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IN THE SPOTLIGHT

Renewing a Lease

By Anthony Casareale

The market has seen significant activity in lease renewals. This article examines the steps to be taken and the key issues to keep in mind if you represent either a landlord or tenant looking at a lease renewal as an option.

Early Assessment

For both parties, the first key is to *start early*. While there are no rules for determining how early to start, certainly, the larger the space required by the tenant, the earlier the tenant should commence an assessment of its options. A critical part of that early assessment is the interview and selection of its real estate broker.

For tenants, an assessment of the functionality of the space is critical. With technology changing so rapidly, the space and the building may not be "state-of-the-art" in meeting a tenant's technology needs. In addition, tenants need to assess if other operational aspects of the building and the space — HVAC, elevators, parking and security — have met expectations.

Landlords need to start early as well. As the lease expiration date nears, a landlord should meet, and be in regular communication with, those tenants.

Know Your Existing Tenancy

For a landlord, an assessment should be made of the quality of the existing tenancy. For instance, does the tenant pay its rent on

continued on page 6

The New ACORD Certificates of Insurance

What Contract-Drafting Attorneys Need to Know

By Brent Winans

The Certificate and Evidence of Insurance forms that ACORD (Association for Cooperative Operations Research and Development) made effective in late 2009/early 2010 have raised alarm among insurance certificate holders and their attorneys. Many real estate attorneys include insurance provisions in the leases they draft, and they should be aware of these changes. Unless insurers issue manuscript endorsements to their policies (which is unlikely), they no longer make any pledge that they will even attempt to notify the certificate holders if the policies are cancelled. The new certificate forms have eliminated the assurance that the insurer would "endeavor to mail __ days written notice to the certificate holder." They simply state that " ... should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions."

What It Means

What does that mean to certificate holders under standard insurance policies? **1) Liability and auto** — Even if a certificate holder is an additional insured, it will not be notified if the policy is cancelled. Only the First Named Insured will be notified; **2) Workers' compensation** — Certificate holders will not be notified of cancellation, since the policy requires the insurance company to notify only the covered employer; **3) Property** — Mortgagees and loss payees on standard property policies will be notified: 10 days before the insurer cancels for nonpayment, 30 days before it cancels for any other reason and 10 days before it nonrenews the policy (unless modified by state requirements). Other certificate holders, even additional insureds, will not be notified; and **4) All policies** — Certificate holders, even additional insureds, will not be notified if the insured itself cancels the policy.

Changes in Contracts

How should insurance requirements in contracts be changed in order to respond?

1. Contract language requiring insurance certificates to state that " __ days

continued on page 2

In This Issue

ACORD

continued from page 1

notice of cancellation be given" and requiring that the "endeavor to" language in the certificate be deleted, is no longer applicable. Even if changes are made to the certificate, ACORD has made it exceedingly clear that changes to the certificate do not change the policy.

2. The contract should require that the insured party provide immediate notice to the owner, lessor, etc. if the insured entity receives notice of cancellation or nonrenewal from its insurer. This provision is especially important since many insurers will not be willing to comply with the recommendations below, especially for smaller insureds. Unfortunately, this has the obvious drawback of depending on the very party who is non-performing to report the situation. The City of Atlanta instituted this approach. To learn more about how and why they did it, *see* www.aci-na.org/static/entransit/Caput—Legal%20Aspects%20of%20Airport%20Insurance.pdf.

3. Contracts should require that the insured's policies be endorsed to meet the certificate holder's reasonable requirements. (However, as stated above, not all insurers will be willing to cooperate.) If the insurer is somewhat cooperative, it may be willing to extend the same notification rights to the certificate holder that it gives to the first Named Insured.

Below is sample manuscript endorsement wording that would accomplish that end. Very large insureds may be able to obtain even broader notification rights.

If we cancel or elect not to renew this policy, we will give written notice to _____ at the following address _____. We will provide the same notice of cancellation and nonrenewal that is required by this policy to the first Named Insured.

So if the certificate holder is given the same notice of cancellation and nonrenewal as the first Named Insured, what does that actually mean with standard policies? *See* the Figure on page 4.

Referring to the figure, most states' laws change these criteria, requiring more notice in many situations. For instance, Florida requires that carriers provide the first Named Insured with 45 days' notice of cancellation in some circumstances. The provisions of the different state laws are often complicated, differing not only by line of coverage, but also by length of time the policy has been in force, the specific reasons for the cancellation or nonrenewal, etc. The specific state requirements can be accessed through the IRMI Insurance Cancellation Guide published by the International Risk Management Institute. *See* www.irmi.com.

4. The larger the insured client, the more likely that it will be able to obtain additional concessions from its insurer. If possible, those additional provisions should require: a) Advance notice to the certificate holder even if the insured initiates the cancellation or nonrenewal; and b) Minimum cancellation and nonrenewal provisions, regardless of what is provided by the standard policies or various state laws.

Why Not Just Require the Old Form?

You may ask, "Why doesn't the certificate holder simply require the insured and its insurance agent to provide the old certificate of insurance form?" What drafting attorneys and insureds should know is that if an agent does modify a standard certificate or sign a custom one that provides notice of cancellation, it is almost certainly doing so against the explicit direction of the insurance company. So while the insured may have a paper in hand stating that the insurance company will provide notice of cancellation, the insurer will not stand behind it. If coverage is cancelled, all that the insured has probably gained is the

continued on page 4

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Lease Years

continued from page 3

such as June 30th) even if such period is significantly shorter than one full calendar year. It also apportions rent to take account of the shortened first Lease Year period.

Model Lease Language

The term of this Lease shall be ten (10) Lease Years. The term of the Lease shall commence on the Commencement Date (as defined herein) and shall expire (Expiration Date") at the very end of the day on the last day of the tenth (10th) Lease Year, unless otherwise terminated in accordance with the terms hereof. As used herein, "Lease Year" means each period commencing on Jan. 1 and ending on the following Dec. 31, except that the first Lease Year shall commence on the Commencement Date and end at the very end of the following December 31. If the first Lease Year is shorter than twelve months, rent shall be decreased pro rata for such additional period.

In the example above, if the lease's effective date is Sept. 24, 2012, the first Lease Year would end at the very end of the day on Dec. 31, 2012. Thus, the first "year" of the lease would only be a little more than three months in duration.

Drafting Considerations

When you are crafting your definition of "Lease Year," make sure to confirm with your client that you are defining Lease Year according to his/her intentions. The first definition mentioned above extends the term for a few extra days or weeks while the second definition could shorten the term by several months, if not longer. This could make an important impact on the bottom line of your deal!

Finally, if you are drafting a lease using a template from a previous deal, be especially vigilant if the prior lease template did not use a "Lease Year" provision. Not only could actual dates have been used to determine the Commencement and Expiration Dates but they could also turn up in many other sections of the lease. For instance, the rent and free rent periods (if applicable) in prior deals could have utilized specific dates that may need to be revised or eliminated altogether. The clauses used in your template pertaining to CAM, insurance charges, and lease renewal dates could also set forth specific dates that need to be modified in your current deal. One size does not fit all documents and all dates mentioned in the lease must, of course, be carefully scrutinized.

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ACORD

continued from page 2

right to sue the agent and hope that it will collect under its errors and omissions policy.

Since the agent is probably executing the modified certificate with the full knowledge that it is not authorized to do so, coverage under its errors and omissions policy is suspect. For a fuller understanding of why an agent executing modified certificates is engaging in a practice that may be unauthorized, deceptive and potentially illegal, *see* the article written by Bill Wilson for members of the Independent Insurance Agents and Brokers of America at www.iiaba.net/eprise/main/VU/NonMember/WilsonCancellationNotice.htm.

Vendor Solutions

There are about 20 different vendors that provide some form of insurance certificate and verification service. Only one vendor provides a certificate service that completely bypasses ACORD certificates and their problems. The following information is included as a service to readers. The vendor's name is Ins-Cert Corporation, and information on its services can be found at www.Ins-Cert.com. Their system is Web-based and requires the agent/broker to agree to make a "good-faith effort" to enter notices of cancellation into their system. The system then automatically sends cancellation notices to all certificate holders by e-mail. This appears to offer a solution to the problem of cancellation notices and also the problem of fraudulent ACORD certificates. It appears that Ins-Cert may offer a legitimate service that is worthy of consideration.

Why the 'Good Ol' Days' Weren't Really So Good

Certificate holders certainly wish that the insurance industry would find a way to notify them when an insurance policy is cancelled. But in reality, they may not have lost much in this change besides the illusion that the insurer would notify them.

Many insureds have a "blanket additional insured" endorsement on their liability policies. That means that anyone that the insured agrees to name as an additional insured in a contract is automatically given that status in its insurance policy. But that also means that the insurance company does not obtain the names and addresses

continued on page 8

FIGURE 1

Line of Coverage	Insurer Cancels for Non-Pay	Insurer Cancels for Other than Non-Pay	Insurer Nonrenews
General Liability	10 days	30 days	30 days
Automobile	10 days	30 days	None
Property	10 days	30 days	10 days to mortgagee and loss payee only
Workers Comp.	10 days	10 days	None

ACORD

continued from page 4

of those additional insureds, so the insurer does not know who they are or how to notify them.

Certificate holders would reasonably assume that as a matter of good faith, insurers would require that the agents/brokers send them a list of all of the certificates that they issued so that the insurer could "endeavor" to give notice of cancellation. Incredibly, that is not the case. Many carriers have explicitly told the agents/brokers not to send them copies of the certificates.

Since many insurance carriers have not made the good-faith effort to comply with the notice requirements of the old certificate forms, not much is lost by eliminating the notice requirements altogether. At least false promises are no longer being made.

Closing Thought

In writing about these changes on its own website, ACORD explained that it had to change its certificates because the certificates sometimes contradicted or expanded the duties contained in the underlying insurance policies. *See* www.acord.org/standards/forms/Documents/20100628_ACORDFormsNotice.pdf.

Unfortunately, they were not able to cooperate with the other players in the insurance industry (the insurance companies, ISO and NCCI) to craft a solution that solved that problem while also meeting the legitimate business need of certificate holders to receive a cancellation notice. The outcry from the business community may need to get much louder before a better solution to this problem is reached. In the meantime, attorneys drafting insurance provisions for leases can serve their clients by removing outdated insurance requirements that cannot be met and inserting new provisions that more effectively protect their clients.

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True Leases

continued from page 7

the supreme court concluded that the subject agreement was a management agreement and not a lease because it did not transfer "absolute control and possession" of the subject properties to CHDFC.

The Appellate Division

The Appellate Division, First Department, in a unanimous opinion, reversed and held that the agreement was, in fact, a lease between the city and CHDFC. The court thus vacated the grant of partial summary judgment to WIC, and instead declared that CHDFC had standing pursuant to RPAPL 721(10) to commence eviction proceedings against WIC.

At the outset, the court agreed with the supreme court that "the mere fact that the agreement is referred to as a 'net lease' does not transform it into one" and that "[t]o determine whether the underlying agreement is a net lease or a contract for management services, its contents must be examined in order to see what interest the parties intended to pass." Citing to well-established Court of Appeals precedent, including the 1960 decision in *Feder v. Caliguira*, 8 N.Y.2d 400, 208 N.Y.S.2d 970 (1960), the appellate division stated that "the critical question in determining the existence of a lease establishing a landlord-tenant relationship is whether exclusive control of the premises has passed to the tenant."

The court further stated that if "control has passed" a landlord-tenant relationship has been established, even if the use is (as was found by the supreme court) "restricted by limitations or reservations." The appellate division found that the terms of the agreement demonstrated that CHDFC had "exclusive control and possession of the leased premises."

In addition, the appellate division further observed that although the city did reserve itself certain rights regarding the premises, these reservations were not, as the supreme court found, revealing of a management agreement, but were instead "completely in line with the type of reservations that are permitted in a lease." Such reservations, which the appellate division found to be consistent with a lease, were the city's right to inspect the premises, the right to examine and audit the books and records, and the right to cure a default in CHDFC's obligations that "creates a risk of immediate harm to persons or property."

The court also noted that a "management agreement" is defined under General Obligations Law Section 5-903 "merely as a service contract" and that such agreements do not "delegate such an extensive dominion and control over the premises, as delegated [by the 'net lease'] here."

Conclusion

Thus, just because an agreement is labeled as a "lease," and states that the parties' relationship is one of "landlord and tenant," one cannot necessarily assume that the agreement is truly is lease, which would provide the parties with various statutory and other legal and equitable rights given to landlords and tenants. Rather, as the appellate court made clear, one must examine the specific rights and obligations that the agreement confers to determine the "critical" question of whether "exclusive control and possession" has been passed to the named "tenant." As such, the question of whether a "lease" is a truly a lease depends on a careful examination of the agreement's terms.

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