

Finkelstein Newman LLP

Newsletter

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TERRORISM INSURANCE: CONSEQUENCES AND COSTS

In an age of heightened terrorism awareness and prevention, terrorism insurance is an additional hurdle tenants face when negotiating leases, says Robert C. Epstein, of counsel to Finkelstein Newman LLP. In negotiations, tenants should inquire as to whether owners carry terrorism insurance, based on new trends in the law. Recent appellate decisions indicate that a lender may now require a property owner to obtain terrorism insurance and that, in the alternative, a lender may apply for terrorism insurance on the owner's behalf in face of an owner's resistance. If leases allow an owner to pass-through the cost of the additional terrorism coverage to its tenants, the expense to tenants could prove to be significant.

According to Mr. Epstein, there are three alternative protections, against unexpected terrorism insurance costs, that tenants have at their disposal when negotiating leases with property owners. Tenants may negotiate a cap amount for the cost of insurance increases. They may also ask for the right to terminate the lease if insurance costs exceed a delineated sum. Lastly, tenants may seek to increase the base-year amount to include the first full-year's premium of any subsequently obtained terrorism insurance.

Setting a cap ensures that a tenant's insurance costs for any given year can only increase by the specified amount. If increases exceed that number, the owner is then responsible for the excess. As a result, agreeing on the cap amount may be a difficult negotiation, since an owner will usually seek the highest possible recoupment of its operational expenses.

If an owner will not agree to a cap, the tenant should ask for the right to terminate the lease if the insurance cost exceeds a certain number, says Epstein. This may be especially important for commercial tenants if cost increases render the leasing of the space uneconomical. However, tenants will need to provide an owner advance notice, typically 60 to 90 days, to terminate the lease. Advance notice provides an opportunity for the owner to search for a replacement tenant, Epstein notes. Another consideration is an owner's requirement of a "termination fee" to cover expenses in the event the space remains vacant. The timing of the notice and the amount of this fee, if any, are important considerations when negotiating the amount of increased



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PARTNERS FIGHT UNAUTHORIZED PRACTICE OF LAW

The Real Property Law Section of the New York State Bar Association has monitored the problems caused by non-lawyers who provide real-estate services. Due to the increased incidents of the unauthorized practice of law by title companies, settlement agents, and other non-lawyers who offer legal services for various aspects of real-estate transactions, partners Robert Finkelstein and Lucas A. Ferrara, both delegates to the New York State Bar Association, are concerned about the adverse consequences such conduct has on the general public.

Non-lawyers often advise parties entering into real-estate transactions, prepare and review property contracts and title documents, conduct closings, and work in conjunction with licensed attorneys. Yet, this practice is still

a concern regardless of whether the non-lawyer provides real-estate services individually, or in the corporate context, since the New York Judiciary Law prohibits non-lawyers from practicing law. Only licensed attorneys can lawfully prepare deeds, mortgages, assignments, discharges, leases, and any other instruments affecting real estate. The only exemption is for corporations and voluntary associations, when the services are necessary to lawfully examine and insure real-property titles or when the services are necessary or incidental to issuing loans.

Real-estate brokers are of particular concern, since their services are so closely related to legal services. Lucas A. Ferrara explains that civil lawsuits filed against brokers providing legal real-estate services have resulted “in careful distinctions between lawful and unlawful conduct in this area.” Ferrara clarifies that brokers may prepare real property contracts if the documents are expressly subject to review by the parties’ attorneys, or if the forms used by brokers are approved by an appropriate real-estate organization and no material terms requiring legal expertise are inserted. However, real-estate brokers who are not licensed attorneys do engage in the unauthorized practice of law when they prepare documents, which include detailed items, such as mortgage terms, requiring legal expertise.

Robert Finkelstein cautions that adequate representation and legal liability are also concerns related to the unauthorized practice of real-estate law. Although the Federal Trade Commission and the United States Justice Department have taken the position that non-lawyer and “witness only” closings may afford consumers significant cost and time savings, evidence also suggests that if problems arise, non-lawyers may claim no representation of, or legal liability to, the parties. Finkelstein adds that “if represented by a non-lawyer, a consumer’s questions or requests for document revisions may be avoided with the excuse that any closing delays will result in significant cost increases.” Therefore, even though a non-lawyer closing may occur more quickly and inexpensively than a closing where the parties are represented by licensed attorneys, non-lawyer closings are much more likely to result in transaction-related mishaps.

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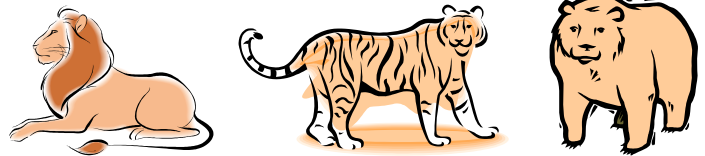
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insurance costs that will trigger the right to terminate the lease. A third protection is to work from a base-year amount. This is an important strategy because the costs of terrorism insurance may spiral upward after the base-year. When these costs are added to the base year amount, tenants are typically responsible for paying a proportionate share of any increases in insurance premiums. However, if new insurance costs are not added to a base-year amount, tenants could be required to pay all or a share of the full premium. To ensure the lowest possible costs, tenants should insist upon working from a base-year level which includes a first full-year's premium.

Finally, setting aside cash reserves to help pay the cost of terrorism insurance is also another helpful protection. In the event one or more of the delineated protections are unavailable, increased operating expenses related to terrorism insurance remain a very real concern to be addressed during the course of client consultations and lease negotiations.

For more information on terrorism insurance and its impact on lease negotiations, contact Robert C. Epstein at REpstein@FinkelsteinNewman.com or 212-619-5400 x 214.

NEW LAWS AFFECT EXOTIC-ANIMAL AND DANGEROUS-DOG OWNERS



An amendment to the State Environmental Conservation Law (ECL) now bans New York residents from acquiring exotic animals, such as tigers, monkeys, and snakes. Signed by Governor Pataki in late 2004, the new provision went into effect on January 1, 2005. New York City's existing prohibitions notwithstanding, other New York State residents who already owned these exotic animals before the amendment took effect may lawfully keep them. However, these residents must have no record of an animal cruelty conviction and must meet strict animal-care and public-safety requirements. There are several reasons why this new restriction has been imposed. Because exotic animals are readily available for purchase in New York, the health, environmental, and financial effects are growing. Public safety officers are called upon to contain exotic animals that escape from private residences. As instances of escape increase, so do the demands for public safety officers. Additionally, the escape of a wild animal presents risks of injury and transmission of disease. As a result, this amendment seeks to encourage animal guardians to be more responsible.

Another new amendment seeks to ensure the proper identification and tracking of all breeds of dangerous dogs. The State Agriculture and Markets Law and Municipal Law now requires clear and convincing evidence that a dog is truly "dangerous." The previous standard for making this determination was subjective in nature. The new standard is objective, requiring proof of a threat or actual serious injury. When the dangerous-dog classification is appropriate, judges are now equipped with more options, including animal behavior expert evaluations, new training programs, muzzling that will prevent biting but not cause injury, leashing in public by an adult at least 21 years of age, micro-chipping, and liability insurance plans not to exceed \$100,000 for dog-related physical injury or death. A judge may also order humane euthanasia or permanent confinement, but only under certain circumstances. Dog owners have a right to appeal euthanasia orders within 30 days, and such an appeal delays the order until resolved. This aspect of the new law provides an additional element of due process.

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The new law also makes a distinction between justified and unjustified dog attacks. When a dog unjustifiably attacks a person or animal and causes serious physical injury or death, the dog will be classified as “dangerous.” Factors courts now weigh include any past attacks and a dog’s known vicious propensity. Courts will not impose a dangerous classification when a dog attack is justified, such as when the attack occurs during a crime committed on the dog’s owner or on the owner’s property, when the victim torments, abuses, threatens, or injures the dog or its offspring, and when the dog attacks in self-defense.

The owner of a dangerous dog may be subject to various penalties under the new law. The penalties increase if the dog was previously classified as dangerous and if the injuries are severe. Dog owners may be subject to fines, imprisonment, class A misdemeanor charges, and medical costs for treatment of all injuries resulting from a dog attack. However, these penalties will not apply when the attack is justified or when a dog comes to the aid of a victim of certain crimes, including murder, burglary, arson, rape, or kidnapping.

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