Lowenstein Sandler's Real Estate Podcast: Terra Firma

Episode 5
What Every Party Needs to Know About Insurance Before Signing a Lease

By Lynda Bennett, Stacey Tyler, Steven Tanico

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Stacey Tyler: Welcome to Terra Firma: Conversations on Commercial Real Estate. I'm Stacey Tyler.

Stephen Tanico: And I'm Stephen Tanico. Stacey and I are real estate attorneys at Lowenstein Sandler. On today's episode, we'll be talking about insurance and real estate transactions. Joining us in this discussion is Lynda Bennett, chair of Lowenstein's Insurance Recovery Group, a friend to Stacey and I, a mentor, a card shark, a badass, the OG pioneer of the Lowenstein Podcast Network, and an overall extraordinary lawyer and human being.

Lynda Bennett: Well, that's quite an intro. Thank you very much for having me join you today.

Stacey Tyler: Thank you for being here.

Lynda Bennett: Absolutely.

Stacey Tyler: You are the first one to come to mind when we think about insurance and, as real estate people, we pretend to be dangerous about a lot of things, but insurance is one of the things that we always try to bring in our colleagues who are more in the weeds on that topic. So, thank you for being here and letting us pick your brain again.

Lynda Bennett: Happy to do it.

Stacey Tyler: Can you talk a little bit about what you do generally and especially how your work in the insurance world collides with real estate, please?

Lynda Bennett: I always like to self-introduce that I'm Lynda Bennett and I sue insurance companies with a smile on my face. It's always memorable and it's actually accurate. I've been doing that for just about 30 years now. And one of the things that I really love about my practice area is there's a litigation component, but a lot of what we also do is counsel clients on the front end so that they don't find themselves in litigation.

And so another element to our practice is looking at policies as they're being placed, as they're being purchased, working very closely with my friends in real estate, Stacy and Stephen, on getting the words right in the lease so that everybody's on the same page as to how the insurance provision's going to work and who's going to be responsible for ensuring what in that relationship.

Stacey Tyler: I'm glad you brought up leasing because that's one of the areas that this comes up the most for us. And I think a lot of businesspeople are tempted to just take a look at the numbers for the policy limits, and that's it, and then they don't really dig beyond that. And so often we're counseling clients, "Maybe send this to your broker. Think about it a little more carefully." What would you say to somebody entering into a lease, landlord or tenant, really, how should they really be thinking and strategizing about the insurance provisions in a lease?

Lynda Bennett: You're exactly right. Not only do they look at the limits, but in my experience, most clients, when they think about insurance, just generally the most important thing to them is cost and premium. And one of the key pieces of advice that we give to clients is price is one element. The words of an insurance policy always matter when a claim is made, but equally important, so is who is your insurer? Because a lot of times you can get cheap coverage and the adage you get what you pay for turns out to be true.

And so we counsel clients there too on give careful consideration, make sure that you're robustly marketing your insurance program before you even get to the stage of talking to your friendly real estate lawyers about entering into a lease. When we get to the actual document, the leasing document, insurance is a funny thing, and insurance provisions in leases are a funny thing because it really depends on whether you're getting or giving the coverage.

So, the negotiation process, if I'm the party that's being asked to provide all of the insurance, I'm going to negotiate in one way. If I'm the party demanding the insurance protection be there, I'm going to have a whole different list of demands, and that's where you guys do the good work of finding the middle ground.

Stacey Tyler: Right, right. We see that come up most often in the casualty context where it ends up being a fight on who's going to build what and where is that line, whose policy does that come from?

Lynda Bennett: Right. And what's interesting, too, that I find with insurance provisions, and you referenced it, and I give all due respect to my real estate partners here in this episode, a lot of real estate lawyers try to play insurance lawyer on TV, and they'll do that in one of two ways. Either the insurance provision will be literally a few phrases and that's it, and it gives me the cringe every time I look at it. "The usual and customary insurance will be put in place." What you just did is bought a lawsuit later when a claim comes in, because usual and customary means different things to different people all the time.

Or the other end of the spectrum is we'll see a very detailed insurance provision that is loaded up with all kinds of insurance requirements that don't exist, and you can't get them in the market. Sometimes it'll be a policy, or it'll be a requirement for a waiver of subrogation. It's one of the key issues that comes up all the time. And so, having non-insurance lawyers drafting that insurance provision can put you in the soup sometimes, on either end of those two spectrums.

Stacey Tyler: Right. Tough being a tenant in that scenario where a lot of times the landlord has their form and, "This is our program, it has to be this." And your hands can be tied to that situation sometimes.

Lynda Bennett: Exactly right. And that's where, and you referenced in the intro here, the broker becomes really important and having an insurance broker that understands your business, understands the risks that you are being required to prove that you have insurance for or, even more dangerous is when you're giving some of your coverage away through additional insured coverage, understanding how that whole process works, understanding that when you get that more detailed insurance provision that has all kinds of policies listed in there.

You better make sure to send that to your broker and say, "Do I have all these policies or not?" Because a lot of times clients don't. You're talking about the 10,000-pound gorilla that's saying, "This is what we require." Sometimes clients forget to check to make sure, and then what you've done is breached your requirement.

Stephen Tanico: And, Lynda, you touched on the idea that, when looking for an insurance policy, it's more than just the cost and let's say the size of the insurance company. Is there anything else you'd recommend just off the top of your head that makes one insurance broker better than another, or something to think about while shopping policies?

Lynda Bennett: Very unpopular comment, but I'm going to make it anyway. Got to read the policy.

Stacey Tyler: They're so long.

Lynda Bennett: That's why you can hire an insurance geek like me because I love reading policies, but all kidding aside, the words of the policy matter. And a lot of these policies, particularly your property policies and your CGL policies, which are two bread-and-butters that are always going to be required, a lot of times they have endorsements on your property policy. A big mistake the clients make is not reading past the declaration page, which identifies the policy limit and the cost, the premium for the policy. You turn three more pages and, lo and behold, it's loaded up with all kinds of sublimates.

I'll give a real-world example. About 10 years ago, 12 years ago, Superstorm Sandy came rolling through and many of our clients were very surprised. They said, "Oh, yeah, we've got property coverage, we've got flood coverage." Except when you turn to page three of the declarations page, it did, but it was capped at $100,000. And so reading the policies is really, really important. And getting a broker that is in your industry will also know what is possible in terms of customizing the terms.

Another common question we get from clients is, "How much should I have for limits?" Well, I'll give a typical lawyer answer. "It depends. And it depends on what your risk tolerance is, but also what your industry is. There are certain industries where it's harder to get a lot of coverage because it's heavy in risk. So being with a broker who really knows and understands your particular industry will put you in a really good position.

Stacey Tyler: And you touched a little bit on, I think you probably get comments from clients about, "Oh, well, additional insured or loss payee," and using them somewhat interchangeably. Can you talk a little bit about the differences in those roles and how your clients should be thinking about that?

Lynda Bennett: Yeah, that's a great question because insurance is complicated, and the words matter. So a loss payee, and many listeners are familiar with that because they have mortgages at home and your mortgage company has to be a loss payee on your homeowner's insurance. And all that's doing is establishing that, if and when a loss comes in, they're essentially establishing themselves in a priority position that that loss payee will get paid the proceeds that flow from the loss.

An additional insured is dramatically different. What you are doing when you make somebody an additional insured on your policy is you are giving that entity or that person access, direct and immediate access, to the policy that you paid for. And so clients really need to be thinking carefully when they're being required to do that from a couple perspectives. One, there are endorsements that can be added to narrow the access that an additional insured gets.

Two, you need to think about if you're going to be giving that out like Halloween candy and you're giving additional insured coverage to lots of people on your CGL policy, not just your landlord, but given the nature of the businesses you're in, you're giving out additional insured certificates to lots of other parties, that's when you may need to assess the total limits that you carry on a policy because all of those insureds, there is nothing in a CGL policy that says the named insured gets paid first and the additional insureds get paid later. You are giving access to coverage that you are paying for to somebody else, and you need to think about, one, do I want to do that? And, two, if I'm doing that with a lot of different parties, how much do I need in total limits so that I'm fully protected for my direct losses and the obligations I have to those other parties?

Stacey Tyler: That's interesting because I feel I see all the time you get the landlord and then the additional insureds are the lender, the manager, and every LLC between the property entity and the parent.

Lynda Bennett: Yep.

Stacey Tyler: That's very interesting. So you can get an endorsement that would limit that, how that flows through?

Lynda Bennett: The party that's asking you for the additional insured coverage is not going to allow you, usually, to narrow out the number of entities. The way to really narrow that is to put constraints around when an additional insured can have access. And let me back up. What additional insured coverage is intended, through the insurance lens, to do, is to say, "When the named insured has done something, they've been negligent, and that additional insured party is being held vicariously liable for what the named insured did." That's what additional insured coverage is intended to do.

But the additional insured endorsements, there's a wide variety of them out that are on the market. Many of them are broader than that, and a landlord, for example, there's a lot of case law on this, landlords try to say, "Well, anything bad that happens at the premises, even if you only lease one portion of it and somebody's coming to deliver plans to that building, I can now trigger the additional insured coverage." Even though maybe the landlord was supposed to be cleaning up the snow that the person fell on or the ice that the person slipped on.

So when you're giving the additional insured coverage, getting really tight language that says, "This is only going to trigger when the landlord is getting pulled in on a vicarious liability theory." Conversely, when we're representing our landlord clients, we say, "Never. No, we're not going to have that narrowing language. I want the as-broad-as-all-get-out additional insured language in the policy, please."

Stacey Tyler: Yeah. Very interesting. So let's switch gears and talk about the purchase and sale side and the ownership, when you actually own a piece of property rather than being a landlord or a tenant. Can you talk a little bit about how you counsel your clients to update their insurance portfolio on an ongoing basis for owned property?

Lynda Bennett: If you're talking about developers that own a number of different parcels of property, one of the biggest mistakes that I see clients make is not making sure that all of those properties are scheduled. And if you're a very active developer, there are ways to do that without having to individually identify each and every property on your first-party property policy, your CGL policy. You can get miscellaneous coverage added for that.

It's important to market that coverage every couple of years so that you're kicking the tires on "Is the pricing good?" You need to work closely with your broker for your first-party coverage to make sure that the insured values on the properties are accurate. As you build out inside the space, you start bringing in more equipment, things like that, it's always important to go back and review and make sure that those insured values are appropriate.

Stephen Tanico: I mean, personally, now I just want to leave and go check my mortgage policy. One last question, Lynda, a lot of the time you'll hear people talk about covering it under an umbrella policy versus individual policy. Is there a difference there in how you think about it versus just the amount of the insurance coverage?

Lynda Bennett: Yeah, that's a great question on umbrella insurance because a lot of people don't understand what that is. Typically, your umbrella policy is going to sit over just your CGL coverage.

Stephen Tanico: Oh, interesting.

Lynda Bennett: That's something that needs to be checked. And the concept behind an umbrella policy, it's intended to be gap filler coverage. So if you've got exclusions on your primary policy, then, if it's not excluded in the umbrella, the umbrella will, in theory, is supposed to drop down. The reality is I review a lot of umbrella policies and oftentimes those risks that you want insured, they add those exclusions to that policy, too, which means it eventually, or essentially, I should say, becomes excess coverage. That's what it is.

One other thing I did want to point out, though, is on the CGL coverage, in particular, when we're dealing with real estate clients, and again, particularly those developers, there is a growing need not only to have CGL coverage to protect yourself against construction defect. Builders risk, you'd obviously have that. But the CGL policy oftentimes now contains a professional services exclusion in it. And that used to be to say, "If you're an architect or you're otherwise licensed, go get a malpractice policy." But those exclusions have expanded dramatically in scope over the last 10 years.

And so, one nugget I would tell our listeners is think about whether you need to have a miscellaneous professional liability policy to protect yourself against that. Because when you're doing what you think is ordinary construction that you would expect to be covered under your CGL policy, you may be met with an unhappy surprise there because you've got a super broad professional services exclusion. And so, the words matter, you've got to read the policy. I'm becoming a bit of a broken record.

Stacey Tyler: Pick up the phone and call Lynda.

Lynda Bennett: Exactly.

Stacey Tyler: All right. Well, any other pieces of advice you'd like to give to a real estate executive? What kind of high-level takeaway would you like them to have about the insurance world?

Lynda Bennett: I think, particularly in any contracts that you're entering into that have insurance provisions, look at the list of policies. Insurance, I always refer to it as a patchwork quilt, and you want to make sure you don't have any holes in the quilt. Cyber insurance is really important. There are separate pollution legal liability policies out there now. Sometimes there are niche policies like if you're involved in distribution of liquor, there are separate liquor liability policies. So, really be thoughtful about the risks that your business faces and make sure that you've got each of the unbundled insurance products that you need to make sure that you're going to have coverage for that claim that comes down the pipe to avoid the unexpected surprise.

Stephen Tanico: Or call Lynda.

Lynda Bennett: My phone is always on.

Stacey Tyler: Well, thank you so much for your time today, Lynda. Thank you for helping us get a little bit smarter about insurance in real estate transactions.

Lynda Bennett: So happy to be here and thanks for having me.

Stephen Tanico: And thank you, listeners, for tuning in today. Be sure to like, subscribe and follow Terra Firma wherever you're listening to this episode. Stacey and I would love to hear from you so feel free to reach out to us at terrafirma@lowenstein.com. Until next time-

Stacey Tyler: ...ciao.

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