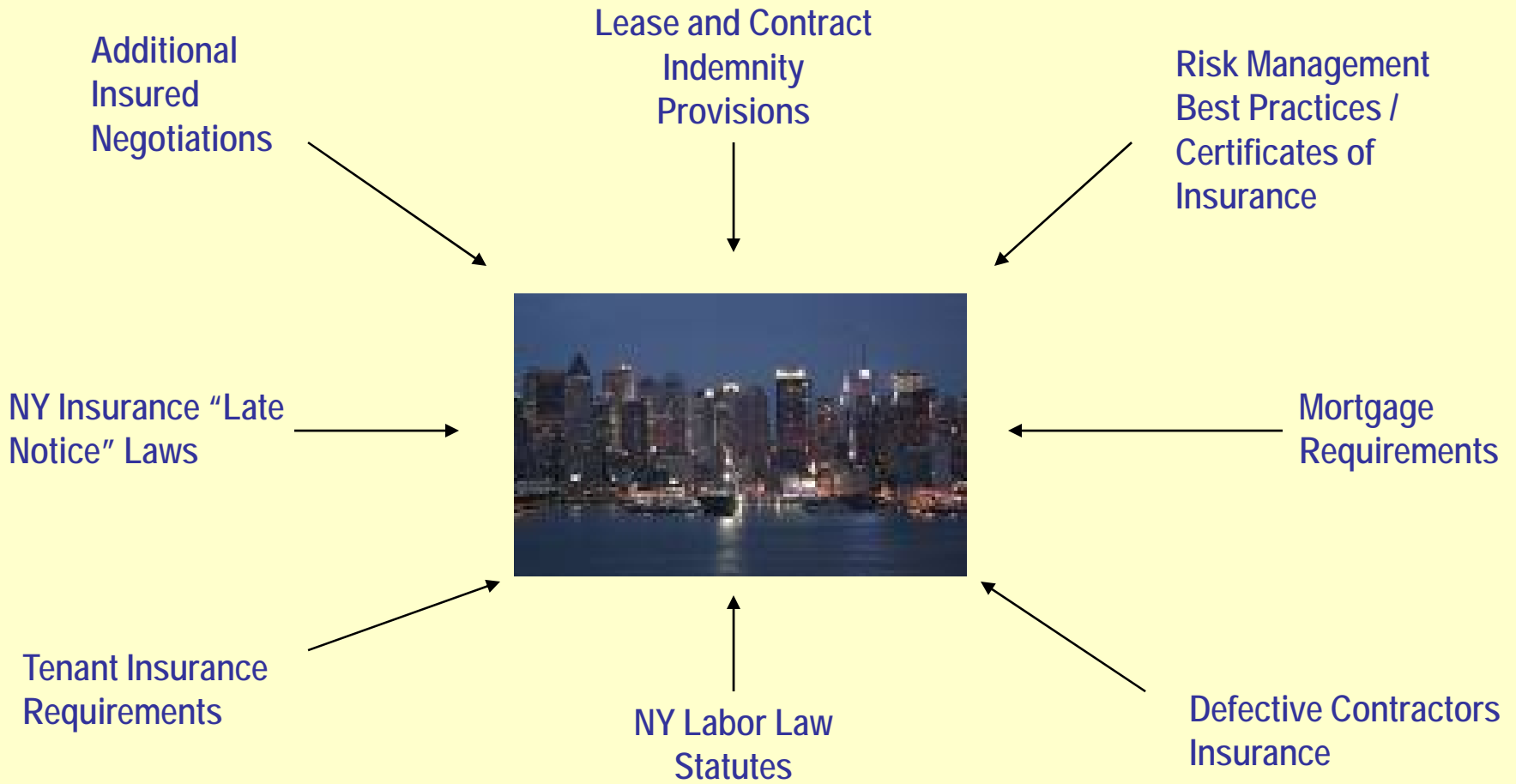




Insurance Issues Facing the NY Real Estate Market Stephen P. DeMatteo, Executive Vice President

Contractual Risk Issues Bombarding the New York Real Estate Landscape



Contractual Risk Transfer:

MY BASIC ADVICE

- **Insurance is the preferred risk transfer vehicle**
- **Any conditions agreed to in the lease not covered by insurance become assumed “business risks” – corporate assets are put in jeopardy. **Was this a conscious decision?****
- **Engage the services of counsel and your insurance broker prior to signing a lease**

It is like a game of cards... (trust me, I'm over generalizing)

Additional Insured trumps a Contractual Indemnity

Contractual Indemnity trumps CGL insurance policy

Good CGL policy trumps a Bad CGL policy

- **But what is the difference between “good” and “bad”**
- **Each of these beat a “wing and a prayer”**

How Does the Commercial General Liability (CGL) Policy Provide Coverage?

- **An exception to the “CONTRACTUAL EXCLUSION” in the CGL providing coverage for qualified “INSURED CONTRACTS”**
- **A Lease (and a number of other contracts/agreements executed before a loss) is a defined “INSURED CONTRACT”**
- **Not all CGL policies are created equal – especially for contractors in the New York area**

Features of Indemnity Provisions

- **Contractual Risk Transfer of:**
 - Liabilities**
 - Duty to Defend**
- **Losses:**
 - Damages**
 - Claims, liabilities**
 - Costs and expenses (including attorney fees)**
 - Fines and penalties**

Features of Indemnity Provisions

- **Types of Indemnity**

LIMITED – to the extent caused by Indemnitor

INTERMEDIATE – all liabilities, except caused by Indemnitor's sole negligence

BROAD FORM – all liabilities, including Indemnitor's sole negligence

Features of Indemnity Provisions

IS BROAD FORM ENFORCEABLE ?

– anti-indemnity statutes, public policy concerns

Enforceable if:

- **Equal bargaining power**
- **Conspicuous and clear intent**
- **No public policy issues**

Features of Indemnity Provisions

TYPES OF DAMAGES

- **Direct**
- **Incidental / Consequential**
- **Punitive**

Insurability will depend upon the PERIL and the VENUE

Additional Insured Status (Leases and Contractors)

Building owner is the Additional Insured (AI):

- **Securing AI status helps insulate the building owner's limits of insurance**
- **AI status provides “belts and suspenders” protection along with indemnity agreements**
- **Provides additional layer of protection in the event of insolvency which minimizes the effectiveness of an indemnity**
- **Be realistic – in most cases you will not get completed operations coverage**

Moving from the Indemnity section to the Insurance section of the lease

- **Agreed Amount vs Coinsurance**
- **Replacement Value vs ACV**
- **Primary and Non-Contributory**
- **Property “All Risk”, “Special Form”**
- **Business Income coverage and rent obligation**
- **Mortgagee rights**
- **Certificate of Insurance requirements**
- **Waiver of Subrogation**

The dangers of Certificates of Insurance, know what you are asking for:

- **The evidence/certificate is not a binding document and does not confer rights to the recipient. It is just a piece of paper.**
- **Evidence of Property Insurance – Acord Form 27 or 28**
- **Certificate of Liability Insurance – Acord Form 25**
- **Don't accept Property coverage to be evidenced on a Liability Certificate of Insurance**

If you want proof, ask to see the underlying insurance contract endorsements or policy

Know your Contractors – BUYER BEWARE

Contractors have been known to say:

“Yes, you have broad contractual liability coverage.”

“The certificate says you are an additional insured.”

“Of course I buy workers compensation coverage for my employees”

“Yes, you are protected as an additional insured for my completed operation after I finish the job”

- But, also know that some attorney-drafted contract language is outdated and unrealistic and at times they use unnecessary language to appropriately protect your interests.
- Don't just think about the insurance broker as placing the policy, seek the help of your insurance broker – while we don't provide LEGAL advice we do provide LOGICAL advice (at least the good ones do).
- Suggest that your real estate clients establish a vendor and tenant certificate tracking program

The deck is stacked against the building owner

- NY Labor Law Section 240 (the “Scaffold Law”)
- NY Labor Law Section 241 (requirements of construction, excavation and demolition work)
- Building owner is held strictly liable to an injured third party working on the site. But, this risk can be transferred to the contractor with an appropriate indemnification and if they have proper insurance (review the WC exclusion on their CGL)
- That is why the quality of the contractor’s insurance is so important.
- In cases of major construction, building owners must purchase an “Owner’s Interest” CGL policy because their regular CGL will likely have a construction exclusion

Back to my original card game analogy –

The BANKS TRUMP ALL

- **Increased bank scrutiny and attention to detail regarding insurance requirements**
- **Don't assume the bank's requirements are easy to comply with, negotiate such things as:**
 - **Minimum allowable S&P rating of the insurer (only a couple of AA rated insurers)**
 - **Better yet, negotiate an A.M. Best rating, not an S&P rating requirement**

- **Review the form requirements, what is mandated for building ordinance coverage, Flood, Earthquake?**
- **Agree to insure the building at its replacement cost NOT a much higher loan amount (insurance to that value is not readily available in the commercial marketplace)**

Questions?

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