Insurance Recovery
Real Estate

January 10, 2019

Securing Indemnification and Additional Insurance Coverage Requires Careful Drafting

By Lynda A. Bennett, Edward J. "Ted" Hunter, and Michael A. Barrese

Insurance plays a prominent role in all real estate transactions. Stakeholders generally understand that insurance policies must be secured for the leasehold to address property damage and liability claims. However, stakeholders often do not pay attention to the precise contract language used to establish the insurance requirements and address how the waterfall of available insurance coverage will flow. Recently, the New Jersey Appellate Division provided a cautionary tale about the importance of careful drafting as it relates to ***whether*** coverage is available and, if so, ***when*** it must be provided.

In ***Lopez v. Palin Enterprises, Associated***, No. A-0886-17T4 (N.J. App. Div. Dec. 5, 2018), Palin Enterprises (Palin) owned a commercial building and leased part of the building to Agile Trade-Show Furnishings, Inc. (Agile). Agile's employee, Teodoro Lopez, was injured while using a freight elevator inside the leased premises. Lopez sued Palin and others for his injuries (the *Lopez* suit). Palin tendered the suit for defense to Wausau Insurance Companies (Wausau), Agile's primary general liability insurer. Palin asserted rights as an additional insured under Agile's CGL policy (the Wausau policy). Palin also demanded contractual indemnity from Agile pursuant to the lease agreement. The trial court held that the Wausau policy provided primary insurance to Palin and that Palin was entitled to contractual indemnity from Agile for its own negligence.

The appellate court reversed the trial court's findings and held that Agile did not owe contractual indemnity to Palin for its own negligence and that the Wausau policy afforded only excess coverage to Palin.

With respect to contractual indemnity, the Appellate Division held that the lease agreement ***specifically excluded*** contractual indemnification for claims resulting from Palin's own negligence. Therefore, Agile did not have an indemnity obligation to Palin for its own negligence in the *Lopez* suit.

With respect to primacy of coverage — i.e., which policy, Palin's or Agile's, pays first — the Appellate Division found that the additional insured endorsement through which Palin was entitled to coverage under the Wausau policy stated that coverage for the additional insured was excess to all other insurance available to the additional insured unless Agile was required to provide liability coverage to Palin on a ***primary*** basis under a written agreement. Under the terms of the lease, Agile was required to provide "a comprehensive policy of liability insurance," but did not state that such coverage was to be afforded on a primary or primary and noncontributory basis. As a result, the Wausau policy provided only excess coverage to Palin.

The Appellate Division further held that Palin's primary commercial general liability (CGL) policy was not excess to or co-primary with the Wausau policy, because the other insurance clause in Palin's primary CGL policy stated that the policy was excess to "any other primary insurance" available to Palin. Because Agile was not expressly required to provide primary insurance under the lease agreement, the Appellate Division held that the Wausau policy was not "primary insurance" available to Palin.

As a landlord, Palin likely expected to be covered by Agile's insurance or indemnified by

Agile for any and all claims that arose from the use of Agile's rented space. In order to avoid unwelcome surprises like those experienced by Palin, stakeholders should carefully review the insurance requirements in their lease agreements. In light of the ruling in the *Lopez* case, when a landlord or other stakeholder is expecting to rely on additional insured coverage to address liabilities flowing from the leased space, the insurance requirements in the lease must explicitly state that the tenant's insurance must be provided on a "primary and noncontributory" basis. Similarly, to account for situations where factors other than a landlord's negligence could have also been a contributing cause of an accident or other incident, the insurance and indemnification provisions in the lease should explicitly state that those obligations exist in all instances other than when the party receiving those protections is ***solely*** negligent or ***solely*** grossly negligent, depending on the applicable indemnification standard in the lease. Finally, although not addressed in *Lopez*, it is also important for landlords and other stakeholders to consider including a waiver of subrogation requirement in the lease contract to prevent insurers from paying a claim on behalf of one stakeholder and then pursuing "backdoor" recovery from the other stakeholder for the loss. Many insurance policies include broad form endorsements that allow for waiver of subrogation when required by written contract, including a lease.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

LYNDA A. BENNETT
Partner & Chair, Insurance Recovery
T: 973.597.6338
lbennett@lowenstein.com

EDWARD J. "TED" HUNTER
Partner & Chair, Real Estate
T: 212.419.5860 (NY) / 973.597.2590 (NJ)
ehunter@lowenstein.com

MICHAEL A. BARRESE
Associate, Insurance Recovery
T: 973.597.6182
mbarrese@lowenstein.com