

Review Commercial Contracts and Insurance Policies Ahead of Hurricane Season

by Philippe Lieberman and Marko Cerenko

With the 2022 hurricane season expected to be more active than usual, and tropical storm warnings already in effect for South Florida, now is the time for commercial property owners to take the time to review their leases to determine their respective responsibilities relating to a potential storm and the damages that may be suffered.

It is also the time for landlords and tenants to look over their insurance policies to ensure they are in full compliance with their legal obligations, and to be certain they have proper insurance coverage. Having a clear understanding of each party's obligations and ensuring compliance before the storm is the best way to try to avoid the potential legal and monetary pitfalls from a storm.

All lease agreements should clearly outline the parties' respective obligations and responsibilities with respect to the risks and consequences from a storm. When reviewing your leases this hurricane season, one should pay particular close attention to the following provisions:

Assigning responsibility: The first step in storm preparations is to clearly detail the landlord's and tenant's respective obligations and responsibilities. Who is responsible for protecting the property from damage and flying debris ahead of the storm? Who is responsible for obtaining property insurance? Who is responsible for obtaining personal property insurance? Who is to be a named insured? How much insurance is necessary and what deductibles are appropriate? Are the deductibles the same for all storms or do they



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vary in the event the storm is elevated to a hurricane? Who is responsible for the clean up after the storm? What type of mitigation efforts need to be undertaken after the storm that don't interfere with insurance companies' inspections?

Have a strong insurance policy and beware of coinsurance provisions: Parties must have a clear understanding of who is responsible for obtaining the insurance, the type of insurance coverage to obtain, the amount of coverage, the deductible and the named insureds. Many commercial insurance policies contain coinsurance clauses, which

are designed to encourage policyholders to insure their properties to a certain percentage, usually 80% to 90%, of the properties' true value. If the amount of insurance is found to be under the coinsurance percentage, then a penalty is applied, which reduces the payout at the time of a loss. In this case, there could be risk of litigation over the insurance payout. Especially now in South Florida, rising property values, along with the increase of repair and reconstruction costs due to inflation, could increase the risk of litigation over insurance payouts if the amount of insurance is found to be under the coinsurance percentage as a result of the property's value rising. Also, make sure that the insurance company you choose has a good track record and provides the insurance necessary to cover all of the tenant's obligations under the lease.

Rent responsibilities and lease termination: Something else to consider is the parties' financial lease responsibilities after the storm. Who is responsible to undertake and pay for costly cleanup and repairs after

the storm? Is the tenant responsible for full rent during the period of repairs? Under what circumstances can the tenant obtain a full or partial rent abatement, or potentially terminate the lease? Can the tenant abate rent or terminate the lease if the tenant's property suffered great damage, or if the repairs will be lengthy and burdensome, or if the leased premises survive but not the surrounding property, like in the case of a shopping center? The answer to some or all of these questions will depend on the lease terms, the type of damage, and the cost and length of repairs.

Restoration requirements: If termination is not something that can be exercised under the lease, what are the requirements for restoration of the property? Who is in charge of restoration, and how quickly must it be done? What if the property cannot be restored to its original state? These things should be spelled out in the lease and careful attention should be given to the force majeure provision, which often addresses disruptive events

that are beyond the parties' control, like hurricanes.

Prepare for unforeseen events: Mandatory evacuation orders and other unforeseen events should also be addressed. For example, under what circumstances can landlords prevent tenants access to the property? Life safety concerns, in addition to liability concerns, may be considered.

The takeaway is be prepared. The more specific you are in a contract, the better prepared you are to avoid unwanted litigation. Be clear of the parties' rights and obligations, have a concrete storm preparation plan, and communicate with each other before and after the storm.

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