

## Three Strategies for Limiting Your Indemnity Obligation

*By Alan M. Cohen, Esq.*

Virtually every commercial lease includes a provision requiring the tenant to indemnify the owner for damages caused by the tenant and the tenant's guests. Some indemnity provisions require the tenant to indemnify the owner for damages caused through no fault of the tenant. Many owners are reluctant to compromise when it comes to indemnity, but an overly broad indemnity provision can lead to significant exposure for a commercial tenant. The Colorado Supreme Court's 2011 decision in *Constable v. Northglenn, LLC* illustrates why careful attention must be paid to the precise language used in an indemnity provision.

In *Constable* a shopping center owner was named as a defendant in a lawsuit filed by a woman who slipped on ice in the shopping center's parking lot. The shopping center owner sought indemnity from a tenant who operated a flower shop in the shopping center because the woman was at the shopping center to visit the tenant's business. The owner relied on the following provision in its lease: "Tenant agrees to exonerate, hold harmless, protect and indemnify [sic] Landlord from and against any and all losses, damages, liability, claims, suits or actions, judgments, costs and expenses which may arise as a result of any bodily injury, personal injury, loss of life or property damage sustained during the term of this lease by any person or entity ... in the Premises, or elsewhere in the Center if present in order to visit the Premises, or as a result of Tenant's business...."

Both the lease and Colorado law required the owner to maintain the parking lot. The tenant argued the indemnity provision was unenforceable because it purported to require it to indemnify the owner against liability for its own negligence. The Colorado Supreme Court disagreed, and held the lease reflected the parties' mutual intent that the tenant indemnify the owner for injuries sustained in the community areas by her customers, whether or not the owner exercised exclusive control over those areas and whether or not those injuries resulted from the owner's own negligence. According to the Colorado Supreme Court, "...an agreement purporting to indemnify a party against liability for its own negligence will be enforced as written as long as it contains a clear and unequivocal expression that the parties intended that result."

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Thus, even though the shopper's injuries may have resulted from the owner's failure to comply with its obligation to maintain the parking lot, the tenant was obligated to indemnify the owner with respect to the shopper's damages. The outcome of *Constable* may have been different had the lease been governed by the law of a state other than Colorado. For instance, under New York law any lease provision that purports to exempt an owner from liability for its own acts of negligence is void and unenforceable. Because state laws vary with respect to indemnity, careful attention should be paid to the precise language used in the lease.

Consider using the following three strategies to mitigate the risks associated with most indemnity agreements included in owner lease forms.

### Strategy #1: Never Agree to Indemnify Owner for Damages Caused Through Its Fault

Many indemnity provisions include an express obligation on the part of the tenant to indemnify the owner for damages caused by the owner's fault. Any language that explicitly requires the tenant to indemnify the owner for damages caused by the owner's negligence, gross negligence, or intentional misconduct should be deleted.

In *Constable*, even though the Colorado Supreme Court held that an agreement whereby one party agrees to indemnify another for its own negligence is enforceable, the court recognized that an agreement whereby one party indemnifies another for its own intentional or wrongful acts is unenforceable. Nevertheless, a tenant should never accept language requiring it to indemnify the owner for damages caused by the owner's own acts or omissions, whether negligent, grossly negligent, or intentional. Instead, your indemnity provision, like our Model Lease Clause: Draft Airtight Indemnity Clause, should explicitly state that under no circumstances will you be obligated to indemnify any party to the extent that the injury, loss, or damage was caused by the negligence or willful misconduct of that party.

Although certain states will not enforce an agreement whereby one party agrees to indemnify another for its own negligent or intentional misconduct, it's always better to address the issue in the lease than to rely on state law. Most reasonable owners, when presented with a controlling anti-indemnity statute or judicial opinion, will concede and delete any requirement inconsistent with state law.

### Strategy #2: Limit Indemnity to Your Proportionate Fault

Owners frequently seek broad indemnity with respect to any injuries or damages in any way attributable to a tenant or the lease, no matter how attenuated the connection between the tenant and the loss. A tenant's indemnity obligation should be limited "to the extent" of the tenant's negligent or intentional misconduct. The insertion of the words "to the extent" is critical because it introduces the concept of proportionate responsibility or compar-

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ative fault to an indemnity provision, if used properly, as in our Model Lease Clause. In other words, to the extent damages are caused by your conduct, you are responsible, but to the extent damages are caused by the conduct of a party other than you, you should owe no indemnity.

Under many leases the indemnity obligation is not tied to conduct, but rather to the lease itself, or to the tenant's occupancy of the leased premises. Every effort should be made to tie your indemnity obligation to your negligent or intentional misconduct, but even if you must agree to indemnify the owner against risks arising from the lease or your occupancy, insertion of the words "to the extent" can narrow the scope of the indemnity agreement.

By limiting your indemnity obligation "to the extent" of damages arising from the lease or your occupancy, you disclaim responsibility for damages arising from something other than the lease, such as the owner's failure to maintain the building's parking lot.

Damages and injuries occurring during a lease often result from more than one cause. It is reasonable to require a tenant to indemnify an owner with respect to losses that are the fault of the tenant, but if losses result from the fault of the tenant and the fault of the owner, the tenant's indemnity obligation should be limited to the tenant's percentage of fault.

### **Strategy #3: Delete Any Duty to Defend**

Many indemnity provisions require the tenant not only to indemnify the owner, but also to defend the owner against any claims for which the tenant owes an indemnity obligation. The duty to defend generally obligates the tenant to pay to defend the owner against claims made against it that fit within the scope of the indemnity set forth in the lease.

That said, the duty to defend is generally broader than the duty to indemnify because the duty to defend generally is triggered by allegations alone. A duty to defend may be owed with respect to a claim in which no damages are ultimately awarded. So even though a claim against an owner may be completely frivolous, if the tenant agreed to defend the owner against the claim, the tenant might be obligated to hire an attorney to defend the owner at the tenant's expense.

If the claim ultimately is dismissed, no indemnity will be owed by the tenant to the owner, but the expenses of defending the lawsuit against the owner may be the tenant's responsibility. In many instances the expenses of defending a lawsuit, which typically include attorneys' fees, expert witness fees, deposition expenses, and court costs, far exceed the actual amount in controversy. If both the tenant and owner were named as defendants in the lawsuit, the tenant might be required to pay for two lawyers, one to defend it, and one to defend the owner.

Accordingly, you should delete any duty to defend from the general indemnity provisions in your lease. In the absence of a duty to defend you still may

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be liable for the owner's legal costs and fees if you owe indemnity and the underlying claim has merit, but deleting the duty to defend should limit your obligation to only those claims found to have merit.

### Incorporate Three Strategies in Clause

Much like insurance policies, contractual indemnity provisions transfer risk. An overly broad indemnity provision could require you to insure the owner against damages resulting from the owner's fault. Thus, efforts should be made to limit your indemnity obligation to damages resulting from your negligence or intentional misconduct, and to delete any requirement that you defend the owner against any claims. If the defense obligation cannot be deleted entirely, the duty to defend should be limited to those claims resulting from your negligent or intentional misconduct. ♦

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#### MODEL LEASE CLAUSE

### Draft Airtight Indemnity Clause

You can use this Model Lease Clause, drafted by Texas attorney Alan M. Cohen, to limit your indemnity obligation to damages resulting from your negligence or intentional misconduct. Ask your attorney about adapting this clause for your leases to protect yourself from unnecessary risk.

#### TENANT INDEMNITY

Tenant shall indemnify and hold Landlord and Landlord's agents, officers, directors, employees, and contractors harmless against and from any and all injuries, costs, expenses, liabilities, losses, damages, injunctions, suits, actions, fines, penalties, and demands of any kind or nature (including reasonable attorneys' fees) to the extent caused by any negligent or intentional act or omission of Tenant or Tenant's agents, contractors, servants, invitees, customers, or employees; any breach or default by Tenant in the performance of its obligations under this Lease; or the failure of any representation or warranty made by Tenant in this Lease to be true when made. Under no circumstances shall Tenant be obligated to indemnify any party to the extent that the injury, loss, or damage was caused by the negligence or willful misconduct of the party to be indemnified. In the event of joint, concurrent, or comparative negligence or fault on the part of the party to be indemnified, Tenant's liability with respect to such indemnity obligation shall be limited to its relative degree of fault.