



**Lowenstein Sandler's Insurance Recovery Podcast:  
Don't Take No For An Answer**

**Episode 61:  
When Insurance and Real Estate Issues Collide: Key Considerations For Leasing or Purchasing Property**

By [Lynda Bennett](#), [Stacey C. Tyler](#)

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**Lynda Bennett:** Welcome to, Don't Take No for an Answer. I'm your host, Lynda Bennett, chair of the Insurance Recovery Practice here at Lowenstein. Today I'm delighted to be joined by Stacey Tyler, who's counsel in our real estate practice group, and she also leads the Lowenstein Cannabis Working Group. Stacey, thanks so much for joining us. You look stunning today.

**Stacey Tyler:** Oh, stop. I woke up like this.

**Lynda Bennett:** Today I wanted to have you on, Stacey, so that we can talk through some of the key insurance coverage issues that come up when a company either wants to lease or own real estate. I know that you do a lot of leasing work, and we know that leases typically include very detailed insurance provisions laying out what coverage the landlord's going to be required to maintain and the tenant's going to be required to maintain. Sometimes they'll even address how the claims process is going to work in the event that a building burns down or it's otherwise affected by a casualty event. Why don't we start off Stacey with having you speak a little bit about what's the market right now in terms of insurance requirements generally, and then we can get into whether that boilerplate language is actually negotiable.

**Stacey Tyler:** Sure. I'll start out by saying that the requirements are really going to vary depending on the property class, the tenant type, and other specific details. In general, if we're talking about a lease and a multi-tenant building, the landlord is going to have the property policy to cover the entire building and then the tenant is going to be responsible for the interior of the four walls of the premises. That means that they'll pay for the property coverage for the actual buildout of the space, so they'll pay for coverage for their personal property, all the contents. Usually, they'll get a comprehensive liability policy and they might have additional coverages such as things like auto or boiler machinery, if there's big components of the property that they're responsible for, workers' comp, whatever's required by statute, things like that.

**Lynda Bennett:** Don't forget builder's risk.

**Stacey Tyler:** Oh yeah, builder's risk, depending on how much work they've actually done. If they're the ones who did the buildout, that's usually a responsibility of the tenant as well.

**Lynda Bennett:** When I've reviewed these types of provisions, they seem to be fairly boiler plated, and I always like to make the joke that real estate lawyers, corporate lawyers try to play insurance lawyers on TV with the insurance provisions. Why don't you address a little bit, how negotiable is this language? Can tenants, when they're leasing from the landlord, do tenants have any leverage to negotiate these terms?

**Stacey Tyler:** For sure. There's definitely wiggle room both in terms of the policy requirements and the particular coverage amount. I always recommend that my clients have their insurance professional take a look at the entire insurance section of the lease, so things like the amount of coverage that could be negotiable, if they're requiring things like I said, auto, or boiler, or earthquake, depending on where it is. If you think those are overkill, try pushing back. Maybe your insurance professional can help know what's market. Sometimes landlords will also try to tell you your insurer has to be X grade on the best scale or they have to have a certain certification, so you're going to want to also confirm with your insurance professional that those things are true with your current coverage, just so you know if there's going to be any shifting that you have to do to make this landlord happy.

**Lynda Bennett:** Yeah, I mean, Stacey, I think that's one of the most important things. I make the joke that these are corporate lawyers or real estate lawyers, a lot of them don't understand even what they're asking for, what the coverage is. I've seen many provisions that contain requirements for specific types of insurance policies that aren't even available in the market. It is, I think, really important to speak with professionals who live this language and these policies day in and day out. The other thing that I wanted to just put out there is paying attention to the primacy of which coverage goes first. Sometimes when an event happens, it's unclear who's ultimately responsible, who's going to have to pay first. What kinds of provisions are you looking to either improve upon or include if it's not there in the first instance in the insurance provisions?

**Stacey Tyler:** There's definitely going to be waiver of subrogation language in there. Landlords are going to push for that, and depending on how your policy is written, that may be in the form of an endorsement. I don't know how much landlords really follow through with that after you sign the lease if they're really getting that policy to review it or check your endorsement, but usually it's a matter of during the lease negotiation confirming that you're okay with that and maybe by lease signing you have to send a certificate of insurance. It's just making that leasing attorney for the landlord happy. Maybe if they're a big behemoth real estate trust or something, if they have an internal risk management department, which many do, then it could go up to that level and maybe they're telling you specifically this is what we wanted to say.

I have seen a disconnect for sure from like you said, the real estate attorney who's drafting the lease and saying, well, I think this is the right words to put here. Then a lot of times we'll take it to an insurance professional, and they'll say, well, you really can't do that. One great example is most leases will say something like this policy cannot be canceled unless you give us 30 days' notice. Every landlord is going to put that in the lease. I have heard from many different insurance professionals that that's just not something that makes any sense for an insurance policy, but that's what your lease is going to say, so whatever.

**Lynda Bennett:** Yeah. One of the biggest mistakes that I see people make in the insurance provision is say they don't set forth what the precise limits are that are required on these policies. It'll say what's usual and customary or at least X amount. I can tell you when you include that type of language in your insurance provision - you're buying a future coverage litigation. What is reasonable and customary is going to be viewed very differently between the landlord and the tenant after a claim's been presented, so paying attention to those details is very important.

**Stacey Tyler:** I want to add something to that. One point I always push on the tenant's side of a lease negotiation is some landlords, especially in the long-term lease, will include some kind of provision that the landlord has the right to adjust the coverage requirements at any time during the lease. It makes sense from the landlord side. If you have a 30-year lease, a million dollars of coverage, who knows what that's worth in the future. From the tenant side, you just want to control that expense over the long term and reduce that risk that the landlord's going to turn around and say, oh, well now I have to get flood coverage and you're going to cover that. From the tenant side, it's really just about controlling that risk. Maybe you can only change the coverage every five years or something like that. You just want to try to limit as much as possible.

**Lynda Bennett:** Great point. Speaking of tenants and things that they should be thinking about, what's the difference between a loss pay and an additional insured, and why does that matter when you're looking at the insurance provision?

**Stacey Tyler:** Most landlord provisions and the lease about what the coverage is going to be, how it's written, what the COIs look like is going to include a laundry list of additional insureds. There's usually a special purpose entity that owns the land, that's your landlord, but then there's really a whole list of other entities that do the real work. The management company may be up the chain in the management structure. All of those entities, they're going to want to be listed as an additional insured. That means that essentially if there's any indemnity obligation that you have, it's flowing to them not just to that landlord entity whose ownership is really usually limited to the actual property that we're talking about.

A loss payee is different. That's something that comes up in the context of your property policy when we're talking about who is going to get the payout of the claim in the event of something like a casualty where the whole building burns down or maybe there's just damage in your space. The negotiating point comes up really about the buildout in this instance. Maybe

we're talking about this is an office building and you just have your cube in the sky, or you have a built to suit entire building. You want to think about who is putting in the initial investment for that premises. If it's just your office building and you are doing the buildout and it's just cubicles and things, then that's really different than if we're talking about you building out a super specific lab with a clean room or something like that.

Whoever's putting in that initial investment is usually the party who's going to push to be the lost payee. That means that if the building burns down and you make a claim against your policy, that claim amount, whatever you get back from the insurance policy, is going to go to that person, to the lost payee. We see pushback from landlords against tenants being the lost payee a lot because the landlords typically want to control the rebuilding process because at the end of the day, they're the ones left holding the bag if you just run away with the money and then they have a burnt-out shell with nothing in it.

If you're on the tenant side, you have to think about how much bargaining power do I have in this situation? If I'm putting in a huge investment in this space and I have a really good argument that I should be the one to get that money back, but then the landlord's probably going to push to have you on the hook pretty strictly to rebuild, unless there's really specific circumstances when you're allowed to walk away and not rebuild. That would be like if the building is burned down more than something like 80%, or if you're really close to the end of the term. In those instances, then the landlord is more likely to let you walk away with that claim amount.

**Lynda Bennett:**

Yeah. I just have to put a little insurance geek gloss on that. That was all really great, Stacey. Through my insurance brain, the biggest difference between loss pay and additional insured is loss pay means you get to receive the check once the insurance company pays, whereas when you're an additional insured under somebody else's policy, that means that you can go and make a direct claim against their insurer and get whatever coverage is going to come out of that. When you're a lost payee, all you're getting is the right to receive a check once the insurance company agrees the claim has to be paid versus an additional insurer, you now have full access and can make whatever arguments, whatever you need to do, to get coverage under their policy. All right, so let's move on. We were just talking about the direct relationship between landlord and tenant. Does this conversation change at all when we're in a sub-leasing context?

**Stacey Tyler:**

Not too much. Usually, the way a sub-lease works is the tenant under the master lease, you have your landlord who owns the building, and then the tenant under a master lease. That's the lease between you and the actual person who owns the property. Then the tenant brings in a subtenant and there's a sublease agreement, but that sublease really flows in every sense from the lease document itself. Whatever the tenant under the lease is required to do as far as insurance, that's going to flow through to the subtenant with respect to their sublease premises. If they're subleasing the entirety of the premises that the tenant has, the sub landlord, then they just have to ensure exactly the same thing. If it's less than that, then they're ensuring less than that.

As the tenant, the middleman in that relationship, you're the sub landlord and you're the tenant under the master lease, you may be tempted to try to abdicate all of that insurance responsibility if you're sub-leasing your entire premises to the subtenant, but that comes with a lot of risk because the landlord isn't going to care about your sub-lease deal. They're not going to just skip you and go after your subtenant if they drop the ball, if they don't get the insurance and they go bankrupt. Even though you may be tempted to try to save some money there, it's, I would say, probably not worth that risk and you should still maintain your coverage. It's completely out of the question if they're only subleasing a portion of your premises. You're still going to want to cover the entirety.

**Lynda Bennett:** Gotcha, so the buck stops with the tenant. Stacey, we're all continuing to suffer COVID fatigue. Let me ask you, did you see any changes to this insurance framework we've just been talking about as a result of what happened with COVID? What lessons or changes happened in the real estate world after COVID?

**Stacey Tyler:** We saw a flurry of claims, or I should say attempted claims against business interruption coverage in general in the 2021-2022 era. We didn't talk about that at all yet. Business interruption coverage, it's coverage that a landlord will usually require the tenant to get that will cover expenses, leasing expenses, during any period of time in which the tenant has experienced a property loss.

Let's say if there's a casualty, the building burns down, everybody has to move out, wait for the work to be redone. The business interruption coverage is what's going to pay your rent in the meantime, move all your stuff, get you a replacement premise in the meantime when that restoration is happening. When all of these tenants during COVID started hitting rough times because they couldn't pay rent, there's nobody in the office, they were trying to find creative ways to recoup some of those losses.

**Lynda Bennett:** You're really hitting on a sore subject here Stacey because we can spend a lot of time talking about that today, but the bottom line is courts slam the door shut very hard on those business interruption cases. What changes came in the leases as a result of everybody now suddenly realizing this very large risk exposure that COVID really laid bare?

**Stacey Tyler:** The main difference I'm seeing is that force majeure provisions got a lot more specific. They used to say things like the tenant is not excused from performing under the lease, meaning paying rent, doing all of those things in the event of a war or an act of God. Usually force reserve provisions were really broad, but now they'll specifically say COVID 19 or other pandemic or health emergency or state mandated shutdown. Pretty much any of those things that were the reason that everybody had to stay home and not work during COVID.

**Lynda Bennett:** Well, I know we certainly kept working. Let's shift gears and talk a little bit about the coverages that come up when you're buying a property. We were just talking about the landlord tenant relationship. How is it different when

you're thinking about insurance when you're actually purchasing the real estate?

**Stacey Tyler:** As a purchaser, your focus is really going to be on the diligence aspect, and your number one diligence item is going to be title, title work from a title insurer with the ultimate goal of at purchase getting an owner's policy of title insurance and maybe a loan policy if you're buying with lenders money. The title insurance company is going to research your property. They'll research the seller, figure out what is recorded against the property, if there's any judgements or liens, anything like that that can affect the title. You will be able to review all of those things and negotiate your title insurance policy. The point of that being that you want the title insurance company to ensure that your interest in the property is encumbered by as little as possible.

You want to delete anything that is related to the past seller, their financing, things like that. Make sure there's no liens and make sure that there's very little chance that you will have anybody trying to tell you that you don't have good title to the property. Claims are super rare, but because the title loss is total most of the time, it's something that people get anyway.

**Lynda Bennett:** All right, so just real briefly, what other coverages should you be thinking about as a buyer other than title?

**Stacey Tyler:** If you find during your diligence process that there's an issue with the environmental condition of the property, then maybe you start talking about a pollution liability policy, and that's going to depend on the facts of the property. That's also very negotiable. Who's paying for it? What's the term? What's the coverage? If there's a compliance issue, let's say it's a legal non-conforming building, it's a hundred years old, if it burned down then today you'd have to rebuild it completely differently, ADA compliant what have you, then you may want to get a law and ordinance policy, L&O coverage that's going to cover you for that increased cost that you wouldn't get from your property policy. Your property policy is going to pay for you to rebuild it exactly as it is today. The L&O coverage will pay for you to build all the ramps or the sprinklers, all of those things that you didn't have to do a hundred years ago.

Flood can be an issue depending on where the property is, and we've seen a lot more flood insurance requirements in the post-Hurricane Sandy world now that a lot of flood zones have shifted, and it's very expensive. That's another thing that you're going to want to know before you close, if that's going to be something that your lenders going to require, how much is that going to be.

**Lynda Bennett:** Yeah, it's amazing the things that we learn after catastrophic events and how it ripples through these lease agreements and purchase agreements. All right, Stacey, this has been really terrific. We're just about out of time. I'm going to give you 30 seconds to give us your views on how real estate intersects with reps and warranties insurance.

**Stacey Tyler:** That's an interesting one. We're seeing it in a lot of M&A deals where real estate is ancillary to the deal. The deal team is going to want to push that all of the liability for a rep breach is on the insurance company. That's a little

tough for us real estate attorneys to deal with since we're used to doing all of that diligence ourselves, doing the title work, all those good things I just mentioned. It hasn't totally taken over in the real estate world yet on a pure real estate deal. We, in the dirt side, as we like to call it, are a little more set in our ways. We haven't seen it taken over yet, but I wouldn't be surprised if it does in the next couple of years.

**Lynda Bennett:** All right. Well, I appreciate that crystal ball watching that you just gave us, but even more, I appreciate that you came on today. It's a real estate lawyer and an insurance lawyer makes perfect music together, and I really appreciate all of your insights and look forward to having you back again soon.

**Stacey Tyler:** Thanks for having me.

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