

Insurance Issues in Commercial Leasing

by

Albert L. Sica, Esq.

The ALS Group
Edison, New Jersey



Issues in Commercial Leasing

Presented by:
Albert L. Sica
Managing
Principal
The ALS
Group

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For the purposes of this presentation we will be discussing matters that are most relevant to traditional commercial leases and will not be covering issues that are specific to Ground Leases. Any lease language will be referenced from the Association of the Bar of the City of New York Real Estate form.

Who We Are and Our Perspective

- Independent Insurance & Risk Management Consultants
- Real Estate Practice Primarily Advises Owners
- Firm Founded 1993



Albert L. Sica

Founder/Managing
Principal

asica@thealsgroup.com

732.395.4251

The ALS Group founder Albert Sica leads the firm's advisory practice providing unbiased third-party expertise on risk-management and insurance issues. Al brings more than 25 years of experience to his role, combining the strategic vision of Enterprise Risk Management (ERM) with decades of hands-on experience implementing strategies at the tactical level, working with executive leaders and front-line operational managers alike, bringing needed change management to risk-exposed organizations trapped in old-game paradigms.

Al's professional experience spans numerous verticals and geographies across the globe, including real estate, construction, retail, manufacturing, distribution, private equity/venture capital, M&A due diligence, and Public/Private Partnerships (P3). He routinely supports clients with risk and coverage analysis, including OCIP vs. CCIP evaluations, broker RFPs, and enterprise-wide risk assessments.

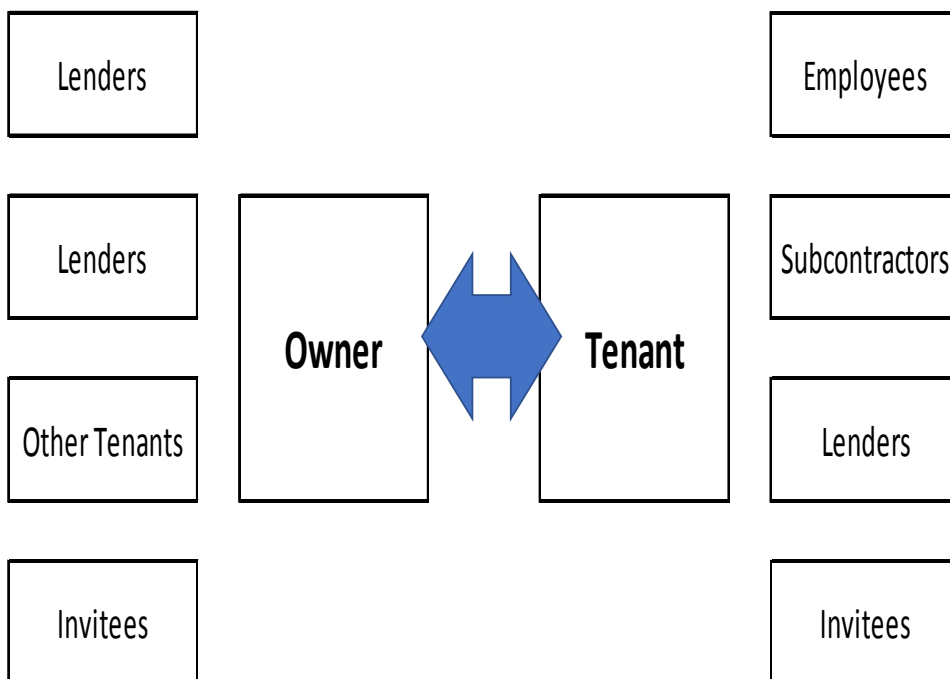


Parties in the Transaction – What’s the Risk and Who Insures What

When thinking about the objectives of Landlord and Tenant, it is relatively easy to consider the goals of each, an uninterrupted and predictable experience that is supported by commercially reasonable contract terms. Both parties seek to minimize unexpected occurrences and mitigate the risk of loss. There is a great deal of alignment of interest between the parties and establishing reasonable insurance provisions that both can satisfy is important to the agreement.

Risk Areas
• <i>Real Property Risk</i>
• <i>Insurance Policy Deductible Risk</i>
• <i>Improvements to Space</i>
• <i>Key Money for Tenant</i>
• <i>Personal Property of Tenant</i>
• <i>Premises Liability for Demised Premises</i>
• <i>Premises Liability for Common Area</i>

Generally, there are two parties in the main transaction, the Landlord and the Tenant which appears simple in nature however each of these parties have “stakeholders” who are concerned with the risk of the transaction and whose interests need to be considered.



What Are The Key Risk Transfer Provisions

There are several key provisions that need to be considered when drafting agreements between Landlords and Tenants that fundamentally start with the Indemnity Provision and Insurance Requirements-Provisions.

<p>Indemnity Provisions – At the heart of the relationship is for one party to protect and indemnify the other party from certain activities that would cause the other party harm. This is the overriding protection in the contract which should be supported by insurance where possible.</p>	<p>Insurance Provisions – Robust insurance requirements that are commercially reasonable are at the core of the financial support that either party look for to support risk transfer provisions. Insurance coverage changes on occasion so any provisions should be as <i>“timeless”</i> as possible with a focus on intent.</p>
<p>Exculpatory Provisions – These provisions are generally sought by the Landlord and need to be carefully considered since they can provide complete transfer of risk.</p>	<p>Damage and Destruction Provisions – These provisions are critical as they define the rights and remedies for a destruction of the premises and how that destruction may effect rebuilding, lease cancellation, use of insurance proceeds, etc.</p>
<p>Subrogation Provisions – Agreements need to be clear to manage the ability of a third party [insurer] to subrogate against the other party for damage/loss caused by that party. Generally, we see there are full and mutual waivers of subrogation in lease agreements so the party carrying the insurance looks to their insurer for recourse/indemnity.</p>	



Sample Waiver of Subrogation Clause

Landlord and Tenant shall have no liability to one another, or to any insurer, by way of subrogation or otherwise, on account of any loss or damage to their respective property, the Premises or its contents, the Building or the Project, regardless of whether such loss or damage is caused by the negligence of Landlord or Tenant, arising out of any of the perils or casualties insured against by the property insurance policies carried, or required to be carried, by the parties pursuant to this Lease. The insurance policies obtained by Landlord and Tenant pursuant to this Lease shall permit waivers of subrogation which the insurer may otherwise have against the non-insuring party. In the event the policy or policies do not allow waiver of subrogation prior to loss, either Landlord or Tenant shall, at the request of the other party, deliver to the requesting party a waiver of subrogation endorsement in such form and content as may reasonably be required by the requesting party or its insurer.¹

¹ – IRMI Contractual Risk Transfer



Additional Insured – What Does It Mean?

A person or entity (Landlord-Lender) that is added to another's (Tenant-Contractor) liability policy as an additional Insured enjoys protection for the vicarious liability of the policyholder. Additional Insured obligations (in the insurance provisions) are generally used with indemnity obligations in leases or agreements.

Additional Insured protection is viewed as “backing up” the indemnity obligation and each trigger two separate sections of the [Insured's] liability policy.

It is important to note that most (if not all) additional insured endorsements are “triggered” based on there being a requirement to add that person or entity by contract or agreement. If one does not exist, it is foreseeable the carrier will question the obligation to extend additional insured status to another.

There are many additional insured endorsement that are used but generally these are the ones that you will see most often.

- **CG 20 10 – Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization**

The endorsement makes a project owner and insured under a general contractor's CGL policy or a general contractor an insured under a subcontractor's CGL policy. It modifies the “Who Is an Insured” section of the CGL policy to add a scheduled person organization but only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused, in whole or in part, by:

1. Your [i.e., the named insured's] acts or omissions; or
2. The acts or omissions of those acting on you [i.e., the named insured's] behalf;

- **CG 20 37– Additional Insured – Owners, Lessees or Contractors – Completed Operations**

The endorsement provides additional insured status with respect to the products-completed operations hazard in connection with Named Insured's work or products after they have been put to their intended use or left the premises. (a restaurant tenant will need CG 24 07 products-completed operations redefined.



Additional Insured – What Does It Mean?

- **CG 20 11– Additional Insured – Managers or Lessors of Premises**

This endorsement adds as an additional insured the owner of premises (CG 20 24 is for Land) from whom the named insured leases property or the owner's real estate manager. The coverage provided to such additional insured is limited to liability arising out of the ownership, maintenance, or use of that part of the premises leased to the named insured and specifically described in the endorsement. There are several limitations to this (coverage ceases when tenancy does; no products or completed operations, no coverage for structural alterations).

Obtaining Additional Insured status on an agreement is a fundamental part of the risk transfer but care must be taken to obtain the right coverage and to see the endorsement. Many carriers have crafted their own endorsements which attempt to provide the coverage.

- * 30-day Notice to Landlord – The Unicorn of Insurance Obligations
- * Use of Proceeds – Rebuild or Pay Down Loans
- * Evidence of Insurance – Satisfactory to Landlord – Certificate of Insurance
- * 3rd Party Over Action and Subcontractor Issues – Discuss Exclusion



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Shedding light on risk
to help you reach your
strategic business goals

Independent Insurance and Risk Management Consultants
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Albert L. Sica
Founder and Managing Principal

379 Thornall Street • Edison NJ 08837
PH: 732-395-4251 • M: 201-341-6773
asica@thealsgroup.com

www.thealsgroup.com

