Segale Consulting Services, LLC

Risk and Real Estate Leases

Working with clients and their leases are never fun. The first hurdle for the insurance agent is: Should you ask for the lease or not? It would be easy to say – sure you should. Not so fast. If you have never read a lease in your life, how would you even know what you are reading? You are also not a lawyer, so how can you be asked to review a legal document? If you ask for the lease, but the insured only sends you the two pages called "insurance requirements" you are now only see a small sliver of the whole picture created by the lease.

Taking these questions separately, consider the following:

- If you have never read a lease before, ask for help from a more experienced insurance person.
- You should never, ever read a lease and give any legal advice. That would be practicing law without a license. You are reviewing the lease from a risk transfer, risk acceptance and insurance response perspective. You should have a disclaimer to the effect that your review is an insurance review and that this review should not be considered legal guidance and for that, the insured should look to their attorney.
- As for reading a legal document, you do so every working day – that would be the insurance policies you provide for your clients.
- If you ask for the lease and you only get a couple of pages, make sure that fact is documented permanently in your files as well as confirming back to your client in writing.
- A final comment here – if you are only placing insurance based upon specific orders from your client, a lease review is going above and beyond the order taking role you are playing. That could put you in an enhanced role of having a "special relationship" with that client. Meaning that your E & O exposure in some states just rose. If you are already in a consultative role with the client, you already have that type of relationship and NOT reviewing the lease (or at least asking for it) could place you at higher risk for an E & O claim should something go awry as a result of a lease condition.

The next hurdle: Your client has already signed the lease before you got a chance to review it. Now, your client is stuck with the results – rarely will a landlord or a tenant be willing to renegotiate lease terms once they have been agreed to and signed. If your client has a number of leases, one thing that is true, no two will be exactly alike. Do your best to request that you are part of the lease negotiations, but in the end, it will be the client's decision.

Let's move on to the next hurdle: What if you are the agent for both the building owner and the tenant? Since the lease will create risk that is transferred at the same time as risk that is assumed, how do you properly act as an advising insurance agent for both? Well, there are a couple of options. First, you can play it straight with both – 'just the facts, ma'am" and offer no opinion as to the good or the bad results, just solutions, if there are any. If there are not, make a written disclosure, whichever is adversely affected. Some insurance agencies will split up this review and recommendations by having another insurance agent in the office review the lease for one or the other of the two clients.

One of the less tangible items regarding leases is the value of that lease to both parties. A landlord may make several concessions because they want a stable, long-term tenant that will care for the property and pay their rent on time. A tenant may find the location extremely valuable and will not want to run the risk of the lease cancelling or upsetting the landlord. A discussion about their motivations and long term objectives is a necessary component in working with your client. An example of this was brought home to me clearly during a recent discussion with a client (tenant). The client wanted to avoid all problems with the landlord at, literally, all costs due the value of the location. This client has 143 locations around the U. S. and, while all of the leases are different in various ways, a common thread among all of them was a hold harmless and indemnity agreement along with a requirement that the landlord be added as an Additional Insured to the General Liability policy. At one of the retail locations, an elderly customer had fallen *outside* the actual retail premises on the common sidewalk at the strip mall. Since the Additional Insured – Managers, Lessors of Premises endorsement only applies to injury *within* the premises leased to the insured tenant, the protection under the Additional Insured endorsement did not apply. Although the insurance company initially denied, they ultimately picked up the defense for the landlord with a reservation of rights under the contractual liability section of the liability policy, this created great concern by the tenant. A discussion took place with the insured and their attorney regarding the language of the endorsement, including the changes affecting that endorsement that took place with the 2007 revisions. That newer edition of the Additional Insured endorsement contains language that restricts the landlord's access to the insurance policy only if the Named Insured (or a party over whom the NI has direction or control) contributes in some way to the injury. Many insurance companies have adopted this newer edition and the insured needed to understand that their desire to broaden the coverage response for the landlord, rather than restricting it, would limit their insurance marketplace options. The result of the discussion was that the insured's attorney would specifically review the indemnity provisions, looking to those to be the backstop to the Additional Insured endorsement and the agent would be watchful for the proper AI endorsement on the future policies. A good division of labor for all.

Good luck and happy reading.