

A Personal Perspective

By Alan M. Di Sciullo

I was one of the lucky ones.

On the morning of September 11, 2001, I was rushing from an early doctor's appointment to my office in the World Trade Center for a 9 a.m. conference call with my Morgan Stanley legal colleagues. Normally, I would be in the office well before 9 a.m., but even with the early appointment I was still making good time to be in place for the call.

I was on the PATH train that links New Jersey with New York, about eight minutes from the Trade Center, when the train suddenly stopped. The passengers were instructed to go to the westbound platform to take a different train into the city. When I exited that train a few minutes after 9 a.m., still hell bent on dialing into the conference call, I looked up and saw what could only be a bad movie—the upper floors of Tower 1 of the Trade Center were on fire! A few more steps revealed that the second tower was burning fiercely a few floors above my 65th floor office.

I approached the buildings as close as possible. The way down to the towers was a mass of debris. Parts of the plane were strewn across the street and had torn away part of a construction canopy. Even from a distance, you could see people jumping from the burning and blackened Tower 1. I was lucky being on the north side of the towers. People on the south side said it was nothing less than an indescribable war zone.

I made my way to within a block of the burning towers to see if co-workers and friends had escaped. FBI agents and New York City police were all over lower Broadway. Several fire trucks passed by, carrying many firefighters in their last minutes of life.

For nearly a half-hour, I watched as the towers burned. At approximately 9:48 a.m., someone nearby shouted that the building was collapsing. We watched the top thirty floors of my building start to twist and fall. The top unit began dropping, crashing upon the rest of the standing tower, causing floors to rapidly and violently pancake upon one another. By the 40th floor, the tower resembled a brownish gray waterfall as the concrete floors imploded on one another in rapid succession. As the remnants, now large pieces of shrapnel, hit the ground and began rushing toward us in a debris-laden brown and yellow cloud, a policeman and I turned and ran up Broadway. When I gestured that we get behind some concrete barriers we were passing, the policeman shook his head and we continued running.

We finally reached safety at City Hall and saw people emerging from the cloud, crying and covered in yellow ash from the collapse. Those of us who had made it turned back to help those who were just emerging. All around the area, strangers helped each other and stood together as the second tower collapsed at 10:15 a.m. Because cell phones were not working, we lined up at pay phones to call home, limiting our conversations out of consideration for the others in line behind us. Instead of panic, I saw the same spirit of cooperation and assistance I had witnessed when we had evacuated the upper floors of the World Trade Center when it was bombed in 1993.

I walked the nearly four and a half miles to Morgan Stanley's midtown offices. About a mile from the now-collapsed towers, it seemed as if nothing had happened. People were outdoors enjoying the day, seemingly oblivious to the horror that was happening only a short distance away. Only when I reached Times Square did reality start to hit home. People were gathered around the street watching a large screen carrying news of the event and related tragedies at the Pentagon and in Pennsylvania.

Arriving at my company's offices, I watched a near-miracle unfold as our information technology and real estate groups had already begun placing employees and getting the firm's computers running. Workers who had been in the towers just hours before were rebuilding their company. We worked well into that evening when I was able to catch a train home. The station's parking lot reflected the tragedy of the day; even at midnight, the lot was still one-quarter filled. I made it home and hugged my family. Then I did the only routine thing I remember doing that day—I took the garbage out to the curb for the next day's collection.

Several months after the attack have given me time to reflect. What is now being called "Ground Zero" was once a vibrant office and tourist complex rising nearly a quarter mile high and totaling over 7 million square feet of office space. Nearly two decades of my legal career were spent at the World Trade Center. Although the company's executive offices moved to midtown Manhattan in 1995, Morgan Stanley still had the largest tenant roster at the Trade Center on September 11. Miraculously, only seven members of our firm died in the attack.

One of those seven fatalities, Rick Rescorla, was a genuine hero. Rick, a lawyer and combat veteran of the Vietnam War, headed our company's security department. As he did during the 1993 bombing of the Trade Center, Rick was directing people out of the building with a bullhorn on the stairwell. As he did in 1993, Rick and his fellow security cohorts went back up into the tower to pull the laggards out of the building. Only this time was different, as the building collapsed on them before they were able to evacuate themselves. Ironically, in the aftermath of his death, it was disclosed that after seeing the damage from the 1993 bombing, Rick accurately predicted that the next time the towers were attacked, it would be by some sort of aircraft.

While mourning the loss of these colleagues, we are also mourning the loss of our home. Many of us spent more time in our World Trade Center offices than we did in our family residences. Every day, those of us with offices in the towers enjoyed a view that paying tourists would wait for hours to see from the observatory deck. The south side had a tremendous view over New York harbor and the Verazzano-Narrows Bridge, and the north side (where my office was located) had a phenomenal view of midtown Manhattan that came to life at night when the Empire State building and the rest of Manhattan lit up.

My children, Megan and Corinne, share my loss. They have had childhood memories of holiday parties and other company functions in the building. Corinne often kicked a soccer ball the length of one of the Trade Center floors with members of our legal staff. Just a few weeks before the attack, Megan and I spent a pleasant day doing college tours and having lunch at an outdoor restaurant in the shadow of the towers.

I am indeed among the lucky ones—I escaped not only with my life after the World Trade Center attack, but also with fond memories of the towering landmark that once was my “home.”

Alan M. Di Sciuolo is first vice president and senior attorney with Morgan Stanley in New York, New York.

Negotiating Lease Clauses to Address the Possibility of Terrorism

By Alan M. Di Sciuolo

September 11 will have a profound effect on the way real estate professionals do business in the future. Even after the World Trade Center was bombed in 1993, not enough precautions were taken to prevent the horror of what happened on that clear, late summer day in 2001. Although the immediate effects of the September 11 attacks are over and rebuilding efforts are underway, the attack will have long-term ramifications on, among other things, the manner in which real estate practitioners approach traditional casualty, insurance, indemnification, and safety issues in commercial leases.

There are no duller issues than these to negotiate in a lease. Nevertheless, there is nothing more gut wrenching to a real estate lawyer than to have a client call saying that its building has been destroyed by fire, flood, earthquake, bombing, terrorist attack, or other casualty and then to advise that client of the parameters for getting the business operation housed again, whether there is adequate insurance coverage, and whether rent continues or abates during this hiatus. This article discusses some of the new issues that must be considered in negotiating these lease clauses to address the possibility of terrorism.

Casualty Clauses

The attacks on the World Trade Center require lawyers to pay careful attention to the casualty provisions in leases. In reviewing and drafting casualty clauses, the following should be considered.

Because the occurrence of a casualty triggers certain rights and remedies, it is essential, as a first step, to define what constitutes a casualty. Although a casualty is generally considered to be any unexpected or unforeseen event that occurs beyond the control of either party, such as a hurricane, flood, or other natural calamity, it can also include an event, such as a fire, even if caused by a party. The occurrence of a terrorist act would have to be evaluated in the context of the definition of casualty used in the lease.

A well-drafted casualty clause should set out the rights and responsibilities of the parties. Termination rights in the event of a casualty must be specified and should be fairly applicable. In many leases, the period within which to exercise such rights is not consistent. For example, a lease may provide for a 60-day period within which the landlord may terminate but a 120- or 180-day period for the tenant. Providing a 60-day period for both would allow for a relatively early exit and finality to the loss of space for both parties.

Absent arson or an acrimonious relationship existing before the casualty, the landlord and the tenant would usually want the relationship to continue after the event. But the landlord's need to rebuild and the tenant's need for alternative business quarters, and the uncertainties of these separate needs being fulfilled satisfactorily, often motivates a termination of the lease. To avoid termination and foster a continuing relationship, the parties should consider a provision in the casualty clause requiring the landlord to make a good faith effort to relocate the tenant to temporary quarters as a condition for the tenant not exercising its termination rights.

The casualty clause should contain a reconstruction schedule detailing each party's respective obligations for restoration and providing an estimated sequencing and completion for each party's work. Such a schedule not only defines the time when the building or premises will be operational but also avoids disputes over which party does what work.

Insurance Coverage

Although it is important to have a casualty provision that clearly apportions rights and responsibilities, it is equally important to have a clearly defined insurance provision that sets out the insurable interests of each party and the amounts of their respective insurance obligations.

The terrorist attacks of September 11 have raised a number of new issues for landlords and tenants concerning insurance coverage for losses suffered because of terrorism. Jo-Ann M. Marzullo's article, *Dealing with Insurance Exclusions in Response to Terrorism*, appearing at page 37 of this issue, discusses many of these issues. As noted in that article, there are significant and unresolved questions as to whether and to what extent insurance can be obtained to cover losses caused by a terrorist act and whether such insurance is or will be available at any cost.

Because of the uncertainties surrounding insurance coverage for terrorism, consideration should be given to more traditional policies or endorsements that may alleviate some of the financial loss. For example, business interruption insurance is available to protect a company's earnings when it cannot conduct normal operations

because of physical loss or damage to the company's real or personal property. William M. Shernoff & Douglas M. Carasso, *Insuring Businesses Interrupted by Terrorist Acts*, N.Y.L.J., Sept. 24, 2001, at 1. In the wake of the attack on the World Trade Center, there was a concern whether such coverage would extend not only to the companies headquartered at the World Trade Center but also to firms that had only their branch offices there. Losses sustained at business locations not identified in the policy but still related and dependent have been allowed in some instances. *Id.* (citing *Wood Goods Galore, Inc. v. Reinsurance Ass'n of Minnesota*, 478 N.W.2d 205, 210 (Minn. Ct. App. 1991), which noted that "coverage is not necessarily site specific. When operations are found to be interrelated and interdependent, mutually dependent, or vertically integrated, courts have not confined the recoverable property that was damaged.").

Business interruption insurance may also extend to a company that was not located at the World Trade Center but was doing business with a firm that was located there. Although the exact language of the policy governs, particularly in the case of site-specific limitations, if there is no site-specific limitation in the language, the issue of whether the insured activities were "interrelated and interdependent, mutually dependent or vertically integrated" with the company formerly at the World Trade Center may arise. *Id.*

A particular concern raised by the September 11 attacks is whether an "Act of War" exclusion in the insurance policy applies to allow insurers to deny claims for damages arising from a terrorist attack. The standard "Act of War" exclusion provides for exclusions for the following combinations of terms: "war," "acts of war," "revolution," "rebellion," "civil war," "civil commotion," "riot," "blockade," "revolt," and "mutiny." Despite President Bush's later statement that "we are at war," none of these exclusions would seem to apply to the World Trade Center attack because the evidence, so far, is that it was not a state-sponsored action. *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974).

Another issue as to insurance coverage was raised in an action brought by Swiss Reinsurance Company (Swiss Re), the biggest insurer of the World Trade Center, against Silverstein Properties, the company that entered into a 99-year lease on the World Trade Center just 10 weeks before the attacks. Stephen Labaton, *A Nation Challenged: Liability; Insurer Sues to Limit Its Payout for World Trade Center*, N.Y. TIMES, Oct. 23, 2001, B5. At the heart of the dispute is whether the attacks on the two towers constitute a single insurable event or two separate attacks, with the latter thereby allowing Silverstein to collect double the \$3.6 billion that Swiss Re was willing to pay for Silverstein's property and casualty losses. Also in dispute was the allegation in Swiss Re's complaint that Silverstein had significantly underinsured the properties. Adding to the uncertainty was the fact that coverage was at the "binder" stage so that final insurance may not have been in place at the time of the attacks. Stephen Labaton & Jonathon D. Glater, *Twin Towers at the Center of Legal Brawl*, N.Y. TIMES, Nov. 3, 2001, at C1.

Force Majeure

Building owners and operators may cite a "force majeure" clause as an excuse for not servicing a building, or even making an effort to do so, after an act of terrorism. The typical force majeure provision in a lease excuses a party from performance (other than monetary obligations) if prevented because of matters beyond the party's control.

Tenants should attempt to carve exceptions from the exculpatory language in a force majeure clause such as for "negligence, willful actions or breach of contract." In the 1993 World Trade Center bombing, for example, such an exception allowed tenants to assert claims against the building operator despite the terrorist bombing. The Port Authority had been put on notice before the bombing because it had received a 1986 security report (in preparation for the Centennial of the Statue of Liberty) suggesting that "car bombs are the vehicle of choice" by terrorists. Goodman Commission, *Report on the Bombing of the World Trade Center* (1993). The building operator's failure to secure all vehicular access to the building was claimed to be a negligent failure in its duty to secure the complex so as to prevent the operator from using force majeure as a defense.

Tenants may also want to consider adding language that would require each party to make a good faith effort to perform its obligations upon the happening of a force majeure event. Such a provision could deprive the landlord of an excuse for its performance because of the event. As an example, consider the following language:

Notwithstanding the foregoing, each party shall make a good faith effort to perform its obligations under this Agreement despite Force Majeure and/or restricted performance events and each party shall have in place a business continuity plan that contemplates disruptions from such force majeure events. The affected

party shall also be entitled to an abatement of Rent and its other obligations during the period that the first party is excused from performing its obligations under this section.

In addition to requiring the landlord to make a good faith effort to perform its obligations, this clause creates an economic incentive to put the building back into service to continue the rent stream.

Business Continuity Plan

If a loss occurs and the landlord's performance is postponed or excused by force majeure, the tenant is left in a difficult position, particularly if it is not able to do business at the premises until restoration. One solution is for the tenant to have a backup or business continuity plan in place before an event occurs. After the terrorist activities of the past decade and the awareness created by Year 2000 concerns, sophisticated owners and occupants are now sensitized to the need for alternative operational sites and scenarios for their own business planning.

In the hours immediately following the attacks on September 11th, nothing short of miracles occurred as firms began their recovery operations. Many of these firms had back-up computer and trading facilities that allowed them to begin operations again when trading reopened several days after the attacks. Although the attack exposed flaws in some companies' business continuity strategies, many companies were nevertheless able to do a significant amount of their regular volume and activity because they had such strategies in place.

For some firms the continuity plan entailed having vacant or secondary space where information technology staff and producers could operate in the event of a catastrophe. Other firms' strategies involved contracting with business continuity firms that would, for a fee, provide facilities for a displaced company's operations or even bring in mobile units for the same purpose, typically on a "first come-first served" basis.

The following clause could be used in both commercial leasing and vendor agreements to address these concerns.

Landlord shall create a business continuity plan (the "Business Continuity Plan") for the Building Services and its other obligations arising under this Lease and will provide Tenant with a written summary of same upon written request. Landlord reserves the right to change such Business Continuity Plan and, upon request, will explain all changes. No change shall degrade the quality of the Business Continuity Plan in a manner that has a material, adverse impact on the Building Services. Landlord will make certain revisions to its Business Continuity Plan, which will meet or exceed applicable legal or regulatory agency contingency planning criteria. Landlord's Business Continuity Plan shall include a schedule for recovering critical business functions.

According to at least one expert, there will be a growing focus on the need for business continuity plans across all industries. Jeffrey A. Moerdler, *September 11, 2001: How Will It Impact the Real Estate Industry*, written remarks from "The Aftermath of Terrorism: Confronting the Legal Issues" (Practising Law Institute, Nov. 15-16, 2001, New York). Although aspects such as redundant systems for business were previously limited to financial service institutions, telecommunications facilities, and data centers, Moerdler suggests that owners and occupants in retail, warehouse, and office transactions now will be implementing backup plans should a catastrophe occur.

Moerdler argues that the need will become stronger for backup generators in buildings, redundant points of entry for electrical and telecommunications systems, availability of in-building wireless communications antennas for improved cellular telephone reception, and similar systems. The existence of such systems will become important marketing tools. He also believes that extra consideration will be given to the use of structural standards that exceed those required by local law, similar to California's earthquake standards, for corporate headquarters and mission critical facilities.

With the abundance of available data center space throughout the country, Moerdler anticipates a much higher absorption rate for this space as businesses seek backup sites for disaster recovery "hot sites." He foresees the growth of the computer system integration business as disaster recovery concerns become more commonplace. He also expects building management and real estate consultants to put greater efforts into a building's disaster plans and security to minimize the consequences of acts of terrorism. Growth in cellular and fixed wireless systems as a means of redundant communications service is also foreseen, which will inevitably necessitate additional cell sites and rooftop antennas, more large antenna towers, and additional network sites. Finally, he

believes alternative energy sources, such as solar and fuel cells, will become a more important consideration for office buildings in another crisis.

Safe Occupancy Clause

Even if a building is not destroyed or otherwise physically damaged in an attack, tenants must consider the possibility that environmental conditions caused by a terrorist act—air pollution—make the premises otherwise untenable. Following the World Trade Center bombing in 1993, I developed the following “Safe Occupancy” clause for use in lease negotiations:

(a) Landlord warrants and represents that the Building and Premises are suitable for the safe and healthy occupancy of Tenant, its employees, agents, invitees and visitors. In this regard, Landlord warrants and represents that the Building and Premises are free from the symptoms commonly associated with “sick building” syndrome and related maladies. To the extent it may become necessary, Landlord shall, at its sole costs and expense, have necessary testing made to check the air environmental and circulation levels and perform all other testing as may be reasonably required to achieve the foregoing purposes.

(b) Landlord shall (i) maintain, operate and repair the heating, ventilating and air conditioning system serving the Premises in a manner to prevent the generation, growth, circulation, release or deposit of any contaminants; (ii) maintain the humidity level and the air exchange rate within the Premises at a level recommended to prevent or minimize the accumulation of stagnant water and to prevent the generation, growth, deposit, release or circulation of any contaminants. Landlord’s obligations in this section are in addition to those repair obligations found elsewhere in this Lease.

Although developed in the aftermath of the first terrorist attack on the World Trade Center in 1993, this clause is intended to address the usual issues of fire safety, security from theft and assault, and environmental safety (such as absence of asbestos, environmental hazards, “sick building” syndrome, and other causes of indoor pollution).

Understandably, many owners were unwilling to accept the clause, especially in the form stated above, not just because of the obligations that would be placed upon the owners as a result of potential terrorism but also because of the higher probability of theft, fire, and other casualty. Some, however, were willing to accept the narrow representations against “sick building” syndrome as a compromise. Although the clause may be viewed as too extreme by owners, its submission as part of the negotiation process at least places them on notice of the possible hazards that terrorists could pose to a building operation.

Since September 11, a new and stronger emphasis is being placed on building safety. It is hoped that no other owner or building occupant will have to experience the horrific manner in which the World Trade Center was attacked. But in the post-attack environment, new issues of building security have emerged. The threat of anthrax is in effect a form of “sick building” syndrome that can be many times more dangerous than out-gassing or stagnant odors running through a building’s ventilation system. External security is a necessity for buildings, and many owners are implementing a multiple set of security clearances at the building entrance, at the elevators, and on each floor. See Moerdler, *supra*.

Other Security Measures

Skyscrapers and signature buildings with a “public image,” such as the World Trade Center, will require even more external security, including barriers to prevent car or truck bombs. Public places, as well as many commercial buildings, will need to implement new security systems using metal detectors, X-ray machines, central package delivery rooms, employee ID checks, requiring visitors to obtain telephone approval before entry, and similar systems and procedures. Higher security for office buildings may evolve with the use of biometric security checks (fingerprints and retina scans, etc.) and employee-only areas. Public facilities such as train stations and airports will also be operated very differently as a result of awareness of terrorism. *Id.*

Other security-related issues that need to be addressed in lease negotiations after September 11 include the following: Are the costs of increased security measures capital expenses or operating costs? Will the tenant be required to assume the risk of occupancy in “high profile” types of buildings? How will another attack such as the one that leveled the Twin Towers be prevented? Obviously these are also issues of state and national concern as the safety of the country’s population in its working environment has become a matter of national security.

Conclusion

Issues that were once mundane aspects of a lease transaction, such as insurance and casualty provisions, will assume greater importance in the foreseeable future. The pervasive concern that “it could happen to us” may force both landlord and tenant to pay more attention to these issues. Building security will—and should—be a significant issue as long as the threat of terrorist activities exists. The usual concerns with casualty and “sick building” syndrome are overshadowed; measures must now be taken and incorporated into leases to protect against intentional and malicious attempts to hurt or kill occupants at their places of business. A new dimension is now added to negotiations between landlord and tenant as a result of actions of truly sinister and evil forces. Concern for security is an issue of importance to both landlord and tenant, who differ only as to the extent to which prevention is practical, effective, and cost efficient.

Alan M. Di Sciullo is first vice president and senior attorney with Morgan Stanley in New York, New York. Portions of this article are condensed from a recent supplement to *Negotiating and Drafting Office Leases* by John B. Wood and Alan Di Sciullo (Law Journal Seminars Press) and reprinted with permission.