<ul style="list-style-type: none"> ▪ Defamation as to purely private matters ▪ Invasion of privacy by publication (appropriation, false light, private facts) ▪ Use of another's advertising idea in one's advertisements ▪ Infringing on another's copyright, trade dress or slogan in one's advertisements 	<ul style="list-style-type: none"> ▪ Fraud or negligent misrepresentation ▪ Interference with contractual relations ▪ Nuisance not involving PD based on negligence theory ▪ Nuisance involving PD based on intent theory ▪ Breach of contract claims ▪ Non-tortious injuries (purely economic losses, bad marketplace, etc.)

The above table provides an answer to the client's first question posed in the introduction to this paper. Each of the above assumed liability claims can be evaluated by the client to estimate the likelihood of such a claim being made against the indemnified party/landlord either as a result of tenant's acts or as a result of landlord's or a third party's acts while

on the premises (depending on whether an acts or geographic indemnity is agreed to). To answer the client's second question, insurance coverage must be considered.

V. Insurance.²

The final essential element for evaluating a party's risk exposure is insurance. Although most landlord-drafted forms contain (and should contain) many different coverage types in their insurance requirements, there are two principal types of insurance that should always be required of both landlord and tenant—liability and property insurance. In addition, the tenant is typically required to maintain business income insurance, and the landlord has the option to maintain business income (also called rent) insurance. (However, only one party or the other (but not both) should maintain the rent portion of the business income policy. Otherwise, the parties will incur the cost of this insurance twice, even though the policies will permit only one recovery.) Workers Compensation and Employer's Liability should also be required of the tenant.

Following are example insurance requirements relating to liability and property coverage from a landlord form:

Tenant covenants and agrees that from and after the date of delivery of the Premises from Landlord to Tenant, and during the remainder of the Term, Tenant must carry and maintain, at its sole cost and expense, the following types of insurance:

(a) Occurrence-based Commercial General Liability insurance (written on the then-current ISO form bearing that name (or the industry-recognized successor to that form), or a form providing broader coverage) covering the Premises and Tenant's activities within the Shopping Center, with combined single limits of not less than \$1,000,000.00 per occurrence, \$2,000,000.00 general aggregate; \$2,000,000.00 products-completed operations aggregate; and \$1,000,000.00 personal and advertising injury, adjusted annually by Landlord in its reasonable judgment. Such policy must include an endorsement that includes contractual liability coverage for personal and advertising injury. Such policy must name Landlord as an additional insured under such policy for all liability arising out of the ownership, maintenance or use of the Premises. The additional insured endorsement is to be included on a primary (not excess) basis and a waiver of subrogation endorsement is to be included for Landlord. Cross suits exclusions applicable to the additional insured shall not be included. In addition, if Tenant offers liquor from the Premises, such policy must include an endorsement that deletes the liquor liability exclusion from the foregoing-described liability policy or must include a liquor liability endorsement to the

² Portions of this section were prepared by Dewaine Ried, Executive Vice President of Brown & Brown Insurance of Arizona, Inc.

policy or such coverage must be provided via a stand-alone policy of Dramshop (liquor) liability insurance. If Tenant insures multiple locations under the same policy, a per location aggregate endorsement must be included. In addition, if Tenant operates a valet parking program, Tenant must maintain (i) automobile insurance for owned, hired and non-owned vehicles, including the loading or unloading thereof, with liability limits of not less than One Million Dollars (\$1,000,000.00) per accident combined single limit for bodily injury (including but not limited to wrongful death) and property damage and (ii) garage keeper's direct primary physical damage insurance covering autos left with Tenant for storage or safekeeping and having comprehensive and collisions limits of not less than Five Hundred Thousand Dollars (\$500,000.00) per occurrence;

(b) Causes of Loss-Special Form Building and Personal Property insurance (written on the then-current ISO forms bearing those names (or the industry-recognized successors to those forms), or forms providing broader coverage), together with endorsements (or separate policies) to provide coverage for (i) Ordinance or Law, (ii) war risks, when and to the extent such insurance is obtainable from the United States of America or an agency thereof, (iii) if the Premises are located within a flood zone, flood disaster pursuant to the Flood Disaster Protection Act of 1973, (iv) earthquake and volcanic eruption risk, (v) demolition and increased cost of construction coverage, (vi) if applicable, sprinkler leakage insurance, (vii) Utility Service—Direct Damage, and (viii) if applicable, Spoilage Coverage, all of which insurance policies and endorsements must cover the full replacement cost of all Tenant Personal Property, and all alterations, improvements and betterments to the Premises now existing or to be added, as updated from time to time during the Term. Landlord must be named as a loss payee under each such policy;

(c) Causes of Loss-Special Form Business Income (and Extra Expense) Coverage insurance (written on standard ISO forms bearing those names (or the industry-recognized successors to such forms), or forms providing broader coverage), in adequate amounts to avoid co-insurance provisions, for an adequate period of time of not less than 12 months, taking into account the reasonable time period required to rebuild and/or replace the insured property. Such policy (or separate policies, as applicable) must cover at least the same causes of loss as are required to be covered in connection with the property policy in clause (b), above, to the extent generally available to similarly-situated tenants in the Shopping Center and other similar shopping centers;

(d) Workers' Compensation and Employer's Liability Policy of insurance (written on the standard ISO form bearing that name (or the industry-recognized successor to that form), or a form providing broader coverage) with limits not less than \$1,000,000.00 each accident, \$1,000,000.00 disease-policy limit, and \$1,000,000.00 disease-each employee. Those policies must include waivers of subrogation endorsements naming Landlord;

(e) Excess or Umbrella Liability insurance providing limits not less than \$2,000,000.00 each occurrence; \$2,000,000.00 aggregate and providing excess commercial general liability, liquor liability, auto liability and employer's liability coverages;

(f) [other coverages required by the shopping center's and tenant's specialized needs, including equipment breakdown (also called "boiler and machinery") coverage, if Tenant is responsible for maintaining any high pressure equipment or equipment that employs centrifugal force (like an HVAC system), glass and sign coverage and building coverage as necessary to insure Tenant's responsibilities under the lease.]

At a minimum, Landlord should be required to maintain the insurance types described in clauses (a), (b) and, if the tenant is not required to cover rents in its business income policies, (c), with respect to the work performed by the landlord and landlord's activities within the shopping center or project. The above policy requirements have been drafted to include specific concerns of retail leases. Through the endorsements listed above, both tenants and landlords can ensure that they are protected from the most likely claims to arise in the retail leasing context—including increased risks presented by the serving of alcoholic beverages and providing valet parking service and by the presence of significant perishable inventory that would be lost in the event of an extended period of utility interruption.

A detailed examination of each type of policy and endorsement and the terms, conditions, exclusions and exceptions of such policies and endorsements is beyond the scope of this paper.³ Each lawyer who advises clients on liability and insurance issues should obtain copies of the ISO versions of each relevant policy and read them. As an outline for use in reading such policies, each policy starts with an insuring agreement, which broadly defines the insurer's obligations. The insuring agreement is then followed by a series of exclusions from and exceptions to coverage. Most of those exclusions and exceptions are present for public policy reasons (as in the case of the exclusion from Coverage Part A of the Commercial General Liability ("CGL") policy for "expected or intended injury") or because coverage is to be provided on a case-by-case basis pursuant to a separate policy or an endorsement to the CGL policy (as in the case of the exclusions from coverage Part A for liquor liability, worker's compensation and employer's liability risks) or because the risk is too difficult or expensive to underwrite (as in the case of the exclusions from coverage Part A for war and pollution). Also part of the policy are conditions to coverage, which explain, among other matters, the duties of the insured,

³ There are many excellent articles that describe in great detail the various insurance coverages and the terms, conditions and provisions of standard, generally-available insurance policies in the retail leasing context. Two such articles were presented at the 2006 ICSC law conference—Neil S. Kessler and Julie A.S. Williamson, [Basic Insurance Issues for Commercial Real Estate Attorneys Including Indemnity, Hold Harmless and Subrogation](#) (ICSC, October 2006) and George J. Meyer and Arthur E. Pape, [Certificates of Insurance and Endorsements](#) (ICSC, October 2006).

how disputes between the insurer and insured are to be resolved, the effect on the insurer's responsibilities of another policy covering the same risk. In the sections that follow, this paper will not, in general, discuss any provisions of the policies other than the insuring agreements. That is based on the assumption that the excluded coverages will be added back by the insured by endorsement or separate policy to the extent the insured is concerned about a particular excluded risk and that risk is insurable. To the extent a risk is not insurable by separate policy or endorsement, this paper assumes that it is a risk either that the insured would be willing to assume or that the insured would not expect to have coverage for. Nonetheless, each such exclusion should be examined and, to the extent questionable, discussed with the client, to confirm the foregoing assumptions are correct in a given case and as applicable to a particular client.

A. Liability Insurance.

Part A. The CGL policy contains three basic insuring agreements – Parts A, B and C. The insuring agreement of coverage Part A provides that the insurer “will pay those sums that the insured becomes obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.”⁴ The policy defines “bodily injury” as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” It is important to note (in considering whether the subrogation waiver should include claims covered under the liability policy, for example) that, unlike the property policy, the CGL policy does not reimburse the insured for its own losses, but merely pays the insured for amounts the insured is obligated to pay as damages to others.

Part B. The insuring agreement of coverage Part B provides that the insurer “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘personal and advertising injury’ to which this insurance applies.” “Personal and advertising injury” is defined as “injury, including consequential ‘bodily injury’, arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

⁴ In ISO Forms, terms that appear in quotation marks are defined at the end of the applicable policy. Capitalized words are defined either in the body of the policy or in the declarations for the policy. The words “you” and “your” refer to the named insured. The words “we”, “us” and “our” refer to the insurer. Finally, in the CGL, references to the “insured” refer not just to the named insured (and certain affiliates and employees of the named insured as more particularly described in the policy) but also to all additional insureds and the persons described as such under Section II of the CGL.

- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your 'advertisement'; or
- g. Infringing upon another's copyright, trade dress or slogan in your 'advertisement'."

Part C. Coverage Part C pays certain medical payments on a no-fault basis and is not generally carried by sophisticated tenants or landlords. This paper does not address this relatively uncommon coverage.

Turning back to the table found in Section II of this paper, the reader can observe that coverage Parts A and B will cover the vast majority of claims a tenant or a landlord is likely to face in the shopping center setting, assuming none of the exceptions or exclusions to coverage apply. That coverage is extended to other parties through the contractual liability coverage that is built into the CGL policy and through additional insured endorsements to the CGL policy.

Contractual Liability Coverage. Contractual liability coverage is provided in an exception to an exclusion from the coverage of the CGL policy. That exception extends coverage to:

- (a) liability for BI and PD claims that would exist even if there were no contract; and
- (b) liability for BI and PD claims (including litigation expenses and attorneys fees to the extent provided for in the contract) that is assumed in an "insured contract" that is entered into before the occurrence of the applicable BI or PD.

"A contract for a lease of premises" is an "insured contract" except to the extent of any indemnity for PD to the leased premises themselves. CGL ¶ V(9)(a). Contractual liability coverage for PAI can also be obtained by endorsement to the basic CGL policy.

Additional Insured Status. Although the contractual liability coverage described above will generally cover a tenant's indemnity obligations under the lease, landlords typically also require that they be named as "additional insureds" under the tenant's CGL policy. As an additional insured, the landlord will have direct access to the policy for payment of certain claims. The scope of the coverage granted to an additional insured will depend on the exact wording of the endorsement that adds the landlord as an additional insured. Pre-2004 ISO-promulgated additional insured forms extended coverage to additional insureds for covered claims "arising out of the ownership, maintenance or use of that part of the premises leased to you [the named insured-tenant]" while the named insured-tenant is still a tenant at such premises. Generally, courts found that language to be broad enough to encompass even claims that arise due to no fault of

the named insured-tenant but that were nonetheless in some way related to the tenant's premises. In response to those court decisions, in 2004, the ISO revised its additional insured endorsement to extend coverage to additional insureds only for covered claims that are "caused in whole or in part by" the named insured and those acting for the named insured. Thus, under the revised additional insured endorsement, broad form coverage (described above) would not be insured under the additional insured endorsement (although intermediate and limited form coverage would be insured).

If care is not taken, the carefully negotiated and drafted indemnity provisions may be undone by this additional insured requirement. The coverage provided to an additional insured under the CGL policy may be broader than the coverage provided by a negotiated indemnity provision. Accordingly, to make sure the compromises struck in the indemnity provisions are not undone through the "back door" of the insurance requirements, a tenant should agree to name its landlord as an additional insured "but only with respect to and to the extent of the liabilities assumed and indemnities extended by Tenant to Landlord under the Lease".

B. Property Insurance.

There are two basic documents that make up an ISO property policy. The first is the "Building and Personal Property Coverage Form" that contains the insuring agreement, lists the types of property that are and are not covered by the policy, provides the terms of the standard additional coverages that may be selected in the policy declarations and contains terms and conditions for making and paying claims. The second document is the applicable Causes of Loss Form as shown on the policy declarations. The Causes of Loss Form specifies the types of loss causes that are covered. The industry-standard form and the one that is the most comprehensive is the "Special Form" Causes of Loss Form. That form provides coverage for all causes of loss other than those that are specifically excluded. Specifically, the insuring agreement under the ISO property form requires the insurer to pay "for direct physical loss or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." The Causes of Loss-Special Form coverage form covers all "Risks of Direct Physical Loss unless the loss is . . . excluded in Section B . . . or limited in Section C" of that form. Given the significance of the exclusions from this coverage form in relation to the overall property policy form, below is a list of the primary excluded causes of loss:

- a. Ordinance or Law (which can be added back by endorsement);
- b. Earth Movement (which can be added through a separate policy or by an endorsement);
- c. Governmental Action (which cannot be insured other than on a manuscript basis, but which will likely be compensable in a condemnation proceeding by or against the applicable governmental actor);

- d. Nuclear Hazard (which cannot be insured other than on a manuscript basis);
- e. Utility Service (which generally can be added back by endorsement);
- f. War and Military Action (which cannot be insured against other than on a manuscript basis to the extent coverage beyond so called “terrorism coverage” is desired);
- g. Water (which generally can be insured against under a separate policy under the federal flood insurance program, although no coverage for business income is included in such coverage);
- h. Fungus, wet rot, dry rot and bacteria (for which a limited coverage extension is provided under Additional Coverage Section E of the policy).

The above exclusions are excluded from coverage, even if they result from or result in a loss of a type that would otherwise be covered (“regardless of any other cause or event that contributes concurrently or in any sequence to the loss”). However, as exceptions to that general rule, resulting damage from fire and explosion from earth movement, resulting damage from fire from a nuclear hazard, resulting damage from a utility service interruption that results in what would otherwise be a covered cause of loss, and resulting damage from water from fire, explosion or sprinkler leakage are covered. By contrast, the other excluded causes of loss listed under paragraph B(2) of the policy are, in general, excluded only if they are the sole cause of the resulting loss. Thus, for example, wear and tear is excluded under Section B(2)(d)(1) of the Causes of Loss – Special Form form. However, if wear and tear result in a fire, then the results of the fire would be covered although the cost to replace the worn item would not be.

C. Business Income.

One of the most commonly held misconceptions in this entire cluster of issues is that Business Income (more commonly called “business interruption” or “rent”) insurance covers all business interruptions regardless of the cause. In fact, the ISO Business Income policy is merely a complement to the property policy. While the property policy generally covers the restoration of the affected property, it does not fully compensate the insured for the casualty loss in that it does not provide compensation for the lost income and extra expenses that the insured will incur while the restoration is taking place. The Business Income policy fills that gap. Its insuring agreement provides: “We will pay for the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your operations during the ‘period of restoration’. The ‘suspension’ must be caused by a direct physical loss of or damage to property at premises which are described in the Declarations The loss or damage must be caused by or result from a Covered Cause of Loss.” Generally, the same Causes of Loss—Special Form form that is described above in connection with the property policy is also used in conjunction with the Business Income policy and, thus, the same exclusions that are discussed above would apply equally to the Business Income policy and no coverage would exist absent a “direct physical loss of or damage to the” premises (that is, a casualty to the premises).

D. Worker’s Compensation and Employer’s Liability.

This insurance policy consists of two basic coverage parts. Part One-Workers Compensation Insurance applies to bodily injury by accident or disease including death. Part One insurance covers medical care, rehabilitation, and lost wages while the worker is disabled. This coverage is governed by individual state laws, which vary a great deal and govern the benefits and compensation amounts.

Part Two-Employers Liability Insurance applies when injured employees have the right to sue under common law and to certain third party suits arising out of the employee’s injury. In most instances the employee does not have the right to sue, as the basis for workers compensation is that it is intended to be the employee’s exclusive remedy for work related injuries and disease.

E. Effect of Insurance on Tenant-Client’s Exposure.

Now we can answer the second question asked by the client in the introduction to this paper. Below is the same table that has been used throughout this paper, but the column headings have been added:

Claims Involving Bodily Injury (“BI”) as an Element	Claims Involving PD as an Element	Claims Involving Personal and/or Advertising Injury (“PAI”)	Claims Not Involving BI, PD or PAI
<ul style="list-style-type: none"> ▪ Battery ▪ Assault ▪ Products liability (for restaurants, usually inadequate warning (of allergens), food poisoning and foreign objects) 	<ul style="list-style-type: none"> ▪ Nuisance involving PD (<u>of 3d parties</u>) based on negligence theory ▪ Nuisance involving PD (<u>of 3d parties</u>) based on intent theory 	<ul style="list-style-type: none"> ▪ False imprisonment ▪ Malicious Prosecution (and abuse of process?) ▪ Wrongful eviction from, entry onto or invasion of premises by the owner or landlord of that premises 	<ul style="list-style-type: none"> ▪ Intentional infliction of emotional distress ▪ Trespass to land or chattels (other than by the owner or landlord thereof) ▪ Conversion ▪ Invasion of privacy other than by publication (intrusion onto seclusion)
<ul style="list-style-type: none"> ▪ Negligence (including land occupant liability) (<u>other than PD of the other party</u>) ▪ Strict liability (animals, ultrahazardous activities) (<u>other than PD of the other party</u>) 		<ul style="list-style-type: none"> ▪ Defamation as to public persons or that are of public concern ▪ Defamation as to purely private matters ▪ Invasion of privacy by publication (appropriation, false 	<ul style="list-style-type: none"> ▪ Fraud or negligent misrepresentation ▪ Interference with contractual relations ▪ Nuisance not involving PD based on negligence

	light, private facts) ■ Use of another’s advertising idea in one’s advertisements ■ Infringing on another’s copyright, trade dress or slogan in one’s advertisements	theory ■ Nuisance involving PD based on intent theory ■ Breach of contract claims ■ Non-tortious injuries (purely economic losses, bad marketplace, etc.)
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Thus, to answer the client’s second question and assuming that the client maintains all of the insurance and endorsements required in the example insurance provisions provided above, only the exposures listed in the right-most column that are not stricken through need be considered.

F. Additional Insurance Considerations.

Coinsurance. This is a property insurance requirement that the insured maintain an amount of insurance equal to a specified percentage of value that is typically 80%, 90% or 100%. It is used by the insurance industry in order to avoid underinsurance by an insured, and if the specified percentage is not maintained, the insurance carrier pays only a proportionate amount of a partial loss. In most instances the insurance is provided on a replacement cost basis, which is the amount the percentage must relate to. An example of how coinsurance applies follows:

If a coinsurance percentage is shown, the insured agrees to insure its property for a minimum amount. In return, the insurance company agrees to reduce the premium that would otherwise apply to that property.

If at the time of loss that property is insured for the minimum amount or more, the coinsurance rule will not have any effect on what the insurer will pay subject to the limit of liability shown in the Policy Declarations.

However, if that property is insured for less than the minimum amount at the time of loss, the insured will have to share the loss with the insurance company. Here is how the insurance company will determine what it will pay and what the insured’s share will be:

First, the amount of the insured loss will be determined. Then the insurance company will divide the amount of insurance the insured had on the property by the minimum amount the insured should have had. Next, the insurance company will multiply this result by 100 to convert it to a percentage. The insurance company will pay this percentage of the insured’s loss up to the

limits of coverage or 100% of the loss, whichever is less; minus the deductible maintained by the insured. The rest is the insured's share. Here is an example of how it works:

Amount of the insured's loss	\$ 30,000.00
Deductible	\$ 250.00
Amount of insurance the insured had	\$ 80,000.00
Minimum amount the insured should have had	\$100,000.00
\$80,000.00 divided by \$100,000.00	= 0.80 or 80%
80% of \$30,000.00	= \$ 24,000.00

In this example, the insurer will pay \$24,000.00 of the insured's loss less the \$250.00 deductible. The insured's share would be \$6,000.00 plus the \$250.00 deductible = \$6,250.00.

Landlord Coinsurance Considerations: Does the landlord have adequate insurance limits, or will the value of the tenant improvements lead to a coinsurance penalty due to underinsurance?

Tenant Building Insurance Considerations: Many leases make the tenant responsible for "building" components such as HVAC, plumbing, glass and damage or destruction caused by tenants, their employees, or invitees. In most instances these are not the tenant's improvements and in order to be insured, the tenant must maintain building insurance that clearly identifies what they are insuring in an amount that is adequate to avoid a coinsurance penalty.

Agreed Amount Endorsement: Both landlord and tenant should consider this endorsement as it waives the penalty imposed by coinsurance for approximately a 5% additional premium.

Landlord Business Income: If the tenant's rent abates or the lease can be terminated arising out of damage or destruction, the landlord should maintain its own Business Income policy insuring rents, and the tenant should not be required to include coverage for rents in its Business Income policy.

Additional Insured Endorsements: Is the landlord the only entity named or should a broader requirement exist to include affiliated entities, parents, subsidiaries, partnerships, joint ventures, limited liability companies and their respective directors, officers, partners, agents, employees, volunteers, members and shareholders? Copies of the additional insured forms should be obtained by the landlord to be certain they comply with the lease requirements.

Deductibles: Should maximum deductibles be imposed in order to be certain the party responsible for them can easily assume them in a time of loss.

Best Rating of Insurance Carrier: A provision should be included requiring the insurance to be placed with an insurance company rated by A.M. Best as A-/VII or better. Landlord should have controls in place to verify the Best rating.

Licensed Insurance Companies: Does the landlord require companies “licensed to do business in the state”? If this is the case it would preclude the tenant from using self insurance, Lloyds of London or other surplus lines carriers that are authorized to do business in the state.

VI. Tying It All Together.

In order to explore in greater detail each of the concepts described above, several examples are provided below. All of the examples provided below assume that your client is the tenant of a shopping center and that your client (and its landlord, where applicable) maintains all of the insurance described in the example insurance provisions set forth in Part V above.

Example 1. Suppose an invitee of the client’s slips on a banana peel left in the parking lot by one of the client’s employees and suffers serious bodily injuries from the resulting fall. Further suppose that the invitee sues both the landlord and the tenant. The landlord is sued under a premises liability theory for failing to discover and remedy the hazard on its parking lot. The tenant is sued due to its vicarious liability for its employee’s negligent act.

Applicability of Waivers. The harm is suffered by a third party and not by either party to the lease. Accordingly, the waivers are inapplicable here.

Applicability of Indemnities. If a purely geographic indemnity regime were applicable, then the client may tender the claim to its landlord and seek indemnification and defense from the landlord. If an acts indemnity regime were to be applicable and the client were to have agreed to either a broad or limited form indemnity in favor of its landlord, then not only may the client not tender the claim to its landlord for indemnification and defense, but the client must take on the indemnity and defense of both itself and its landlord. If an acts indemnity regime with a limited form tenant indemnity of the landlord were applicable, then each of the landlord and the client will be responsible for indemnifying and defending the other to the extent of his proportional fault.

Applicability of Insurance. Regardless of whether any indemnity is applicable, the resulting harm is a bodily injury (BI) and thus will also be covered by the client’s CGL policy. Accordingly, the claim should also be tendered to the client’s liability

insurer. In addition, as an additional insured under such policy, landlord may directly claim coverage under tenant's CGL policy (regardless of whether the old or new form of additional insured endorsement is used, as the tenant was at least partially at fault).

Example 2. Suppose one of the client's employees, thinking erroneously that he had extinguished a cigarette, negligently discards the cigarette into a waste basket in the premises. A fire results that damages the premises and an adjacent premises and that physically injures invitees of both the client and the tenant of the adjoining premises. Both the client and the landlord are sued by the adjacent tenant for property damage, and the invitees of both the client and the adjacent tenant sue the client and the landlord for bodily injuries they suffer.

Applicability of Waivers. Assuming the lease contains a typical "subrogation waiver" like the example subrogation waiver provided above, the property damage claims relating to the portions of the shopping center owned by the landlord would be waived, as this fire resulted from a cause of loss that is covered under the "Special Form" property policy maintained by the landlord. The lease may also contain a general waiver of property and other types of claims by the landlord—only a broad form general waiver from the landlord would be effective here as the landlord was without fault in this example.

However, the landlord is not generally capable of waiving claims on behalf of third parties. Accordingly, any waivers agreed to by the landlord (including the subrogation waiver) would not likely be binding on the adjacent tenant or on any of the invitees of either the client or the adjacent tenant. Thus, that adjacent tenant and those invitees would be entitled to pursue the full range of their common law claims against the client.

Applicability of Indemnities. Regardless of whether the lease contains a geographic indemnity or an acts indemnity, the client will likely be responsible for indemnifying its landlord against all claims that were not waived as described above. Thus, the client will be responsible for indemnifying and defending the landlord against any claims made by the injured invitees against the landlord (but not for the property losses suffered by the landlord, as those claims were waived). However, as neither the adjacent tenant nor any of the invitees were parties to the lease between the client and the landlord, they will not benefit from those indemnities unless the indemnity was drafted broadly enough to include them as indemnified parties.

Applicability of Insurance. Because the property damage resulted from a covered cause of loss, the property insurance would cover the cost to the tenant and the landlord to restore the damaged property and the business income insurance should cover lost income until that property is fully restored. The property damage to the adjacent tenant's property and the bodily injury claims of the invitees would all be covered by the client's liability policy. As an additional insured, the landlord could also make a direct claim

under the client's CGL insurance policy to the extent of any claims asserted against the landlord.

Example 3. Suppose that one of the landlord's employees enters the premises to repair a broken conduit that the landlord was obligated to repair. Suppose further that, in response to a call to the employee from one of the client's own employees, the landlord's employee suddenly pivots to face the caller while holding a ladder and negligently injures an invitee of the client's and also damages some of the client's décor.

Applicability of Waivers. Because it is not an excluded cause of loss under the "Special Form" property insurance policy, the damage to the décor would be covered by such insurance. Accordingly, the client's subrogation waiver would waive any property damage claims against the landlord for the damage done to the client's décor.

The client's invitee would not be bound by any waivers contained in the lease. Thus, the waivers there are not applicable to the invitee's claims.

Applicability of Indemnities. If a geographic indemnity is applicable, then the client would be responsible for indemnifying the landlord against all claims arising in this example as the occurrence happened on the premises. If an acts indemnity from the landlord applies, then coverage would depend upon which specific form of indemnity is used. If a one-sided (non-reciprocal) broad or intermediate form indemnity is used, then the landlord would be responsible for all indemnity and defense costs. If, however, a limited form indemnity is used, then the client would not be covered to the extent the client's negligence contributed to the injury. If the lease employs reciprocal acts indemnities other than on a limited form basis, then a conflict will exist between the parties' respective indemnity obligations. Thus, each party would be obligated to indemnify the other party because the occurrence arose in part from the acts of each party and neither party can be said to be solely responsible. Such a conflict would likely be resolved by a court by reading out of the respective indemnities any responsibility for the indemnitees' own negligent conduct, given the hostility in most jurisdictions to indemnification for the negligence of the indemnitee. This example illustrates the danger inherent in following the direction to "just make the indemnities reciprocal".

Applicability of Insurance. As discussed above, the replacement of the décor will be covered by the client's property insurance. Because the invitee's injuries constitute bodily harm, the client's liability insurance policy will cover any harm to the invitee. Also, as an additional insured, the landlord could make a claim under the client's insurance policy for any liability it incurs as a result of the invitee's injury.

Example 4. Suppose that, while on the premises, an employee of the landlord's decides to play a "joke" on one of his acquaintances whom he sees eating at the client's restaurant and who happens to be eight months pregnant by rushing up to her and telling her that the father of her unborn child was just killed in an accident. As a result of that, the pregnant woman suffers severe emotional distress and sues both the client for failing

to take appropriate (in light of the heightened duty owed by a shop keeper to its invitees) affirmative steps to prevent or mitigate the landlord's employee's actions and the landlord under a vicarious liability theory.

Applicability of Waivers. The pregnant invitee was not a party to the Lease and, thus, the waivers contained in the lease are inapplicable to her claims.

Applicability of Indemnities. If a geographic indemnity is applicable here, then the client would be responsible for indemnifying and defending the landlord against this claim. If landlord has agreed to an acts indemnity (even in its most limited form), then landlord would likely be responsible for indemnifying and defending the client.

Applicability of Insurance. Because the pregnant invitee's claim involves neither BI, PD, nor PAI, it would not be covered under the client's liability insurance. Consequently, even if listed as an additional insured under such policy, landlord would not be entitled to any coverage under the client's policy for this claim. Nor does the contractual liability coverage of the client's liability policy expand the coverage of such policy to cover the pregnant invitee's claim. Thus, if a geographic indemnity were used here, the client could be exposed to indemnifying the landlord against a claim arising from the landlord's employee's intentional misconduct, with no insurance coverage to back up that indemnity.

Conclusion. As you can see from the above examples (and the table included in Section II), in the vast majority of claims and regardless of which waivers and indemnities apply, the client will be protected from liability under its liability policy. However, the client will face its most serious exposure in those few cases in which no insurance coverage is available. Thus, at a minimum, the waivers and indemnities should be drafted to ensure that claims arising from uninsured events are not waived (just adding exceptions for the intentional misconduct of the landlord and its agents, contractors and employees would eliminate most of the risks that reside in the rightmost column of the table in Section II), that those uninsured claims are not included within the client's indemnity obligations and, ideally, that those uninsured claims are covered by the other party's indemnity obligations to the client. Those areas for which the client's insurance provides no coverage define the client's most serious exposure and should be the most carefully evaluated and focused on aspect of this set of issues if the other party to the lease refuses to make appropriate provisions to address those exposures. That evaluation becomes much easier when the potential claims are more specifically defined, as with the table provided in Section II, above, or as with the list of exclusions set forth in Section V.B., above, or as with a list that the lawyer draws up based on his or her review of the applicable policies in light of the actual waivers and indemnities being considered.