# 409 Attack on America - The Legal Aftermath

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**American Corporate Counsel Association, 2001 Annual Meeting, San Diego, CA**

# Attack on America: The Legal Aftermath

**What are the main legal issues for in-house counsel in dealing with the aftermath of the Sept. 11, 2001 attacks on America?**

- Current problem solutions.
- Preventive action against future problems.

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Ronald S. Goldbrenner was most recently the General Counsel of the Promotion Marketing Association, Inc. He currently maintains an active private practice in New York City. Mr. Goldbrenner served for many years as in-house counsel to two major American packaged goods companies where his practice ranged broadly across the problems that confront such companies.

His work has included general corporate, intellectual property/licensing, contracts particularly regarding computers (software agreements and representation of software application companies), Internet law, antitrust/trade regulation, administrative law, lobbying, international law, and advertising review. At Lorillard, in addition to his duties as Associate General Counsel, he served as Counsel to the Research and Manufacturing Division and to the International Division. Before joining Lorillard, he served Schering-Plough Corporation, first as Trademark Counsel, and then as General Attorney specializing in food and drug law, and then as Counsel to Manufacturing and to the Animal Health Division.

Mr. Goldbrenner holds both Bachelor of Laws and Master of Laws (Trade Regulation) degrees from New York University School of Law and he has attended the Harvard Program of Instruction for Lawyers. Additionally Mr. Goldbrenner studied in NYU's MBA program. He is a member of the ABA, Association of the Bar of the City of New York, American Corporate Counsel Association and the NYS Bar Association, and has lectured on various legal topics to bar association, industry and college groups.

Mr. Goldbrenner has served on the Board of Directors of a number of industry and charitable institutions. He is President and a member of the Board of Directors of the Greater New York Chapter of ACCA, a Vice President of the Board of Directors of The City College Fund. He has served on the Board of Directors of the Promotion Marketing Association of America and The Stern School of Business Alumni Association, and as President of the NYU Executive Forum.

 

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# Attack on America: The Legal Aftermath

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## Contracts

The World Trade Center disaster and other disasters, whether resulting from natural causes or man made actions, have an impact on the performance of many different kinds of contracts. Under what circumstances may you be relieved of your duty to perform a contract, particularly in light of a disaster like the attack on the WTC or a natural disaster like a hurricane or an earthquake?

Contract analysis treats the facts we have as occasioning excuses for non-performance of a contract which may mean cancellation of the entire contract or some lesser remedy. Of course, you may represent a client who seeks to have the contract enforced according to its original terms. If your client is seeking to avoid a contractual obligation the first place to look is in the agreement for termination provisions. If your contract is terminable at will or after a very short duration, this may solve your problem easily. In that case you want to look at any notice provisions and their requirements. Also, the easiest exit may be a negotiated one. Most of the time it doesn't hurt to ask.

If your client needs a formal legal excuse you should be looking at contract law for the following: 1. Provisions in the contract itself permitting your client to be relieved of its obligation to perform such as a "Force Majeure" clause.
2. Provisions in the law of the applicable jurisdiction permitting the excuse of a contract obligation under certain circumstances even where no provision is made in the contract: for example,

I. **Act of God** and other eventualities detailed in the laws of each state
II. **"Frustration of Purpose," object, or effect through the failure of a thing, state of things, person, or future event**
III. **"Impossibility of Performance"**
IV. **"Impracticability of Performance"**
V. **Death or illness**
VI. **"Material Adverse Change"**

"**What ifs**:"

A. There was a contract for the sale of goods that fell under the Uniform Commercial Code (UCC). (Remember contracts for services are not covered by the UCC, although some courts in dealing with service contracts will look to the UCC law for guidance.)
    a) The Buyer had offices in the WTC and no longer has use for the goods. May he cancel? Maybe.

 

b) The Seller had offices in the WTC and can no longer produce. Must he deliver? Maybe.

B. There was a contract for services to be performed. For example, computer support services, graphic design services, financial management services.
   a) The company obligated to perform the services was in the WTC and lost all of its employees as well as its records. Is it still obligated to perform? Maybe.
   b) The company scheduled to receive the performance of services was in the WTC and no longer requires them. Is it still obligated to receive performance? Maybe.

C. There was a contract for personal services to be performed where the individual scheduled to perform the services was especially talented and specifically designated as the person to perform. A classic law school example is the opera singer. Evanoski v. All Around Travel, (1998) 178 Misc.2d 693, 682 NYS2d 342.

D. Equipment was leased by a WTC company that was destroyed in the disaster. Does the lease remain in effect and are payments still due? Yes, most likely.

E. A letter accepting an offer or a payment was put into the mail on or before Sept. 11, 2001, a) but never received by the party to whom it was addressed because of the disaster, b) or was received, but lost among the rubble. Is a contract formed? Yes, but you will have to prove to the satisfaction of the court that the letter was in fact, mailed. An acceptance of a contract offer is deemed to have occurred when the letter is put in the mail, not when it is received, unless otherwise agreed by the parties. However, this rule may not apply to documents sent by Fed Ex and other couriers. Payments will be more tricky. It is likely that you will be able to successfully contend that the payment was timely made, but you will be responsible to supply another check.

The answers to these questions depend upon the law and the facts applicable to each and will depend first on what the contract calls for and secondly on what the law requires in light of the contract or despite it.

The most important contract clause to look for is the “Force Majeure” clause or “Act of God” provisions. One must look at the provisions very carefully because the wording usually varies from one agreement to another in important ways. For example, "war" will be defined very differently from "acts of war." "Terrorism" may not be listed at all. Is it included in "civil disturbances" or "riot?"

Although President Bush declared the attacks to be “acts of war” they would not ordinarily be classified as such under traditional definitions. Nevertheless, Bush’s characterization alone should be sufficient to justify an argument that this is a new kind of war and these events are justifiably classifiable as such. One must first look at the words of the agreement and then consider how those words might be applied to the actual facts of this disaster and then the applicable law.

Force Majeure is a civil law concept and excuses performance on a broader basis than the “Act of God” excuse in common law. Force majeure usually includes a general, all encompassing “beyond reasonable control” grounds, while traditional common law jurisprudence was more limited to “Acts of God.”

What are the main provisions of law that excuse performance in the event of certain unusual events?

I. **Act of God** and other eventualities detailed in the laws of each state. Since the acts here were intentional, it is not likely recourse will be available under this doctrine. However, "Force Majeure" or "Act of God" is often the title of a contract clause that contains a number of excuses for performance. Read the clause carefully. It may have helpful language. Absent a

 

clause, the law would not automatically cancel the contract. The party obligated to perform might simply be required to wait until performance can be accomplished. Also, if the contract contemplated such exigencies a party may not be excused. If it was reasonably possible for the party affected to perform despite the difficulties, such performance may be required.

II. **"Frustration of Purpose," object, or effect through the failure of a thing, state of things, person, or future event.**

A party may be excused from its obligation where

a) the parties were relying, whether explicitly or implicitly, on the existence of a condition (for example, the World Trade Tower buildings themselves or the traffic they created for consumer purchasing) and that condition no longer exists, and
b) that its absence was not the fault of the party asserting the defense, and
c) that the loss is not reasonably to have been a risk the parties assumed or was foreseeable (would the prior bombing of the WTC constitute enough to assert that the parties were taking the risk or that it was foreseeable?).

Dubrow v. Briansky Saratoga Ballet Center, Inc. (1971) 68 Misc2d 530, 327 NYS2d 501; 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp. (1968) 23 NY2d 275, 296 NYS2d 338.

III. **"Impossibility of Performance"**

Traditional common law excused performance when it became impossible and the impossibility was not the fault of the party asserting it, especially where the parties clearly contemplated certain existing facts to remain so and an independent force destroyed the means of performance or the subject matter. This requires objective destruction of the means of performance or subject matter, not merely making it prohibitively expensive. Manufacturers & Traders Trust Co. v. Lindauer (1987) 135 Misc. 2d 132, 513 NYS2d 629; etc. Moreover, the contract might literally have been impossible to perform at its outset, but the parties would still be bound. The excuse operates only if the subject matter of the contract or the means of performing are destroyed. The destruction must also have not been foreseeable or capable of being provided for in the contract. All of that said companies have indeed been able to get out of contracts on the grounds of economic hardship.

One form of impossibility occurs when the government introduces new laws or regulations that make performance impossible. Such an eventuality may give rise to an action against the government for an unlawful taking under the Constitution so as to require compensation. It remains to be seen if the emergency measures instituted by the federal government and New York City give rise to any such actions. The defense of the necessity to deal with a public emergency and the danger to public safety will probably go a long way in insulating federal, state and local governments from any such liability.

IV. **"Impracticability of Performance"**

This defense is closely aligned to Impossibility and probably derived from it. It goes a little farther and includes the excuse of performance, which is possible, but prohibitively expensive. The lines here are not clear and each case must be carefully scrutinized. In the recent Tyson case this argument was rejected and a merger required to be consummated where the court found that financial changes, though significantly adverse did not permit cancellation. Unexpected difficulty, expense, hardship, injury or loss is not ordinarily excused. Failure of a source of supply may be adequate, for example where there is one producer of a necessary ingredient and that supplier goes out of business or stops manufacturing the particular item.

UCC §2-615 spells out the defense in transactions involving the sale of goods. The UCC requires the event to have affected the performance and to have made performance impracticable. Moreover, the parties must have assumed that this event would not occur or

 

not have contemplated it as possible of happening, and they cannot have contributed to the event occurring, and there must be nothing in the contract that assumes a greater obligation than the law requires.

This defense also requires that the party whose performance is impeded, take all reasonable steps to overcome the difficulty, i.e. make partial performance to the extent possible.

A seller of goods is permitted to allocate its products in reasonable ways among its customers and the Seller has great discretion to determine the allocations. The Seller also has a duty to give reasonable notice to its customers of non-deliveries, delays or allocations.

V. **Death or illness** will relieve an individual from liability. It may also relieve a corporation of liability if the parties clearly understood that the performance of one individual was key to the deal, particularly if such understanding may be found in writing in the agreement. For example, some contracts may have a clause permitting the cancellation of an agreement if one of more key employees no longer works for the supplier company.

VI. **"Material Adverse Change"**
Mergers and acquisitions will frequently have a clause stating that the buyer's obligations are released if there occurs a "Material Adverse Change" in the business or finances of the party to be acquired or one or both of the companies involved. Subsequent to the 9/11 disaster at least one company has asserted that the events of 9/11/01 caused a "Material Adverse Change," and another has commenced a lawsuit using this argument at least in part as justification for canceling a deal. USA Networks Inc. v. National Leisure Group Inc., Delaware Court of Chancery, filed Oct. 3, 2001; 10/3/01 NYTimes pg W1, WPP seeks to abandon pre 9/11 bid for Tempus Group.

The United Nations Convention on Contracts for the International Sale of Goods has been ratified by the U.S. The Convention applies automatically by operation of law to all agreements entered into between parties who are residents of countries that have ratified the Convention. The U.S. and a great number of our substantial trading partners have now ratified the Convention. If you do not wish to be bound by the Convention you must so specify in writing in the agreement. Its main impact is to permit many more oral contracts than U.S. law now permits. It also contains a commercial impracticability concept.

**Do I have to return any monies paid in advance if I am prevented from performing the contract by an event like the WTC disaster?** Yes, you may be relieved of obligations you can't reasonably perform, but that is not a license to take advantage of the situation and keep the deposit or advance. All such monies not earned must be returned. Sokoloff v. Natl. City Bank (1924) 208 AD 627, 204 NYS 69, affd 239 NY 158, 145 NE 917, 37 ALR 712; Parker v. Hoppe (1931) 231 AD 666, 248 NYS 454, revd on other grds 257 NY 333, 178 NE 550 80 ALR 1359, reh den 258 NY 365, 179 NE 770, 80 ALR 1365.

 

Force Majeure clauses are often deemed boilerplate that can be ignored. For at least a little while after the Sept. 11 disaster, I am sure lawyers will be paying a little more attention. The first form below is annotated to better explain the considerations involved. The main utility for such a clause is to shift the risk of certain perils from one party to the other, or to share such burdens.

# Sample Force Majeure clauses:

Seller shall not be liable

for disruption, failure or delay in the performance (such excuse shall operate to the extent by which performance is prevented thereby) of this Agreement

**[Note: This goes beyond protection the law generally provides, to include "disruption" or "delay."]**

arising from any of the following:

a) act of God, storms, floods, fires, explosions, or other catastrophes;
b) act of war (declared or undeclared), riot or revolution, act of a public enemy, terrorism, civil insurrection;

**[Note: Given the history of the world over the last 50 years "war" can be a very limited term. U.S. action in Korea in the early 50's was officially called a "police action" because no formal declaration of war was made by Congress. Further, there has been all kinds of political unrest that one might like covered, but doesn't fit into the definition of "war" or even the broader "act of war."]**

c) strikes, lockouts, labor unrest, or sabotage disputes (of or involving the affected party's employees only);

**[Note: Seller should insist on such a clause for obvious reasons. Buyer should resist it because control of such problems is with the Seller. At the least, Buyer should demand striking the words “labor unrest” because they are not defined and could be interpreted very broadly. Seller might try to offer the parenthetical as a limitation on his own excuse parameters if the Buyer is objecting too much to such an excuse.]**

d) government action (foreign or domestic), including but not limited to laws, regulations, rules, ordinances, orders, embargoes and which unavoidably and directly prevent performance hereunder;

**[Note: As a general rule exclusions under the law for governmental action require a more formal action, for example, the passage of laws, the imposition of regulations by government agencies, or Executive Orders. You may have a situation, as we recently have in New York City, where the Mayor merely urged people not to come into the City for the first few days after 9/11/01. Would that constitute sufficient government action to trigger the performance excuse under the law? Under a contract with the words above?]**

e) act or failure to act of the other party hereto, or its subcontractors;

**[Note: Clearly this expands the scope of protection beyond that offered under the law.]**

f) epidemic or quarantine;

**[Note: Would the current Anthrax attack be included in the definition of either of the words above? If not would it fit in “Acts of War” or “terrorism.”]**

g) any other cause beyond the reasonable control of Seller;

 

**[Note: Seller should insist on such a clause where the nature of its business provides a myriad of opportunities for something to go wrong.]**

h) and which could not have been avoided or overcome by the exercise of reasonable diligence.

**[Note: Buyer should insist on this addition. If Seller is going to have all those excuses listed above for non-performance, the least the Buyer can expect is that they will try to avoid problems or do their best to fix them when they occur.]**

i) A party who is prevented from performing for any reason shall immediately notify the other party, in writing, of the cause for such nonperformance, and the anticipated extent of the delay.

**[Note: If one party is going to provide itself with extensive excuses for non-performance, th other party might try to pin down that party to make every reasonable effort to perform in the face of adversity or at least to notify promptly of the consequences.**

j) Bidder shall provide Owner satisfactory evidence that nonperformance is due to other than fault or negligence on his part.

Force Majeure – ABC Co. shall not be liable for disruption, failure or delay in the performance (such excuse shall operate to the extent by which performance is prevented thereby) of this Agreement arising from any act of God, storm, flood, fire, explosion, or other catastrophe, war (declared or undeclared), riot or revolution, labor disruptions, strikes or sabotage, epidemic or quarantine, government action (foreign or domestic), including, but not limited to laws, regulations, rules, ordinances, orders, embargoes, act or failure to act of the other party hereto, or its subcontractors, or any other cause not reasonably within the control of ABC Co.

In the event of delay due to any such cause, the date of delivery will be extended by a period equal to the delay plus a reasonable time to resume production and the contract price will be adjusted to compensate ABC Co. for such delay.

Force Majeure - Either Buyer or Seller may suspend performance during the occurrence of an excusable delay, which shall mean and include any delay not occasioned by the fault or negligence of the delayed party and which results from the acts of God or public enemy, restrictions, prohibitions, priorities, or allocations imposed by governmental authority, embargoes, floods, fires, typhoons, earthquakes, epidemics, unusually severe weather, delays of similar nature or governmental causes, and strikes or labor disputes (of or involving the delayed party's employees only).

Excusable delays do not include lockout, shortage of labor, lack of or inability to obtain raw materials, fuel or supplies or any other industrial disturbance. Nothing contained in this paragraph shall limit Buyer's rights hereunder in any way, except that, in the event of Seller's excusable delay, Seller shall not be liable for Buyer's incidental or consequential damages resulting from that delay.

FORCE MAJEURE. BUYER may delay performance due to causes beyond its control including government action or inaction, strike or other labor trouble, fire, or unusually severe weather. SELLER shall hold any goods involved at BUYER's direction until the delaying cause has been removed and BUYER shall be responsible only for SELLER's direct additional costs in delaying performance or holding the goods at BUYER's request.

FORCE MAJEURE. Any delay in, or failure of performance of either party hereto, shall not constitute default hereunder or give rise to any claims for damage, if, but only to the extent that, delays or failure are the direct result of causes beyond the reasonable control of the party affected and which, by the exercise of reasonable diligence, said party is unable to prevent, which

 

shall include war, civil disorder, lockouts, riots, strikes, action of the elements, regulations imposed by law or administrative rule. The party so affected shall exercise due diligence in such an event to prevent or overcome such cause and to resume performance as expeditiously as possible.

Force Majeure
Any delay in, or failure of performance of either party hereto shall not constitute default hereunder or give rise to any claim for damage if, and to the extent, such delay or failure is caused by occurrences beyond the control of the party affected and which by the exercise of reasonable diligence, said party is unable to prevent, including but not limited to, acts of God or the public enemy, expropriation or confiscation of facilities or compliance with any order or request of a governmental authority affecting to a degree not presently existing, the supply, availability, or use of materials or labor, acts of war, public disorders, rebellion or sabotage, floods, riots or strikes. A party who is prevented from performing for any reason shall immediately notify the other party, in writing, of the cause for such nonperformance, and the anticipated extent of the delay.
Should the work be delayed beyond the control of, or without the fault, or negligence of either party, the parties to this Agreement shall confer to reach an agreement on the alteration of fees and/or other terms and conditions upon which the work shall be continued, or otherwise terminated. However, the Consultant shall not be entitled to recover for any loss of anticipated
revenue(s), including overhead and profit, due to force majeure.

FORCE MAJEURE:
Bidder shall be excused from performance hereunder during the time and to the extent that he is prevented from obtaining, delivering, or performing in the customary manner, by acts of God, fire, war, strike, loss or shortage of transportation facilities, lockout or commandeering of raw materials, products, plants or facilities by the government. Bidder shall provide Owner satisfactory evidence that nonperformance is due to other than fault or negligence on his part.

# Sample "Choice of Law" clauses:

Among other boilerplate which needs a second look in light of the WTC disaster is the "choice of law" clause. Traditionally parties have chosen the law of a particular jurisdiction to govern a transaction, but such selection may not be arbitrary. It must have a rational relationship to the transaction.

Most people are familiar with this clause as selecting a law to govern the agreement. However, there are other related purposes to be considered and served, for example,

1. Agreement to submit to the jurisdiction of a particular court (Venue),
2. Injunctive Relief or Specific Performance,
3. Service of Process,
4. Waiver of Jury Trial,
5. Disclaimer of specific laws or Treaties (for example, The United Nations Convention on Contracts for the International Sale of Goods),
6. Agreement that service by mail is tantamount to personal service,
7. Appointment of a "friendly" agent to receive process.

Sample "Choice of Law" clauses

Choice of Law - Any and all transactions between the parties and any contracts formed hereunder, shall be governed by the laws of the United States of America and the State of New York.

 

CHOICE OF LAW - This Agreement shall be interpreted according to the laws of the U.S.A. and the State of New York, without giving effect to the principles of conflicts of law.

**[Note - Despite the fact that the parties may designate the state of "Abbott" as the governing law, the courts of the State of "Abbott" may nevertheless, by virtue of its own "Conflicts of Law" principles, apply the law of another jurisdiction.]**

Each of the parties hereto hereby irrevocably agrees (a) that the courts of the State of New York and of any federal court located therein shall have exclusive jurisdiction in connection with any suit, action or other proceeding arising out of or relating to this Agreement, or the transactions contemplated herein, (b) to waive any objection to venue in the Counties of Nassau or Westchester, State of New York, in connection therewith, and (c) that service of process with respect thereto may be effected by mailing such process certified mail to the other party. The parties hereto waive any right to trial by jury.

**[Note: a) Choice of law is a different concept than choice of jurisdiction or forum. In any particular contract you may wish to apply the law of one state, but have the lawsuit actually take place in a different state. You also may wish to select the particular county in a state or federal court where you wish the action to be filed. The courts, however, will not accept arbitrary designations in this regard. Rather they require some connection between the contract and the states chosen. b) The use of "Registered Mail" is a needless inconvenience that will slow the giving of notice without enhancing its verifiability. "Certified Mail" is less expensive and provides the same assurance of delivery through the "Return Receipt." However, you must list delivery in person or by courier to include these as alternatives.]**

The Law of the Territory shall apply to the activities to be conducted under this Agreement in the Territory.

**[Note - In a situation where you are licensing trademarks or other intellectual property in a foreign country, and therefore, the contract is to be performed substantially in the foreign country, you may have doubt about the enforceability of designating U.S. law. The following clause may be helpful following the designation of a U.S. jurisdiction.]**

Appointment of a "Friendly" Agent to Receive Process -
ABC Co. hereby irrevocably designates, constitutes and appoints [Name and address of designee], as his lawful agent and attorney upon whom all process against him in, or in connection with, this Guaranty or the transactions contemplated hereby, may be served with the same effect as if ABC Co. was a resident of the State of New York and had lawfully been served with such process in such state.

ABC Co. shall cause appoints [Name of designee] to accept such appointment and shall furnish, to the satisfaction of XYZ Co., evidence thereof and of their agreement not to resign until a successor agent, reasonably satisfactory to XYZ Co., has been appointed, in which case this section shall apply to such successor.

Choice of Law - This Agreement shall be interpreted according to the laws of the United States of America and the State of New York (without giving effect to the principles of conflicts of law). Client agrees that any suit or proceeding relating in any way to this Agreement may be brought in the courts of the State of New York or of the United States of America for the Eastern District of New York and Client submits to the jurisdiction of such court. Client hereby waives and agrees not to assert, by way of motion or otherwise, in any such suit, action or proceeding, any claim that Client is not personally subject to the jurisdiction of the above-named courts, that the suit, action or proceeding is brought in an inconvenient forum or that the venue of the suit, action or proceeding is improper. Client also waives any right to trial by jury.

 

Waiver of Objection to Consent to Jurisdiction
Seller hereby waives and agrees not to assert, by way of motion or otherwise, any such suit, action or proceeding, any claim that Seller is not personally subject to the jurisdiction of the above-named courts, that the suit, action or proceeding is brought in an inconvenient forum or that the venue of the suit, action or proceeding is improper.

Injunctive Relief or Specific Performance -
Licensee agrees that in the event of a breach of this agreement, Licensor will be entitled to injunctive or other equitable relief, including but not limited to specific performance, as the court may deem just and proper.

Service of Process -
Distributor consents and agrees to service of process or other legal summons by certified mail addressed to Distributor at Distributor's address as set forth [above, herein, or on its order for (Products)(for purposes of any such suit, action or proceeding).]

New York City Contract clause:
The Company and the City agree that any and all claims asserted by or against the City arising under this Agreement or related thereto shall be heard and determined either in a court of the United States located in New York City ("Federal Court") or in a court of the State of New York located in the City and County of New York ("New York State Court"). To effect this agreement and intent, the Company agrees that:

(a) If the City initiates any action against the Company in Federal Court or in New York State Court, service of process may be made on the Company either in person, wherever such Company may be found, or by registered mail addressed to the Company at its office the City of New York as required by this Agreement, or to such other address as the Company may provide to the City in writing:

(b) With respect to any action between the City and the Company in New York State Court, the Company hereby expressly waives and relinquishes any rights it might otherwise have (i) to move or dismiss on grounds of forum non conveniens, (ii) to remove to Federal Court, and (iii) to move for a change of venue to a New York State Court outside New York County;

(c) With respect to any action between the City and the Company in Federal Court, the Company expressly waives and relinquishes any right it might otherwise have to move to transfer the action to a United States Court outside the City of New York; and

(d) If the Company commences any action against the City in a court located other than in the City and State of New York, upon request of the City, the Company shall either consent to a transfer of the action to a court of competent jurisdiction located in the City and State of New York or, if the court where the action is initially brought will not or cannot transfer the action, the Company shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction in New York City.

 

# Blackacre at Ground Zero:
# A Dirt Lawyer Looks at the Legal Aftermath

By: Charles C. Jordan and Joshua Imhoff

Carrington Coleman Sloman & Blumenthal LLP
Trail Lawyers ©
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### *Education*

Emory University (B.A., summa cum laude, 1974). Harvard Law School (J.D., 1978). Phi Beta Kappa.

### *Memberships*

Member: American Bar Association Natural Resources, Energy, and Environmental Law Section and Real Property, Probate, and Trust Law Section; State Bar of Texas Environmental and Natural Resources Law Section and Real Estate, Probate, and Trust Law Section; Dallas Bar Association Environmental Law Section and Real Property Section.

### *Offices*

Immediate Past Chair: Dallas Bar Association Environmental Law Section; Treasurer: Environmental and Natural Resources Law Section, State Bar of Texas (2000-2002); Secretary, Board of Directors: Uptown Public Improvement District (2001-2002).

### *Admitted to Practice*

Texas, 1978.

Mr. Jordan's practice is focused on development processes, involving representation of clients in pre-development planning; land acquisition; municipal and county relations; public works and other infrastructure bidding; development financing; negotiation of economic development incentives and other capital formation activities; partnership formation and dissolution; development and subdivision planning; master planned industrial and residential projects; ground leasing; master leasing; and other transactions generated in the development pipeline.

Mr. Jordan represents, on an on-going basis, real estate investment- and development-oriented clients, many of whom are engaged in master planned, multiple use community development. His clientele also includes facility operators engaged in site searches and tax abatement and other tax-based incentive negotiations, on occasions where the site search is highly politicized due to the anticipated project scale. Mr. Jordan regularly evaluates competing economic development inventive packages and facility sites, and is involved in the structuring and negotiation of incentive packages on behalf of developers and operators alike throughout Texas.

Mr. Jordan is also actively engaged in an environmental practice, emphasizing Brownfields development, legal defense and counseling in site- and facility-related enforcement, remediation, and compliance matters.

 

Mr. Jordan has an active docket of compliance counseling matters arising out of (i) enforcement actions, which frequently expose the need for compliance systems; (ii) capital transactions (mergers, land transfers, and debt refinancing); or (iii) voluntary environmental audits.

His real estate practice particularly complements his environmental practice in the area of interpreting and advising on environmental site assessments, which play a major role in most purchase, sale, merger, recapitalization, and debt transactions.

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Joshua Imhoff is an associate at Carrington, Coleman, Sloman & Blumenthal, L.L.P. He practices primarily in the area of complex civil litigation, at both the trial and appellate levels, and has extensive experience in real property disputes.

Mr. Imhoff attended Duke University School of Law, where he graduated with honors in 1998, earning both a J.D. and an LL.M. in International & Comparative Law. While there, he served on the Editorial Board of the Duke Law Journal from 1996 to 1998. He graduated summa cum laude from Austin College in 1993 with a degree in English. Prior to his employment at Carrington Coleman, Mr. Imhoff served as Briefing Attorney to the Honorable Greg Abbott of the Texas Supreme court form 1998 to 1999.

Mr. Imhoff is a member of the American Bar Association, the State Bar of Texas, the Dallas Bar Association, and the Dallas Association of Young Lawyers.

 

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By: Charles C. Jordan and Joshua Imhoff[1]

## Introduction

Wondrous and lengthy though its creation may have been, the typical office lease under which World Trade Center tenants occupied their offices likely does not address in sufficient detail the outcome of the disaster for affected office tenants. Feudal law holds its tenacious grip on tenants, and though the grip has slipped somewhat, the high rise tenant with designs on getting his business unit "up and running" 24/7 may have unrealistic expectations about his landlord's legal duties following destruction of the office building.

How are tenants, traditionally disadvantaged in the negotiation of leases, to cope with the legal aftershock of facility destruction on the order of the World Trade Center decimation? When the tenant's business unit is least capable of coping with legal hassles, its rights and obligations under its lease will present anything but a clear picture of the future. Consultations concerning this uncertainty, and options for addressing future lease negotiations, are the subject of this paper. "Blackacre at Ground Zero" is written from the perspective of the office tenant, with equal attention paid to disaster response and contingency planning for the future.

## Summary of contents

The following includes an analysis in the form of a Q & A for preparing counsel for consultations with a facility manager whose building was affected by disaster, including some relevant case law. The rights and duties of landlord and tenant are largely governed by their lease, as opposed to statutory law. The emphasis of the discussion is therefore on the likely repercussions of the lease on a disaster aftermath (and *vice versa*).

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- Questions addressed:

  - In the absence of detailed contractual provisions spelling out his duties, must the tenant recommit its credit to rebuilding? How, and when, may the tenant "kick out" in order to relocate his business?
  - May the landlord be compelled to rebuild? Or did the landlord reserve enough discretion to turn to different projects, with the perception of a better yield and fewer transactional hurdles?
  - If the landlord rebuilds, what exactly will he rebuild? Is he required to replicate the pre-disaster environment? Can he replicate it?
  - How will the rebuilding process work while the building is going up?
  - If the landlord rebuilds, what will the tenant be required to rebuild?
  - What about the tenant's rent obligations during rebuilding?

- Addenda:

  - Addendum 1: Checklist for Facility Planning After Disaster
  - Addendum 2: Checklist for Building Re-occupancy Following Disaster
  - Addendum 3: Market updates, New York City and area office market conditions[2]
  - Addendum 4: Bulletin of the Chairperson, Real Estate Board of New York, regarding ethical responses to the World Trade Center tragedy[3]
  - Addendum 5: Specimen Clauses from the Real Estate Board of New York Office Lease Form (Tenant's Negotiation Points Marked)(Casualty Damage)
  - Addendum 6: Specimen Clauses from the Real Estate Board of New York Office Lease Form (Tenant's Negotiation Points Marked)(Force Majeure)

## Introduction to the Issues

With respect to the settlement of the landlord-tenant relationship under many existing leases, the parties' legal relationship following disaster veers off from a superhighway of often heavily negotiated provisions dealing with standard phases of their courtship and term together. Their path becomes a lightly traveled network of backroads, the negotiation of which tries the patience of client and lawyer, alike: casualty damage, repairs, "kick outs," force majeure,

[2] A portion of Addendum 3 is available in hard copy only.

[3] Addendum 4 is available in hard copy only.

 

and rent abatements. How will the tenant's need for business continuity and planning certainty jibe with often under-negotiated lease language?

Of equal interest, in the wake of the World Trade Center attacks, it is likely that lease negotiations, like the rest of our world, will be consumed with fresh attention to landlords' and tenants' post-disaster rights and obligations. In post 9/11 lease negotiations, is it reasonable to expect that a different level of attention will be paid to rebuilding and tenant business continuity requirements? Security measures in the workplace? The true economics of the relationships among landlord, tenant, and their respective insurance carriers?

- Landlord orientation of the modern office lease.

The modern office building lease probably addresses the essential issues presented to the landlord by destruction or substantial restriction of utility:

  - Reconstruction duties of the landlord;
  - Reconstruction processes (i.e., scheduling of the rebuilding election, what is to be rebuilt; and the duration of rebuilding);
  - Rent abatement in the aftermath; and
  - Continuation of the tenant's occupancy rights and financial obligations after rebuilding.

Yet it is likely that the lease touches these subjects with a less than desirable attention to detail. Indeed, in the past, if the same attention were given to these aspects of the landlord-tenant relationship as to the workings of their everyday (or at least monthly) rhythms, many delicate lease negotiations would probably have self-destructed.

- Friction between financing and operational demands

What detail exists probably is there more to facilitate landlord's financing than assure tenant's business continuity. From a system with a default presumption that a tenant continued to have liability for payment of rent following total destruction of the premises, it is now the rule that the metropolitan office lease addresses the issue and expressly allocates the expense and delay risks of premise destruction. Landlord-oriented lease forms (if that term is not an oxymoron) continue the tradition of leveraging ownership and control of the facility, occupancy of which is desired by the tenant, into a risk allocation scenario for the primary benefit of the landlord (and not coincidentally, the landlord's mortgagee). Landlord and tenant alike yearn for a safe harbor amid the turmoil of disaster. However, the requirements of the landlord's safe harbor are not necessarily consistent with the operational continuity which the tenant likely seeks. Put another way, conditions for fostering long term capital investment clearly do not serve the short term operational flexibility sought by the tenant.

 

Access restrictions, or use denial, necessitated by disaster response will trigger even fewer duties. While the landlord and the tenant can readily comprehend the necessity for such restrictions, the tenant's facility manager cannot be blamed for letting his thoughts drift to greener, more accessible, pastures.

The alert tenant representative will have made some inroads in negotiation, perhaps shortening deadlines for the landlord's rebuilding decision and incorporating termination rights (a "kick out," in the vernacular) if reconstruction is delayed beyond any reasonable replacement period. It is possible that such bones thrown by the landlord in the course of negotiations may assist the business unit affected by the disaster, but hardly likely they will resolve the murky future of the proper home for the business unit.

- New York City market conditions following the World Trade Center disaster

Adding to the ambient uncertainty in the New York City area after the World Trade Center disaster is the possible "supply shock" to the market, materially reducing, with the stroke of the collapses, the amount of available Class A space downtown.[4] If supply constraints will presumably have the expected results: driving up the price of remaining space in the market area, and sending many area residents outside the market area, in search of better economic conditions for their facilities. However, the market can and often does confound the experts. There is some doubt about the true ripple effects of the disaster.[5] The softening of the economy prior to the attack likely resulted in retrenchment of several larger employers, which in turn appears to have produced a larger-than-usual supply of sublease space poised to come to market. The supply of sublease space to some degree will counterbalance any perceived space shortage. Added to this effect are the spontaneous acts of sympathy and cooperation among businesses coping with the disaster. At least in the short term, room has been made at the inn.[6]

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[4] *See* Addendum 2 for revealing market summaries of some of the probable economic effects of the World Trade Center destruction on the New York City, particularly the downtown, office market. These materials were graciously provided by Cushman & Wakefield's New York City office, whose disaster relief efforts may be viewed at www.cushwake.com. (Follow the World Trade Center Client Assistance Center links.)

[5] *See* "Property Market in Manhattan May Still Soften," *Wall Street Journal* (October 8, 2001), at Addendum 2.

[6] The reaction of the New York City real estate brokerage community has been prominently featured in the media. *See* Addendum 4, Bulletin of the Chairperson of the Real Estate Board of New York (September 14, 2001, and September 20, 2001), calling for an ethical response by member brokers to any distortion of market conditions brought on by the World Trade Center disaster, including commission waivers for interim lease transactions and avoidance of profiteering by owner-clients.

 

## Discussion

The following collection of contractual observations and law is intended a backdrop for catastrophe response in facility planning and management, now and in the brave new world of lease negotiations likely to develop in the wake of 9/11.

We may assume that the manager of most business units is not routinely presented with a crisis to manage such as partial or total destruction of the facility housing his employees, computer systems, and other physical trappings of his operations. You might anticipate many of the following questions from such a manager. The answers have been framed within the context of a common office lease form circulating in New York City (left largely unnegotiated by the tenant). Some of the manager's questions are annotated with case law and statutory law resolving some obvious questions, and observations of the author concerning the specific wording of the form lease:[7]

**Q: Is my lease still binding?**

**A:** The tenant is commonly held to its lease obligations (with temporary suspension of rent obligations during disaster response and rebuilding periods) if the landlord makes an election to rebuild. The tenant may have limited rights to terminate the lease ("kick out") based on an unusually lengthy period of displacement. The tenant's discretion is usually very limited, compared to the landlord's. The landlord may also be able to claim the benefits of a *force majeure* clause, excusing delays (such as bad weather or certain permitting hold ups) which are beyond the landlord's reasonable control.[8] The REBNY Lease grants broad relief from deadlines for *force majeure* events including "government preemption in connection with a National Emergency, or by reason of any rule, order or regulation of any department or subdivision thereof or any governmental agency or by reason of conditions of supply and demand which have been or are affected by war or other emergency."[9]

Time is typically of the essence under the modern lease, and the landlord's failure to meet the deadline for his election to rebuild may trigger a kick out right for the tenant.

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[7] *See* Addenda 5 and 6 for relevant casualty damage and *force majeure* language. The Standard Form of Office Lease promulgated by the Real Estate Board of New York, Inc. is in wide use (typically as the starting point in heavy negotiations), and is hereafter referred to as the "REBNY Lease." (Unmarked text in the Addenda is drawn directly from the REBNY Lease.)

[8] *See* text accompanying Notes 15 and 16, below.

[9] *See* REBNY Lease, Addendum 6.

 

For a project on the scale of a substantial office tower, it is likely that the landlord will request that the tenant "re-up" through a lease amendment specifically acknowledging the tenant's on-going lease obligations and specifying more precisely the landlord's rebuilding obligations. Similar acknowledgments by a critical mass of tenants will ordinarily be the necessary basis for mortgage financing of the rebuilding project (along with a settlement of casualty insurance proceeds acceptable to both landlord and mortgagee). The alert tenant will evaluate carefully any request for an extension of this period, as such a concession may be the only real contractual negotiating leverage available to the tenant.

- Legal background: lease continuity following casualty damage

  - By far the most prevalent fact situation dealt with in existing case law involves fire or weather casualties affecting the landlord-tenant relationship. Are these cases invariably analogous to the terrorist act? Where the event is truly unexpected and the product of an uncontrollable circumstance, several cases we located suggest that the courts will interpret "acts of God" and acts of "public enemies" similarly.

  - Generally, there does not appear to be a substantive legal distinction between destruction by an "act of God" or some other calamity, and destruction by a public enemy or terrorist. *See Brown v. Williams*, 576 So.2d 195, 196-97 (Ala. 1991) (analyzing rental abatement clauses where a fire, "incendiary in origin," had resulted from a possible arson).

  - Lease provisions allowing for termination in the event of "unavoidable" or "inevitable" "casualty" or "accident," contemplate damage of an unusual, unexpected, or extraordinary character, which occurs without the participation of the landlord or tenant; it does not include destruction through age, decay or want of repair. *Zimmerman v. Savoy Hotel Corp.*, 97 S.E.2d 727, 731 (Va. 1957).

  - The common law rule is that the destruction of improvements upon the leased premises by fire, Act of God, or some other catastrophe does not terminate the lease, and the tenant will generally remain liable for the rent, so long as any part of the premises is capable of being occupied or enjoyed. *Viterbo v. Freidlander*, 120 U.S. 707, 712 (1887) (flooding of plantation along the Mississippi River).

 

- This rule typically applies where the lease includes both the building and the land under and adjacent to it. The rationale is that (1) an interest in the soil remains; and (2) it is equitable to divide the loss between the landlord and tenant so that the landlord loses the property while the lessee loses the benefit of the term. *Albert M. Greenfield & Co. v. Kolea*, 380 A.2d 758, 759-60 (Pa. 1977) (tracing the evolution of the common law and its infusion with contract principles).

- Many states, however, now modify the common law by statutes providing that a lease terminates in the event of the total destruction of the premises by an unforeseen event. *Pivnick v. Seaboard Supply Co.*, 105 A.2d 695, 698 (N.J. 1954) ("The hardship of [the common law] rules upon tenants led to the adoption in most states of statutes such as our N.J.S.A. 46:8-6 and 7, which provide that (in the absence of lease stipulations to the contrary) whenever any leased building 'shall be injured' by fire, the landlord shall 'repair the same,' whereas when any leased building 'shall be totally destroyed' by fire, 'the lease shall cease and come to an end.'"); *see also* N.Y. REAL PROPERTY LAW § 227 (McKinney 2001). These statutes are generally interpreted liberally, although the parties' agreement may override application of the statute dealing with their respective rights in the event of destruction. *Pivnick v. Seaboard Supply Co.*, 105 A.2d 695, 698 (N.J. 1954).

- Where the lease contained a provision stating that in the event of a casualty, the lease would remain in effect unless the landlord elected to cancel it, the tenants were held to have waived their statutory rights to surrender the premises upon its destruction. *RVC Associates v. Rockville Anesthesia Group*, 700 N.Y.S.2d 231, 232 (N.Y. App. Div. 1999).

- The tenant must surrender the premises to take advantage of a lease or statutory termination provision conditioned on the damage or destruction of the premises. *See Tyson v. Weil*, 53 So. 912, 914 (Ala. 1910); *Smith v. Kerr*, 15 N.E. 70, 71 (N.Y. 1888).

- Apart from the rise of statutory exceptions to the common law, some jurisdictions have developed doctrines influenced by contract law and the doctrine of impossibility, holding that where the purpose of the lease has been frustrated, the lease may be terminated by the tenant without liability for the remaining rent. *Albert M. Greenfield & Co. v. Kolea*, 380 A.2d 758, 759-60 (Pa. 1977).

 

- Contrary to the common law as it pertains to a lease of land and a building, where there is only a lease of part of a building, its destruction terminates the lease because there is no implied understanding that an estate was granted in the land on which the building stands; therefore, when the building is destroyed, nothing remains which the tenanat can enjoy or claim. *Crow Lumber & Bldg. Materials Co. v. Washington County Library Board*, 428 S.W.2d 758, 764 (Mo. App. 1968) (holding that, although Missouri follows the common law that a tenant remains liable for rent despite destruction of the premises, a tenant who only leased part of a building was not liable for rent following destruction of the demised portion of the building by fire).

- A tenant may avoid liability for future rent by showing that the leased building was condemned by public authorities on account of its dangerous condition, provided the condition was not the fault of the tenant. In one interesting case, the landlord sought rent from the tenant after access to it had been preempted by the city during the holdover of the tenancy. Following the partial cave-in of the roof, the city posted an order barring anyone from occupying the property until it was declared safe. The lease contained a "No Rent Abatement" clause that stated that the tenant was not entitled to any abatement "in the event of a business interruption or inconvenience . . . which results from some governmental order ," which by another clause applied to the holdover period. Nevertheless, the court agreed with the tenant that it was not liable for the rent during the holdover period because the premises had "no reasonable value because of their condition." *438 W. 19th St. Operating Corp. v. Metropolitan Oldsmobile, Inc.*, 536 N.Y.S.2d 669, 671-72 (N.Y. Civ. Ct. 1989).

**Q: How long will it take before I know what is going to happen?**

**A:** The modern office lease typically reserves to the landlord the decision whether to rebuild following material damage to the building or a given tenant's premises. On a negotiated basis, the lease typically allows anywhere from 30 to 90 days for this decision to be made. The REBNY Lease provides for a 90-day decision period which may arguably be subject to extension by certain *force majeure* events surrounding the World Trade Center attack.[10]

[10] Governor Pataki of New York has promulgated emergency declarations tolling expiration of certain statutes of limitations during the period of disaster response. *See* Executive Order No. 113 of the Governor of the State of New York (September 11, 2001), as modified by Executive Order Nos. 113.7 (Temporary Suspension And Modification Of Statutory Provisions Establishing Time Limitations On Actions And Time In Which To Take An Appeal) and 113.28

 

- Legal background: lease termination following casualty damage

  - Parties often provide for themselves the terms by which a lease may terminate in the event of the damage or destruction of the leased premises, and these lease provisions normally control over any applicable statute. *Edelman v. Henderson*, 294 F. Supp. 323, 331 (D.C. V.I. 1968); *Mawardi v. Purple Potato, Ltd.*, 590 N.Y.S.2d 132, 133 (N.Y. App. Div. 1992).

  - Where the lease provided the landlord a "reasonable time" to elect whether to rebuild its fire-damaged building, and landlord sent terminating notice to tenant more than nine months after fire, landlord's delay was unreasonable under facts and circumstances resulting in a waiver of termination right. *Sabre Realty Management v. Vitale*, 94 Misc.2d 1035, 406 N.Y.S.2d 227 (N.Y. City Civ. Ct. 1978).

  - The tenant is entitled to a "reasonable" amount of time to elect whether to surrender the premises and terminate the lease or remain on the premises; but an unreasonable delay (as determined by a jury) will constitute a waiver of this right. *Zimmer v. Black*, 14 N.Y.S. 107, 108 (N.Y. Gen. Term 1891); *Pacific Warehouse Co. v. McKenzie-Hunt Paper Co.*, 141 P. 1147, 1148 (Wash. 1914). *Cf. Sabre Realty Management v. Vitale, op cit.*

  - Where a lessee continued to operate business for 23 months after the discovery of soil contamination, then attempted to terminate the lease by invoking an untenantability provision after failing to secure a longer lease term, it was held that the premises were not untenantable for purposes of applying the provision and termination was invalid. *Pomeranz v. McDonald's Corp.*, 821 P.2d 843 (Colo. Ct. App. 1992), *aff'd in part and rev'd in part*, 843 P.2d 1378 (Colo. 1994).

**Q: What are my obligations if the landlord throws in the towel?**

**A:** If the landlord elects in his discretion not to rebuild the building (which he may do because of financing constraints, an inadequate assurance of yield based on existing tenant commitments, or simple lack of interest), the tenant's lease obligations are deemed terminated as of the date of

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(Reinstatement of Statutory Provisions Establishing Time Limitations On Actions And Time In Which To Take An Appeal And Continued Limited Suspension and Modification Of Such Limitations), *http://a.www.state.ny.us/sept11/wtc_exeorders.html.* The proclamation does not appear to reach contractual deadlines.

 

the catastrophe. The REBNY Lease provides that the deemed termination date is to be treated as the expiration date of the primary lease term for all purposes.[11] Where the tenant's office has been totally destroyed, vacating will obviously not be any issue. Where access restrictions are in place preventing tenants from reaching their offices, the lease may not expressly excuse the delay in vacating by the tenant. Damages to the landlord arising from such a delay would not appear to be meaningful, however.

**Q: We liked our place. Can I make the landlord rebuild it?**

**A:** If for no other reason than the necessity to reserve to the mortgagee the right to capture casualty insurance proceeds and repay the building mortgage, landlords have been traditionally reluctant to concede to tenants a promise to rebuild following casualty loss. Commonly, for "minimal" damage to the premises or building, the landlord may be required to rebuild. The standard for measuring the degree of damage suffered is sometimes based on a comparison of the estimated rebuilding cost as a percentage of the project's market value, or a maximum rebuilding period.

In the REBNY Lease, in the case of total destruction of the premises, of complete "unusability," the standard is almost purely discretionary with the landlord but is often varied by negotiated compromise with tenants possessing any leverage to speak of.[12] However, partial damage is treated differently under the lease. The landlord is obligated to repair in the event of partial damage. The lease language itself seems to suggest that partial damage would be construed to be any damage short of total destruction. New York common law interprets this clause somewhat differently, however, through application of the "marine rule"[13] and other equitable principles.

The common law provides some relief to tenants whose premises have been affected by casualty, in the form of the doctrine of constructive eviction, The doctrine will not afford the tenant an offensive cause of action, but allows for the assertion of an affirmative defense against lease enforcement in certain circumstances where damage to the premises amounts to a constructive eviction.

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[11] *See* REBNY Lease Addendum 5, subparagraph (C).

[12] *See* REBNY Lease Addendum 5, subparagraph (D).

[13] *See* "Legal background: determining the extent of casualty damage," immediately below.

 

- Legal background: Rebuilding obligations following casualty damage.

  - The "marine rule" adopted by New York courts states that if the cost of restoration of the building to the condition it was in immediately preceding the fire is more than one-half the value of the building prior to the fire, then there is deemed a total destruction and repair is not required. *See, e.g., Bernard v. Scharf*, 634 N.Y.S. 2d 919 (N.Y. City Civ. Ct. 1995). The New York Court of Appeals derived the doctrine from law applicable to ship damage. *See Corbett v. Spring Garden Ins. Co.*, 155 N.Y. 389, 50 N.E. 282 (1898)(interpreting the extent of damages and remedies under a tenant's insurance policy for premises in a commercial building damaged by fire). Subsequently, it was applied in the landlord-tenant context. *See, e.g., General Outdoor Advertising Co. v. Wilson*, 276 A.D. 63, N.Y.S.2d 131 (3d Dept., 1949); *Leone v. Russo*, 190 Misc. 984, 76 N.Y.S.2d 347 (S. Ct. Nassau Co. 1948), *aff'd* 275 A.D. 674, 87 N.Y.S.2d 220 (2d Dept. 1949). The rule is not necessarily mechanically applied, and evidence beyond rebuilding expense and market value is relevant. *Sabre Realty Management v. Vitale*, 94 Misc.2d 1035, 406 N.Y.S.2d 227 (N.Y. City Civ. Ct. 1978)(finding that landlord's unreasonable delay in electing whether to rebuild was not defensible, notwithstanding that landlord's evidence supported conclusion that rebuilding costs would be double the market value of the rebuilt building; other evidence, including pictures of the building, reflected a complete building without excessive damage.)

  - Generally, a tenant may only be entitled to terminate the lease and escape liability for rent where there has been a total, as distinguished from a partial, destruction of the premises, substantial enough to necessitate rebuilding rather than repair. *Standard Indus., Inc. v. Alexander Smith, Inc.*, 133 A.2d 460, 467-68 (Md. 1957) (clause in commercial lease authorizing tenant to terminate upon a "substantial destruction" of the premises, and defining substantial destruction as "damage to such extent as to render 50% or more of the floor space unusable for the purposes of the lessee's business," held to permit termination only where structural damage could not be cured by ordinary repairs; despite the fact that all of the floor was flooded with 8 feet of water, tenant could not terminate because structural integrity of the building remained and repairs to the $100,000 building could be made for $5,000). *But see Mawardi v. Purple Potato, Ltd.*, 590 N.Y.S.2d 132, 133 (N.Y. App. Div. 1992) (holding that lease provision stating that landlord could terminate lease if building was "so damaged" that landlord decided to demolish or rebuild it did not require total or substantial destruction, which had been

 

interpreted to mean restoration costs exceeding 50% of the value of the building).

- Whether a building has been totally destroyed so as to terminate a lease is typically a question for the jury. *O'Neal v. Bainbridge*, 146 P. 1165, 1167 (Kan. 1915).

- Where two clauses of a lease made provision for the rights of the parties in the event of partial destruction or destruction so extensive as to render the premises untenantable, a third clause providing an election to terminate in the event of "total or substantial destruction" was held to contemplate destruction so substantial as to effectively cause the building to "lose it[s] identity or character as a building." *General Outdoor Advertising Co. v. Wilson*, 93 N.Y.S.2d 131, 134 (N.Y. App. Div. 1949).

- In a decision presaging the doubts expressed about reconstruction of the World Trade Center towers in light of prospective market resistance to occupying "target buildings," the District Court in the District of Columbia in a case arising out of the D.C. riots following the assassination of Martin Luther King, found the tenant liable for rebuilding obligations under its lease, construing the word "fire" as employed in the lease to contemplate a loss from burning, regardless of how the fire was started. *Investing Corp. v. G.C. Murphy Co.*, 290 F. Supp 1300, *aff'ed* 434 F.2d 521 (D.C. Cir. 1970). The Court rejected the argument that it would be impossible for the tenant to obtain insurance in the future and that it would not be feasible, economically, to rebuild the burned building in an area of "danger and tension."

- In a turnabout on the usual allegations of the parties, the landlord unsuccessfully asserted the defense of unconscionability against rebuilding obligations under an unambiguous lease clause. The Court rejected the argument, noting that the landlord failed to allege either lack of knowledge of the lease terms or unequal bargaining positions. *Marcovich Land Co. v. J.J. Newberry Co.*, 413 N.E.2d 935 (Ind. App. 1980).

- Where other areas of a building are destroyed or damaged besides the leased premises, the tenant is still liable for rent, unless the failure of the landlord to restore the building is such a physical disturbance of the tenant's possession that it amounts to a constructive eviction justifying abandonment. *See American Nat'l Bank & Trust Co. v. Sound City, U.S.A., Inc.*, 385 N.E.2d 144, 145-46 (Ill. Ct. App. 1979) (failure to repair constituted constructive eviction where physical appearance of leased premises was

 

important factor in operation of business, on grounds that premises were unsuitable for purposes for which they were rented)

**Q: What will happen if our building is rebuilt?**

**A:** If the landlord elects to rebuild the building, the rebuilding which must occur is the building "shell" (*i.e.*, the entire building "out to the studs," *sans* particular tenant improvements such as drywall, carpets, millwork, and other improvements for the particular use of the tenant), or somewhat less frequently, the building shell and tenant improvements.

It is not likely that the lease will abate the tenant's rent during the rebuilding of tenant improvements. There will therefore be a premium placed on commencing tenant improvement construction as soon as possible during shell construction, in order to minimize the construction period rent outlays of the tenant. The "overlapping" of separate contractors at the site can obviously produce unhappy results when delays ensue.

The REBNY Lease provides that if rebuilding occurs, the landlord will rebuild the "shell," only, with a total absence of detail concerning the extent of required restoration.[14] However, the terminology used strongly implies that the building will be "restored," the plain meaning of which certainly carries with it an implication of exact duplication.

**Q: How long will reconstruction take? It is *really* inconvenient not to know when we can resume operations here.**

**A:** The landlord is unlikely to embark on a rebuilding program without contemporaneous contractual assurance from tenants of their continuing contractual commitment, for a potentially lengthy rebuilding period. The duration of the period will not be easy to predict, but the primary risk of delay will be allocated to the tenants and not the landlord. Broad *force majeure*, or unavoidable delay, clauses are the rule.[15] The landlord will not likely bear any legal risk for delays beyond his reasonable control,[16] but it is sometimes possible to negotiate an

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[14] *See* REBNY Lease Addendum 5, subparagraph (D).

[15] *See* REBNY Lease, Addendum 6.

[16] The REBNY Lease, Addendum 6, provides for time extensions in the event of "government preemption in connection with a National Emergency, or by reason of any rule, order or regulation of any department or subdivision thereof or any governmental agency or by reason of conditions of supply and demand which have been or are affected by war or other emergency." This particular clause goes beyond the usual pale in excusing the landlord under circumstances which are not necessarily beyond the landlord's control; the renegotiated version of this clause on Addendum 6 rectifies this oddity.

 

*absolute* aggregate delay period, after the expiration of which the tenant may have a "kick out" right. Given the inherent breadth of *force majeure* language, there is always the possibility of a dispute over just what the landlord can and cannot control.

**Q: Who pays for rebuilding?**

**A:** The cost of rebuilding the "shell" will (normally) be funded primarily by casualty insurers. A portion of the rebuilding cost, such as a policy deductible, may be funded by committed tenants. A portion may be funded by the landlord, typically through internal or external financing sources. The REBNY Lease is silent on the subject of any limitations on the landlord's rebuilding obligations contingent on satisfactory insurance settlements, though the rebuilding period is subject to *force majeure*-type extension for "delays due to adjustment of insurance claims."[17] On the other hand, the REBNY lease reserves such complete discretion to the landlord in determining whether to rebuild, or not, that this contingency may be practically subsumed in that determination.

**Q: Do I have to pay rent during reconstruction? I'll be paying in my interim building. How do I operate during reconstruction?**

**A:** The tenant's rent is usually abated during reconstruction. In some circumstances, the portion of rent attributable to building operations and maintenance, real estate taxes, insurance premiums, and the like, which continue to accrue no matter whether the building is occupied or not, may or may <u>not</u> be abated. Many of the landlord's fixed costs (insurance, for example) may continue, regardless of the condition of the building, but many will be changed (real property taxes, for example, may decrease by reason of reduced valuation of the landlord's damaged building), and some will not continue (building maintenance for a destroyed building). The tenant should carefully examine its lease to determine the likely intention of the parties concerning the portion of rent related to operating expenses, as the literal wording of the lease could likely suggest that payments at the level preceding destruction should continue. An actual re-estimation of the "pass-through" in light of post-disaster conditions is obviously a more equitable approach, and may be practical if the rebuilding period will be lengthy.

The tenant's operations must be carried out from other facilities during the rebuilding period, unless the tenant's occupancy would not impede reconstruction. The cost of temporary facilities is the tenant's. The tenant may have insured this risk with business interruption type of

[17] *Id.*

 

coverage. In rare instances, the landlord may have made some form of soft commitment to house the tenant's operations temporarily.[18]

The tenant may be obligated to resume rent payments when "shell" space is tendered to him for construction of tenant improvements (dry wall, carpeting, millwork, lighting, and the like).

- Legal background: Continuing liability for rent

  - A lease may provide for the cessation or abatement of rent where the premises are rendered "untenantable," which has been held to mean that "the destruction is so complete that [the premises] cannot be used for the purpose for which they were leased and cannot be restored to a fit condition by ordinary repairs made without unreasonable interruption of the tenant's use." *Luis v. Ada Lodge, Indep. Order of Odd Fellows,* 294 P.2d 1095, 1098 (Idaho 1956); *see also Old Line Co. v. Getty Square Dep't Store, Inc.*, 322 N.Y.S.2d 149, 151-52 (N.Y. City Ct. 1971) (defining the statutory term "wholly untenantable" to address fitness for occupancy, as opposed to the amount of damage).

**Q: Is there any legal recourse if this catastrophe response scenario just doesn't fit into my business plan?**

**A:** While equity traditionally plays a limited role in lease enforcement, courts have been known to bend feudal legal principles in favor of more modern concepts of fairness and contractual equity. Given the unprecedented scope of the World Trade Center catastrophe, it is not difficult to imagine a court seizing on contractual principles such as impossibility of performance and *force majeure* in an attempt to fairly allocate an enormous and largely unprecedented loss. The courts may be aided by the obvious distinctions between fire destruction proximately caused by ordinary negligence and suicidal acts of terror and resulting damage never contemplated in our culture. The subject of whether such legal developments might favor tenants, landlords, or investors as a class is of course impossible to generalize about and somewhat beyond the scope of this paper.

[18] *See* marked provision of REBNY Lease, Addendum 5, relating to substitute premises. This type of "kick out" relief for the tenant is very difficult to achieve, as a practical matter, except where the tenant enjoys exceptional negotiating leverage.

 

# Addendum 1

## Checklist for Facility Planning After Disaster

| | |
|---|---|
| 1. | Survey leases:<br>. Immediate notice requirements<br>. Landlord's and Tenant's respective rebuilding obligations<br>. Tenant's rent obligations pending rebuilding<br>. Tenant other financial responsibilities for rebuilding (deductible reimbursements?) |
| 2. | Survey nondisturbance agreements for immediate notice requirements |
| 3. | Contact landlord representative:<br>. Furnish appropriate contact information<br>. Inquire re: facility restoration, municipal structural inspections, status of insurance settlements, financing arrangements, and building redesign<br>. Consider benefits of contractual extension or waiver of impending decision points |
| 4. | Gather assessments of ongoing facility needs<br>. Short term<br>. Long term |
| 5. | Commence process of investigating short term housing options for business operations |
| 6. | Advise responsible personnel of contractual deadlines<br>b. Deadline for rebuilding election<br>c. Deadline for completion of shell construction<br>d. Deadline for availability of premises for construction<br>e. Reconstruction period deadlines of tenant |
| 7. | Consider how disaster and facility destruction may relate to business plans<br>. Acceleration of facility planning<br>. Possible continuation of suspended legal commitments to leased premises |

 

# Addendum 2

## Checklist for Building Re-occupancy Following Disaster

| | |
|---|---|
| 1. | Structural Soundness<br>a. Overall Building Structure<br>b. Building Façade<br>c. Minor Repairs (Windows, Roofing, etc.) |
| 2. | Utilities:<br>a. Gas<br>b. Electric<br>c. Water<br>d. Steam |
| 3. | Air Quality |
| 4. | Hazardous Materials |
| 5. | Fire Protection:<br>a. Fire Alarm Systems<br>b. Smoke Detectors<br>c. Sprinklers |
| 6. | Mechanical Systems:<br>a. HVAC (Heating Ventilation and Cooling)<br>b. Central AC System Cleaning<br>c. Window AC Units Cleaning<br>d. Elevators/Escalators<br>e. Security Systems |
| 7. | Cleanup:<br>a. Interior Debris and Dirt Removal<br>b. Sanitation Removal<br>c. Extermination |
| 9. | Computing Systems:<br>a. Data Lines<br>b. Computer Systems |
| 10. | Telephone Service:<br>a. 911 Emergency Service<br>b. Phone system<br>c. Internal calling<br>d. External Calling |
| 11. | Insurance:<br>a. Review of Building Insurance 911 Policy/Inspection Requirements |
| 12. | Access and Safety:<br>a. NYPD Approved Access to Building<br>b. Sidewalks, Street Lighting, Street Signals, and Paving |

 

| | |
|---|---|
| 13. | Agency Phone Numbers:<br>a. FDNY : (718) 999-2343/4<br>b. Department of Environmental Protection : (718) DEP-HELP<br>c. Department of Sanitation : (212) 360-3520/22/24<br>d. Economic Development Corporation : (212) 509-7549<br>e. Department of Buildings : (646) 248-8997<br>f. Department of Transportation : (718) CALL DOT<br>g. Department of Design and Construction : (212) 941-5342<br>h. Department of Health : (212) 213-1844 (8 AM - 10 PM) |

Addendum 3

Market updates, New York City and area office market conditions

[Portions available in hard copy, only]

 

THE WALL STREET JOURNAL.

MONEY & INVESTING

# Lehman Will Move Its Base out of Wall Street

By Peter Grant
And Charles Gasparino
*Staff Reporters of* The Wall Street Journal

More of Wall Street is moving away from Wall Street these days.

**Lehman Brothers Holdings** Inc.'s announcement yesterday that it will move its headquarters to midtown Manhattan from the downtown financial district in the wake of the Twin Tower attacks sets the stage for yet another major realignment of Wall Street securities firms away from the southern tip of Manhattan, specialists say.


Lehman, which will buy a one million square-foot office development in the Times Square area from rival **Morgan Stanley**, is the most prominent Wall Street tenant since the Sept. 11 tragedy to say it wouldn't return to its downtown headquarters. Terms of the deal, which was forecast in a Wall Street Journal article on Friday, weren't disclosed. But Lehman paid roughly the building's cost of about $650 million, people familiar with the property say.

The decision is particularly significant because just a small portion of Lehman's space was in the World Trade Center. Most of it was across the street in two towers in the World Financial Center complex, which was damaged when the Twin Towers collapsed. In a letter to employees yesterday, Lehman Chief Executive Richard Fuld Jr. said the firm couldn't wait until it was able to move back into the financial center, which he said would take more than a year.

"While the World Financial Center has been a terrific home for all of us ... we simply cannot wait that long," the letter states.

The loss of Lehman's headquarters marks yet another blow to the financial district, which is anxiously trying to reassert itself as a global center of the securities industry. Some 30 million square feet of office space—about the size of downtown Houston—was lost or damaged by the attack. Now, one by one, tenants that had been mainstays of downtown are saying they don't plan to return or that they're keeping their options open.

Once an area that securities firms had to be in, Wall Street has seen many of its big-name firms head uptown and out of town as advances in technology reduced the need for proximity. In the 1970s, big brokerage firms began leaving the Wall Street area, and its low-grade real estate, for swanky offices in

 

**Credit Markets:** *Military action sets a firmer tone for Treasurys* **Page C14.**

**Fund Track:** *For mutual-fund investors, a wait-and-see stance* **Page C17.**

# Lehman Says It Plans To Move Headquarters To Midtown Manhattan

*Continued From Page C1*

Manhattan, largely because it owns two buildings in the area. The rest have either said they don't want to return, partly because of the trauma of the attack, or they can't return because of the unavailability of suitable space.

To be sure, some firms that were forced out of damaged space—like **Merrill Lynch** & Co. and **Dow Jones** & Co., publisher of The Wall Street Journal—have indicated that they will return as soon as their buildings are repaired. And other firms that have headquarters nearby, like **Goldman Sachs Group**—which has been based near Wall Street since 1869—say they have no intention of pulling up stakes. Henry Paulson, Goldman's chief executive, recently conceded that he and other Goldman executives have received some calls from employees who are concerned about returning to work in lower Manhattan.

But he doesn't believe the attacks will spark a broad exodus from Wall Street. One reason is simply the proximity to other decision-makers. For instance, in 1998 Mr. Paulson and executives at several other major financial firms were called to frequent emergency meetings at the New York Fed to rescue Long-Term Capital Management LP, the big hedge fund, from collapse.

Still, there are several securities firms that are saying they might not return, even though space will be ready for them soon. **Canadian Imperial Bank of Commerce**'s CIBC World Markets, for instance, is considering staying in temporary quarters in midtown Manhattan, rather than returning to the World Financial Center. Even before Sept. 11, CIBC had plans to eventually occupy a new development in midtown so it might just stay in temporary space until it's ready.

Robert Rittereiser, chief executive of **Gruntal** & Co., said yesterday his securities firm was considering selling its 180,000 square-foot lease in One Liberty Plaza, across the street from the World Trade Center, rather than returning there. He said the temporary closing of the building has accelerated a decision to consolidate that the firm had been thinking about making before the disaster.

Some securities firms just aren't sure of their plans. Nomura Securities International, the U.S. securities unit of Japan's **Nomura Securities**, says its employees "are located in a number of locations in New York and New Jersey." The firm says it "would like to move back our employees in a single main location and we would prefer to return to our offices in the World Financial Center as quickly as possible. Right now we are working hard with everyone involved to determine whether and when that would be possible."

midtown Manhattan. The first major firm to bolt lower Manhattan was Morgan Stanley, followed by **Bear Stearns** Cos., says Roy Smith, a finance professor at New York University. (Even as firms have moved away from Wall Street, securities-industry employment in New York still ballooned during the 1990s bull market.)

"There's always been pressure on downtown firms in the direction of midtown," says Julien J. Studley, who heads a real-estate firm by the same name. "This may be another push in that direction."

Nor is the geographic realignment of the financial-services industry caused by the terrorist attack limited to downtown. The devastation inflicted by the hijacked jets has convinced many firms that they need to be spread out to a number of locations in the region. For example, Morgan Stanley said yesterday that it decided to sell, rather than move into, its new midtown development at 745 Seventh Ave. because most of its trading and backup operations already were in the Times Square area.

The firm decided to sell the 32-story tower to Lehman largely because it didn't want to take the risk of concentrating its operations "within one city block that are dependent on the same transportation and power infrastructures," a spokesman said.

Lehman owns or leases more than one million square feet in the two buildings it occupied in the World Financial Center. A Lehman spokesman says the firm hasn't decided what to do with that space when it's fixed up. Options include subleasing or selling it or using it for some of Lehman's operations, he said.

Morgan's sale to Lehman was negotiated quickly, underscoring how highly motivated securities firms are to find stable and secure quarters in the wake of the terrorist attacks, some real-estate specialists say. Typically it takes months for such large real-estate deals to reach this stage.

But many Wall Street firms and other downtown tenants are clearly recognizing that the tragedy has rewritten the rules about where employees and headquarters should be housed. Morgan Stanley hasn't divulged its permanent plans for 3,700 employees who had worked in the World Trade Center or the people who had been planning to move to 745 Seventh Ave. But people familiar with the firm say there is very little chance any of them will return downtown.

Only one of the 10 largest tenants in the World Trade Center, **Deutsche Bank**, has indicated that it plans to return to lower

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THE WALL STREET JOURNAL MONDAY, OCTOBER 8, 2001

# Property Market In Manhattan May Still Soften

## Surge in Demand for Offices Doesn't Allay Concerns About Vacancies, Prices

By Motoko Rich
*Staff Reporter of* The Wall Street Journal

NEW YORK—Despite a torrent of demand for office space in the wake of the World Trade Center attacks, Manhattan may still be heading into a softening real-estate market, say some local brokers and landlords.

With the economy slowing down, some real-estate executives are concerned about how an increase in sublease space coming back on the market, as well as dwindling demand from new tenants, will affect the city. Adam Hochfelder, president and chief executive officer of property owner **Max Capital Management** Corp., which owns eight million square feet of office space in Manhattan, believes the vacancy rate in New York, currently somewhere between 5% and 7%, could rise as high as 10%. "I think short term, there are definitely concerns," said Mr. Hochfelder.

Meanwhile, softening market conditions are helping home buyers in New York to negotiate better prices. "I think there's a transfer of power here," says Scott Durkin, chief operating officer of Corcoran Group, one of the city's largest real-estate brokerage firms that was recently bought by **NRT** Inc. He said the company had about 20% more listings in the third quarter of this year, compared with last year, and that prices had eased between 3% and 5%.

To date, companies displaced by the terrorist attacks have signed leases in Manhattan for about 2.7 million square feet, according to Bruce Mosler, president of U.S. operations at New York real-estate services firm **Cushman & Wakefield.** Deals representing an additional five million square feet are pending, he said.

But since Sept. 11, according to Bethesda, Md., real-estate information service CoStar Group Inc., more than 9.52 million square feet of office space have been brought to the market. About half of that is sublease space from tenants who no longer need space for which they have leases outstanding.

**Vivendi Universal,** for example, put 250,000 square feet in a building on Third Avenue on the market just over a week ago, according to Giles Wrench, director at **Cresa Partners,** a real-estate broker in New York. "It was the intention prior to Sept. 11 to dispose of that space," said Mr. Wrench, who is representing Vivendi. "But obviously, we have accelerated the marketing program because of the current demand."

The terrorist attacks destroyed about 15 million square feet and damaged about 15 million square feet more, though not all of the displaced tenants will be seeking to replace all their previous space downtown.

Many of the larger tenants in and around the World Trade Center had extra space elsewhere in the New York region where they have put displaced workers, noted Mark S. Weiss, executive managing director at Julien J. Studley Inc., a real-estate brokerage firm in New York.

Salomon Smith Barney, a unit of **Citigroup** Inc., for example, has been able to place about 2,200 general-counsel, human-resource-department and asset-management employees from 7 World Trade Center in facilities in New Jersey and other offices in Manhattan. The company has also taken extra space in Stamford, Conn.

THE WALL STREET JOURNAL.
MONEY & INVESTING

# Homeless, a Wall Street Law Firm Improvises

By Richard B. Schmitt
Staff Reporter of The Wall Street Journal

NEW YORK—Like many firms near ground zero on Sept. 11, **Cleary, Gottlieb, Steen & Hamilton** has been forced to improvise the way it does business.

One day, for instance, the large law firm found itself scrambling to help a client arrange a $500 million bond offering for American Express Co.—at a pay phone on a Manhattan street corner.


The firm has been homeless since its One Liberty Plaza offices, across the street from the World Trade Center, were evacuated after terrorists attacked the Twin Towers. Its 1,900 employees, including 350 lawyers, won't be back for weeks. So it has morphed into a kind of virtual law firm. People have been scattered in makeshift offices. Laptops have become portable law libraries and document repositories. Clients are nurtured and deals are struck by cellphone and e-mail.

"It doesn't take long before the words pass on," said Jeff Lewis, a partner. The week of the attacks, he borrowed an office from a friend in the insurance business to huddle with associates about some pending projects in Latin America. "I used to complain about how [electronic gizmos] were ruining my life. Now, they have saved it."

Over the years, the firm has had disaster training. In the early 1990s, the building housing its London office was bombed by the Irish Republican Army, forcing the lawyers to find other quarters. After the 1993 World Trade Center blast, it set up a "disaster recovery" center in a bank tower in midtown Manhattan to house backup computer systems and emergency offices.

These days, Cleary more resembles a Silicon Valley start-up than a stuffy law firm. On a recent day, a swarm of technicians program dozens of new laptops to replace those left at the office, in a room dubbed the "computer factory." A graphic designer puts the finishing touches on a draft of a new firm marketing brochure. Senior lawyers accustomed to posh private offices share a conference room. A sign on one door: "Please come in. We are trying to block out noise—not people!"

There have been glitches. With law

*Please Turn to Page C12, Column 3*

**Journal Link:** Installments of the recovery diary of Keefe, Bruyette & Woods's CEO will run in the online Journal at **WSJ.com/JournalLinks.**

## Cleary, Gottlieb, Steen & Hamilton


One Liberty Plaza

### A Brief Look

- **Lawyers:** 750
- **Total staff,** including lawyers: 2,050
- **Offices:** New York, Washington, Paris, London, Rome, Brussels, Frankfurt, Hong Kong, Tokyo
- **Organized:** 1946
- **Clients:** Goldman Sachs; Deutsche Bank; Texas investor David Bonderman; governments of Russia, Mexico and Argentina; Guggenheim Museum; James Dale, the N.J. scoutmaster fired for sexual orientation.

### A Change of Venue

Before Sept. 11, Cleary's 350 lawyers in New York occupied seven floors at One Liberty Plaza, across the street from the World Trade Center. Today, it has taken up temporary residence at nine New York locations, previously occupied by other law firms or clients. Here's a list of the locations:

| TEMPORARY LOCATION | TENANT PROVIDING SPACE |
|---|---|
| 919 Third Avenue, 30th Floor | Debevoise & Plimpton |
| 150 E. 52nd Street, 3rd Floor | Debevoise & Plimpton |
| 1285 Sixth Avenue, 21st Floor | Paul Weiss |
| 885 Third Avenue, 31st Floor | Ropes & Gray |
| 850 Third Avenue, 15th Floor | Instinet |
| Citigroup Center, 153 E. 53rd St., 32nd Floor | Elf Brothers Investments, L.L.C. |
| 900 Third Avenue, 25th Floor | Brown Raysman; Quinn Emanuel Urquhart Oliver & Hedges |
| 885 Third Avenue, 13th Floor | Latham & Watkins, Heller Ehrman |
| Citigroup Center, 153 E. 53rdSt., 39th Floor | Kirkland & Ellis |

MONDAY, OCTOBER 8, 2001 C1

**IPO Outlook:** *After hiatus, IPO market makes speculative return* Page C12.

**Credit Markets:** *Unscheduled auction boosts 'repo' market* Page C12.

# Homeless Law Firm Improvises

Continued From Page C1

firms more dependent on original documents than most businesses, Cleary lawyers have had to reconstruct crucial data to get certain deals done. The firm also says its computer system didn't have the latest information on addresses and phone numbers, which delayed tracking down its personnel and touching base with clients. In the hours after the attacks. The disaster has also coincided with peak recruiting season for top law students, spawning concern that the upheaval may turn off prospects, though Cleary says interest has remained strong.

But the firm concedes it has been luckier than most. As of a week ago today, its lawyers had all been located into temporary new offices, many provided by rival law firms in an unusual burst of professional courtesy. And while much of the city has struggled with spotty phone service, Cleary is installing its own state-of-the-art laser system that allows it to bypass the local operator.

Some young lawyers are getting a short course from their bosses in working under duress. "You get to see them under real pressure, and how they react," said Tia Brackley, a first-year associate, who started three weeks ago, and who saw her new One Liberty Plaza offices getting national television exposure during the attacks. At one point, some newscasters speculated that the building would collapse.

The firm says an optical illusion created by the structure, originally built as the headquarters of U.S. Steel, led some observers to wrongly conclude it was tumbling. While the firm says the building is safe, it plans to conduct independent engineering and air-quality tests before moving back in.

Since Sept. 11, the firm has resolved an arbitration dispute for the Russian finance ministry, and closed the purchase of a Norwegian yellow-pages firm by a company owned by Fort Worth, Texas, investor David Bonderman. At the same time, an initial public stock offering for a Continental Airlines subsidiary, which was set for a pre-IPO promotional roadshow to big investors starting the day the airports were shut down nationwide, itself was grounded; Cleary had been advising one of the Wall Street underwriters.

At first, the big American Express deal also looked to be a victim of bad timing. The parties had planned on working on the transaction's final details on Sept. 11, with the closing set for the next day at the Cleary offices in lower Manhattan. That presented a major problem after the offices were evacuated; they also contained the crucial documents.

Regrouping, the two sides pulled copies of earlier offerings handled by the Cleary client, Credit Suisse Group's Credit Suisse First Boston, and marked them up by hand. Then, all agreed to close the deal a day late, on Sept. 13, at CSFB's office in midtown Manhattan around noon.

With minutes to go, however, the CSFB building was itself evacuated after a bomb scare. That sent all the parties to the street, where, with their cellphones on the blink, they dialed into a conference call at a corner pay phone, cementing the final details.

On one level, getting the deal done seems inconsequential, Cleary partners said. "But we did in fact close—without either the issuer or us having access to the [original] documents or to our offices," said Craig Brod, the partner who oversaw Cleary's role in the deal. "We proceeded to do what we had to do."

THE WALL STREET JOURNAL.

# MARKETPLACE

# Lessons From the Rubble

## *Architects and Engineers Study Stairwells, Building Material To Bolster Future Skyscrapers*

By DEAN STARKMAN
*Staff Reporter of* THE WALL STREET JOURNAL

IN ASSESSING the rubble of the World Trade Center, architects, engineers and scholars are finding lessons that could affect the future of skyscrapers—from their height to the width of interior stairwells.

Designers, for instance, are now looking at the building codes of Britain and some Asian countries that require separate stairways and freight elevators for rescue personnel, along with widening landings, all to avoid crowded scenes that investigators say hampered rescue efforts in the 100-story World Trade towers.

**THE PROPERTY REPORT**

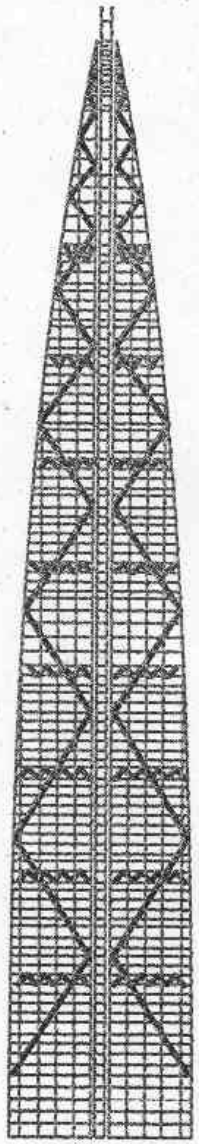
Also attracting some interest: so-called refuge floors. Required by building codes in China, the Philippines and elsewhere, the open-air floors are spaced 10 to 12 floors apart, allowing inhabitants to breathe while waiting for rescue personnel. Stairwells are required to open onto the floors, which were conceived in part to avoid scenes such as occurred during the 1993 World Trade Center bombing when office workers smashed windows to escape smoke drawn up through the building from a "chimney effect" caused by the blast. The challenge, says T.J. Gottesdiener, a managing partner of architectural firm Skidmore, Owings & Merrill LLP, "is separating what is appropriate from what is a reaction." His firm had no role in building the World Trade towers.

The deliberations come despite a widely held belief that designing buildings to withstand the impact of airplanes is a waste of resources that are better spent elsewhere, including on airport security. Despite the recent attack, many designers don't believe high-rise buildings themselves will become less desirable or useful.

"Are we not going to build buildings with five sides anymore because they hit the Pentagon?" asks Carol Willis, an architectural historian and director of the Skyscraper Museum, in New York. "We're asking the wrong questions."

Still, some lessons are obvious. The attack dealt a fatal blow to fledgling attempts to revive the monumentalist school of American architecture last seen with the completion of Chicago's Sears Tower in 1974. Nascent plans—in Chi-

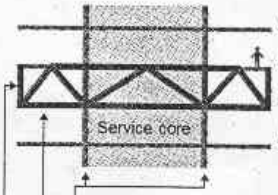
*Please Turn to Page B14, Column 1*



## Next Wave

The International Financial Center in Shanghai is now in development and planned to be more than 1,600 feet tall, 15% taller than the World Trade Center

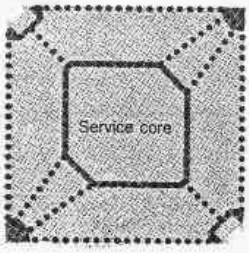
**Refuge floor:** A safety requirement in some Asian countries, the floors are placed every 10 to 12 stories, and accessible from all stairwells. The open-air floors are designed to provide protection from smoke. The space may not be occupied by anything else.

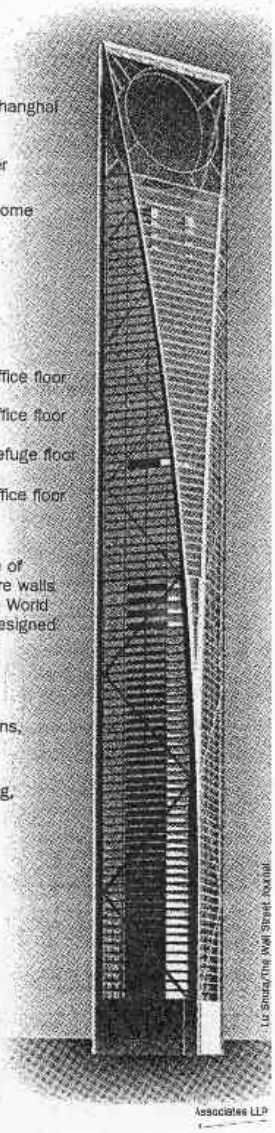



**Perimeter core walls:** Made of reinforced concrete, the core walls are to be stronger than the World Trade Center's, but were designed for economic and structural reasons, not safety.

**Outrigger Truss:** Connects the core to main exterior columns, an important structural feature

**Belt Truss:** Wraps around the building, linking exterior columns horizontally for additional structural strength



Associates LLP

**Technology:** *Charter names Liberty Media's Vogel president, CEO* ***Page B7.***

**Technology:** *Are 'telecom hotels' making a comeback?* ***Page B8.***

# Engineers Ponder Lessons

*Continued From Page B1*

cago, Donald Trump's plans for the Sun-Times property, as well as a much-discussed 2,000-foot tower in Miami—are less likely to proceed, certainly on such a grand scale. So, too, does even the idea of rebuilding the World Trade Center towers to their former height. "I don't think, frankly, we're going to build back the Trade Center to 110 floors," Mr. Gottesdiener says. "People won't be comfortable there."

Still, some developers are trying to proceed with business as much as usual as they can muster. The developer of the Miami project, Guillermo Socarras, is still trying to arrange financing, according to a spokesman, who added, "he's not going to allow 19 or 19,000 terrorists to change a project he's worked on for three years."

Other lessons will be less noticeable—and will take longer to have effect. Two teams of engineers will review the so-called performance of the Pentagon and the Trade Center and surrounding buildings and issue a report to the Federal Emergency Management Agency and other interested parties. The review will explore the buildings' overall resistance to collapse from the moment of collision, as well as the effects of the fire. The report, which won't be ready for 18 months or so, will likely result in recommended changes in model buildings codes. Possible areas under review include the strength of columns and beams, and the number and width of stairwells.

***Many designers don't believe high-rise buildings will become less desirable. 'Are we not going to build buildings with five sides anymore because they hit the Pentagon?' asks one architectural historian.***

At a conference of structural engineers held last weekend at a rustic New Hampshire inn, engineers puzzled over the problems posed by the destruction of support columns after the two jetliners collided into the towers. They also studied the effect of burning jet fuel on fire-proofing systems, and the subsequent "progressive collapse," when the steel columns finally gave way.

Among other issues, engineers said, the fire grew hot faster, burned far hotter and stayed hot longer than the 1,400 degrees and higher found in standard "time-temperature" tests used to rate protection materials. Engineers said the standards themselves, which approximate the heat of burning desks, carpets and paper, may have to be changed.

If there is one thing to be considered a failure in the Trade Center's design, it was that "people in the floors above the crash had limited ability to escape," said Ron Hamburger, chief structural engineer for ABS Consulting, New York, and a member of the performance-review team. Mr. Hamburger's firm should know. The firm had offices on the 91st floor of the North Tower. Employees found two stairwells blocked by debris, but all 16 escaped safely down a third.

The towers were believed to have been the first to rely on "shaft-wall" interior cores, made of gypsum-based wallboard instead of harder materials, masonry or reinforced concrete. The shaft-wall design was considered a breakthrough at the time, favored for its fire resistance and air-tight qualities. A question today is whether abandoning shaft-wall construction is worth the additional weight and cost.

Leslie E. Robertson, who directed the structural design of the Trade Center, said he would be "astonished" if codes are changed to require harder interior cores. The proper response, he says, "is not making buildings resistant to the airplane, but to keep the airplane from running into it."

Addendum 4

Bulletin of the Chairperson
Real Estate Board of New York
September 14 and 20, 2001
(Ethical Response)

[Hard copy only]

Addendum 5

Specimen Clauses from the Real Estate Board of New York
Office Lease Form
(Tenant's Negotiation Points Marked)

Destruction, Fire and Other Casualty.

(A) If the demised premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give immediate notice thereof to Owner and this lease shall continue in full force and effect except as hereinafter set forth.

(B) If the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the damages thereto shall be repaired by and at the expense of Owner and the rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty according to the part of the premises which is usable.

(C) If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty **or are partially damaged, but shall be unusable by Tenant for the specific uses permitted in Article __ of this lease, or subject to material impairment of access, in either event as determined by Tenant, in Tenant's reasonable judgment,** then the rent shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the premises shall have been repaired and restored by Owner, subject to Owner's right to elect not to restore the same as hereinafter provided.

(D) If the demises premises are rendered wholly unusable or (whether or not the demised premises are damaged in whole or in part) if the building shall be so damaged that Owner shall decide to demolish it or to rebuild it, then, in any of such events, **provided Owner shall make such determination in the exercise of commercially reasonable discretion,** Owner may elect to terminate this lease by written notice to Tenant, given within 90 days after such fire or casualty, specifying a date for the expiration of the lease, which date shall not be more than 60 days after the giving of such notice, and upon the date specified in such notice the term of this lease shall expire as fully and completely as if such date

were the date set forth above for the termination of this lease and Tenant shall forthwith quit, surrender, and vacate the premises without prejudice however, to Landlord's rights and remedies against Tenant under the lease provisions in effect prior to such termination, and any rent owing shall be paid up to such date and any payments of rent made by Tenant which were on account of any period subsequent to such date shall be returned to Tenant. **Landlord's right to terminate this lease shall be conditioned upon the concurrent or prior termination of the leases of other office tenants of the building, the premises of which suffered damage similar to that affecting the premises, and not entering into new leases for a reconstructed building with such tenants or parties under their control or under common control with them.** Unless Owner shall serve a termination notice as provided for herein, Owner shall make the repairs and restorations, under the condition of (B) and (C) hereof, with all reasonable expedition, subject to delays due to adjustment of insurance claims, labor troubles and causes beyond Owner's control. **Landlord agrees in performing its restoration obligations hereunder to perform the same with commercially reasonable diligence, using materials at least as good as those which are being replaced. In rebuilding following total destruction, Landlord shall have the right to modify the original structural design of the building to the limited extent of technological, engineering, and material sciences advances since the original construction of the building, provided such modifications do not compromise the structural integrity of the building or compliance with applicable building and fire codes.** After any such casualty, Tenant shall cooperate with Owner's restoration by removing from the premises as promptly as reasonably possible, all of Tenant's salvageable inventory and movable equipment, furniture, and other property. Tenant's liability for rent shall resume ~~<five (5) days after written notice from Owner that the premises are substantially ready for Tenant's occupancy.>~~ **on the earlier of: (i) Tenant's reoccupancy of the premises for the conduct of Tenant's business; (ii) _____ days after the premises are tendered to Tenant's contractor for construction of Tenant's interior improvements; (iii) [absolute reoccupancy deadline?] . If Owner is required or elects to repair or rebuild the premises in accordance with the provisions of this lease, Owner shall complete the repair or**

**restoration work within six (6) months after the date of fire or other casualty subject to the *force majeure* provisions of this lease. Tenant shall have the unconditional right to terminate this lease by notice (the "Termination Notice") to Owner given within the periods set forth below in each of the following circumstances, notwithstanding any term or provision of this lease to the contrary:**

**1. If Owner does not complete such repair or restoration work within such six (6) month period (as extended by *force majeure* provisions of this lease), then Tenant shall have the right to terminate this lease by written notice to Owner within thirty (30) days after the expiration of such rebuilding period;**

**2. If the duration of repairs or restoration work necessitated by such damage shall be estimated by Owner, in Owner's reasonable judgment, taking into account all relevant factors and *force majeure* events or conditions likely to delay Owner's work, not to permit reoccupancy of the premises by Tenant within [rebuilding period as likely to be affected by *force majeure* dependent on circumstances and nature of improvements] days from the date of the damage or destruction in question, then Tenant shall have the right to terminate this lease by written notice to Owner within thirty (30) days after Tenant shall receive Owner's notice that Owner has elected to rebuild the premises pursuant to the terms and conditions of this lease; and**

**3. If the damage or destruction in question shall occur within the last twenty four (24) months of the then current term of this lease, then Tenant shall have the right to terminate this lease by written notice to Owner within thirty (30) days**

**after the occurrence of the damage or destruction in question.**

**Upon receipt of the Termination Notice by Owner, this lease shall terminate as if the date of the Termination Notice were the date provided in this lease for expiration of the then current lease term.**

(E) Nothing contained hereinabove shall relieve Tenant from liability that may exist as a result of damage from fire or other casualty. Notwithstanding the foregoing, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty, and to the extent that such insurance is in force and collectible and to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery against the other or any one claiming through or under each of them by way of subrogation or otherwise. The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance. If, and to the extent, that such waiver can be obtained only by the payment of additional premiums, then the party benefitting from the waiver shall pay such premium within ten days after written demand or shall be deemed to have agreed that the party obtaining insurance coverage shall be free of any further obligation under the provisions hereof with respect to waiver of subrogation. Tenant acknowledges that Owner will not carry insurance on Tenant's furniture and/or furnishings or any fixtures or equipment, improvements, or appurtenances removable by Tenant and agrees that Owner will not be obligated to repair any damage thereto or replace same.

(F) **In the event of damage to the building, if Owner does not elect to terminate this Lease as provided herein, Tenant may require Owner to furnish to Tenant substitute office space reasonably suited for the use permitted by Article __ of this lease and of comparable size and price (after subsidy, if required, by Owner) during any rebuilding period hereunder. If Tenant so elects, Tenant shall notify Owner within thirty (30) days of Owner's notice of intent to rebuild; Tenant's failure to give such notice within such thirty (30) day period shall be deemed an election not to require provision of substitute space.**

**If Owner fails to provide substitute space as required by the terms of this paragraph within sixty (60) days after Tenant's notice of election to require such space, Tenant shall have the right to terminate this lease as Tenant's sole remedy for such failure, exercisable for a period of thirty (30) days after the expiration of the aforesaid sixty (60) day period. Tenant's failure to give such notice within such thirty (30) day period shall be deemed a waiver of Tenant's right to terminate under this subparagraph.**

**(G)** Tenant hereby waives the provisions of Section 227 of the Real Property Law and agrees that the provisions of this article shall govern and control in lieu thereof.

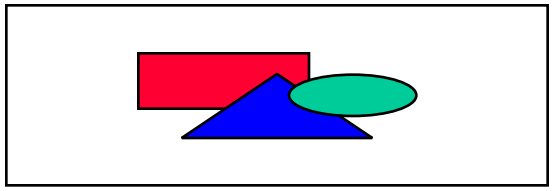
Addendum 6

Specimen Clauses from the Real Estate Board of New York
Office Lease Form
(Tenant's Negotiation Points Marked)

Inability to Perform [Force Majeure]

This lease and the obligation of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease or to supply or be delayed in supplying any service expressly or impliedly to be supplied or unable to make, or is delayed in making any repair, additions, alterations or decorations or is unable to supply or is delayed in supplying any equipment or fixtures if Owner is prevented or delayed from so doing by reason of strike or labor troubles or any cause whatsoever **beyond the reasonable control of Owner** including, but not limited to, government preemption in connection with a National Emergency, or by reason of any rule, order or regulation of any department or subdivision thereof or any governmental agency or by reason of conditions of supply and demand which have been or are affected by war or other emergency. **Subject to the conditions set forth in this paragraph, such occurrence shall authorize the extension of time for the performance of Owner's covenants or obligations directly affected by such occurrence for a period (the "Suspension Period") equal in duration to the continuance of such occurrence. As soon as the Owner shall learn of the happening of any such occurrence, Owner shall promptly notify Tenant and, if reasonably ascertainable, the occurrence's estimated duration. Unless (a) Owner shall have notified Tenant within ten (10) days after such occurrence, and (b) Owner shall pursue the performance of Owner's covenant or obligation hereunder with commercially reasonable diligence throughout the Suspension Period, such occurrence shall not authorize any extension of time for the performance of any covenant or obligation of Owner under this Lease.**



# ACCA Annual Meeting Program

## When Disaster Strikes: The Legal Department's New Imperative

## Insurance, Risk Management and Legal Implications of the WTC Disaster

## October 16, 2001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On September 11th, 2001, the Lutine Bell at Lloyd's of London rang for only the nineteenth time in the last 100 years. While the long-term effects of the terrorist attacks are somewhat difficult to project, current estimates of the insurance industry's potential liability range from $40 billion to an astonishing $100 billion. To put these estimates in perspective, 1992's Hurricane Andrew, previously the most expensive disaster of all time, cost the insurance industry approximately $20 billion in adjusted 2000 dollars.

Without a doubt, there will be a myriad of claims stemming from the terrorist attacks. The World Trade Center bombing in 1993, which killed six people, resulted in 500 lawsuits and numerous insurance claims, some of which have yet to be resolved. In an effort to curtail a race to the courthouse, the Association of Trial Lawyers of America called for a moratorium on civil lawsuits related to the events of September 11th. The long term effectiveness of this moratorium appears to be in question, however, as the widow of a World Trade Center worker filed a wrongful death suit on October 11th against Osama bin Laden, the Islamic Emirate of Afghanistan and the country's ruling Taliban.

As was the case with Hurricane Andrew, the 1993 WTC bombing, and the 1994 Northridge earthquake, business interruption claims will constitute a key component of the overall losses faced by the insurance industry as a result of the September 11th attacks. At least one estimate predicts that business interruption claims will cost insurers in excess of $7 billion. These claims, however, are guaranteed to face heightened scrutiny by insurers. For example, after the Northridge earthquake, which cost insurers over $12.5 billion, business interruption claims formed a large portion of the disputes between insurers and policyholders.

Moreover, insurers appear ready to attempt to modify the terms of the business interruption coverage in the near future by restricting the terms and conditions of their insuring agreements, expanding exclusions and demanding higher premiums. A number

 

of issues related to business interruption coverage remain unsettled. Some of the more important issues affecting the parameters of coverage are discussed below.[1]

## A. Damage to or Destruction of the Insured's Property

Business interruption coverages are the most common type of insurance for the consequential losses of business owners. Unlike other types of business-related claims, those made under business interruption coverages are highly subjective and potentially broad in scope. As a result, this type of coverage is more likely to result in disputes between insurers and policyholders.

Although business interruption coverages vary significantly from policy to policy, the typical claim for business interruption stems from actual physical damage to or destruction of the insured's premises or other property. See, e.g., Howard Stores Corp. v. Foremost Ins. Co., 82 A.D.2d 398 (N.Y. 1st Dept. 1981), aff'd 56 N.Y.2d 991 (1982). This requirement is easily met for insureds in the World Trade Center and areas immediately surrounding it, as there was almost total physical destruction of the buildings in a three-block radius.

However, given the scope and subjective nature of this type of coverage, a significant portion of the business interruption claims most likely will be far removed from the WTC's "ground zero." Although the matter is far from settled, several cases

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[1] Immediately after the events of September 11th, the "war risk" exclusion found in many policies was the focus of attention. Soon thereafter, several major insurers addressed this concern by stating publicly that the exclusion would not apply to the terrorist attacks. In any event, it appears unlikely that insurers would succeed in arguing that this exclusion was applicable to the events of September 11th. See, e.g., Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1013 (2nd Cir. 1974) (holding that "war risk" exclusion did not apply to situation where Palestinian terrorists hijacked and destroyed insured's plane).

 

have found coverage for business interruption despite the absence of direct physical damage to, or destruction of, the insured's property. See, e.g., Farmers Ins. Co. v. Trutanich, 858 P.2d 1332 (Or. Ct. App. 1993) (holding expenses incurred to remove an odor resulting from the operation of an illegal drug laboratory in the insured's home by tenant constituted "direct physical loss"); Blaine Richards & Co. v. Marine Indem. Ins. Co., 635 F.2d 1051 (2nd Cir. 1980) (holding fumigation of beans with a pesticide later banned constituted physical damage); Western Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52 (Colo. 1968) (holding that infiltration of gasoline fumes into the insured's church constituted direct physical loss).

Some cases have found that an insured is entitled to coverage only where its business operations were completely suspended. See, e.g., Quality Oilfield Products, Inc. v. Michigan Mut. Ins. Co., 971 S.W.2d 635 (Tex. App. 1998) (holding that insurer is not entitled to coverage where occurrence resulted in work slowdown rather than cessation or suspension of business); Howard Stores Corp., supra, 82 A.D.2d at 403 (coverage denied where insured did not actually suspend its business); Hotel Properties, Ltd. v. Heritage Ins. Co. of America, 456 So. 2d 1249 (Fla. Dist. Ct. App. 1984) (coverage denied where insured suffered a diminution in business rather than an interruption).

One case worth noting is New Market Investment Corp. v. Fireman's Fund Ins. Co., 774 F. Supp. 909 (E.D. Pa. 1991), in which an insured fruit importer's business was damaged after the U.S. government temporarily halted the importation of Chilean fruit after discovering that terrorists injected cyanide into two grapes imported from Chile. The insured filed a claim under a Strikes, Riots, and Civil Commotions Endorsement. The insurer denied coverage, claiming that it was only liable for fruit that was physically damaged, i.e., grapes actually injected with cyanide. The court rejected this argument and held that the policy language could not be interpreted to require physical damage. While this case did not directly discuss the scope of business interruption coverage, the

 

court did allow the insured to recover all damages that were proximately caused by the terrorist acts. Ironically, the jury awarded only $217,218.00 on a claim of $5,430,452.25.

## B. Damage to or Destruction of Property Not Insured

Some policies may afford business interruption coverage when the insured's business is impacted by damage to property not covered by the policy. See generally, W. Danne, Jr., Business Interruption Insurance, 37 A.L.R. 5th 41 (2001). For example, in Studley Box & Lumber Co. v. National Fire Ins. Co., 154 A. 337 (N.H. 1931), an insured sought coverage for business interruption after a fire destroyed a building not included in the insured's policy. The court held that physical damage occurring exclusively on property not covered under the policy could still trigger coverage where the insured's property and the uncovered property were interrelated and interdependent – giving rise to a claim of "mutual dependency".

However, the "mutual dependency" doctrine is extremely fact intensive and a court may decline to find coverage where the relationship between the parties and the properties is too tenuous. See W. Danne, Jr., Business Interruption Insurance, 37 A.L.R. 5th 41 (2001) (citing Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co., 835 F.2d 812 (11th Cir. 1988); Swedish Crucible Steel Co. v. Travelers Indem. Co., 387 F. Supp. 231 (E.D. Mich. 1974)). See also Royal Indem. Ins. Co. v. Mikob Props., Inc. D/B/A Balboa Apartments, 940 F. Supp. 155 (S.D. Texas 1996) (refusing to apply "mutual dependency" where only one of insured's three apartment buildings and its related amenities were damaged or destroyed by a covered occurrence).

## C. Damage to or Obstruction of Ingress or Egress to the Insured's Property

Some insurance policies afford coverage for business interruption caused by damage to, or the obstruction of, the ingress or egress to the insured's property. In the

 

narrowest sense, this coverage may afford relief only to insureds located in lower Manhattan. A broader reading of the business interruption policies could extend coverage to a far wider area of Manhattan, as well as numerous other cities in which traffic was diverted and buildings were closed. There is a dearth of case law in this area, making it a potential hotbed for disputed claims.

## D. Property Not Damaged but Under Control of Civil Authorities

Coverage issues may arise for losses associated with property that has not been damaged or destroyed, but has been placed under the control of civil authorities. The most obvious example of this involves the restricted access to several areas in lower Manhattan following the attacks.

Courts have reached different conclusions as to whether an insured is entitled to coverage where civil authorities have ordered the business closed or restricted access to the insured's business. In Syufy Enters. v. Home Ins. Co., 1995 U.S. Dist. LEXIS 3771 (N.D. Cal. 1995), the court held that the insured could not recover under its business interruption policy for a business loss associated with a dawn-to-dusk curfew imposed by civil authorities following the return of the Rodney King verdict. However, before the trial, the parties stipulated that no civil authority prohibited access to insured's premises and no property within two blocks of the premises had been physically damaged.

By contrast, courts came to the opposite conclusion in Kilroy Indust. v. United Pacific Ins. Co., 608 F. Supp. 847 (C.D. Cal. 1985) (insured allowed recovery where local zoning authorities determined that building would be unsafe in the event of an earthquake), and Hampton Foods, Inc. v. Aetna Casualty & Surety Co., 787 F.2d 349 (8th Cir. 1986) (holding recovery under business interruption policy was warranted where city building commissioner was forced to vacate property when it was discovered that

 

building was in imminent danger of collapsing). However, these cases both involved possible or potential damage to the insured's property.

## E. Property Unusable – Utility Problems

Insurers also may face claims from policyholders that suffered losses as a result of an interruption in their power or other essential utilities. In Pressman v. Aetna Casualty & Sur. Co., 574 A.2d 757 (R.I. 1990), an insured was allowed to recover when he was forced to close his business for several days because of a power failure. The power failure resulted when a tree located on property adjacent to the insured's property fell onto the power line running to his building. The insurer denied coverage, arguing that the policy excluded coverage for loss caused by "[i]nterruption of power or other utility service furnished to the described premises if the interruption takes place away from the described premises." Rejecting the insurer's narrow interpretation that "premises" only included the interior of the building, the court ruled in favor of the insured.

 

# INSURANCE, RISK MANAGEMENT AND LEGAL IMPLICATIONS OF THE WTC DISASTER

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## TYPES OF COVERAGE IMPACTED

- First Party Property Insurance
  - Property Loss
  - Business Interruption
- Life Insurance
- Workers Compensation Insurance
- Aviation Insurance

 

## TYPES OF COVERAGES IMPACTED

- Third-Party Comprehensive General Liability (CGL) Insurance
- Umbrella Policies
- Other
- Reinsurance Policies

## FINANCIAL VIABILITY OF INSURERS AND REINSURERS

- Estimates of $40 B to $100B of Insurable Loss
- Insurers and Reinsurers Hardest Hit
  - Munich Re
  - Ace
  - Lloyd’s
  - Zurich Financial
  - XL Re Ltd.
  - Northwestern Mutual
  - Alleghany Corp.
  - Swiss Re
  - Allianz
  - Berkshire Hathaway
  - AIG
  - Chubb
  - Employers Reinsurance
  - Prudential

 

## FINANCIAL VIABIILTY OF INSURERS AND REINSURERS

- Some Insurer/Reinsurer Insolvencies Can Be Expected
- After Initial Plunge, Many Insurers' Stock Prices Have Soared
- Ramifications Going Forward
  - Tougher Coverage Terms
  - Higher Deductibles
  - Higher Premiums
  - Creation of New Markets

## FINANCIAL VIABIILTY OF INSURERS AND REINSURERS

- Effect of an Additional Catastrophic Event
  - Terrorism
  - Other Catastrophes
- Impact on Brokers
  - Loss of Personnel
  - Business Frenzy -- Brokers' Stock Prices Have Soared

 

## LESSONS FROM THE PAST

- Hurricane Andrew/Northridge Earthquake/San Francisco Earthquake
- Insurers Are Generous in the Beginning
- Insurers are Less Generous When Reality Sets In
- Insurer-Insured Relationship May be of Critical Importance

## ISSUES REQUIRING IMMEDIATE ATTENTION

- Notice to Insurers
- Filing Proofs of Loss
- Retaining an Adjuster/Counsel, If Appropriate

 

## POSSIBLE CONTROVERSIAL ISSUES

- War Exclusion/Terrorist Act Coverage
  - September 11 Events
  - Future Events
- Number of Occurrences/Application of Deductibles
  - Multiple Occurrences May Increase Available Limits
  - Multiple Occurrences May Increase Insured's Deductible

## POSSIBLE CONTROVERSIAL ISSUES

- Business Interruption Caused By:
  - Destruction of Insured Property
  - Destruction of Property of Another
  - Damage to Ingress/Egress
  - Property Taken Under Control by Civil Authorities
  - Property Not Usable - Lack of Electricity, Water, Etc.
- Valuation, Valuation, Valuation
- Priority When Multiple Insurance Policies Are Implicated

 

## LEGAL AND RISK MANAGEMENT CHALLENGE

- Cancellation of Coverage
- Expiring Coverage
  - Higher Premiums
  - Higher Deductibles
  - Tougher Coverage Terms
  - Choosing Financially Viable Insurers; Evaluating Reinsurance and Other Security

## LEGAL AND RISK MANAGEMENT CHALLENGE

- Effect Upon Legal Departments
  - Claims Handling and Litigation: More Work In-House
  - Transactions: Greater Negotiation Over Risk Transfer/Indemnification Terms
  - Directors and Officers: Exposure for Procuring Inadequate Insurance
- Coordination Between Legal and Risk Management Departments

 

## BALANCE OF POWER

- Insureds Need to be Concerned with Backlash from Overreaching
- Insurers Need to be Even More Concerned with Backlash from Underpaying

 

# What In-House Employment Counsel Need to Know After September 11, 2001

**Presented by:**

**Michael E. Caples, Esq.**
**Michael J. Lotito, Esq.**
**Jackson Lewis Schnitzler & Krupman**

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Even before the devastating events of September 11, 2001, America's workplaces were under stress. Indeed, in perhaps no other area of corporate legal affairs do in-house counsel face the unending changes in laws, regulations, and rules for compliance than in the field of employment law. To help employers come to terms with these forces of change, in-house employment counsel need to develop preventive strategies for taking control of emerging workplace law developments from the courts, legislatures, and regulatory agencies, as well as from unexpected and sometimes catastrophic economic, societal and political events.

## I. MILITARY LEAVE RIGHTS: RESPONSIBILITIES FOR CORPORATE EMPLOYERS

In times of national crisis, individuals who are members of the military reserves and national guard units may be called away from their places of employment to serve in active duty for indefinite periods of time. In addition to their legal obligations to affected employees, many corporate employers may consider this an opportunity to show their commitment not only in support of military service personnel but to the entire workforce. This commitment may take the form of a military leave policy, which goes beyond the guaranteed reinstatement and continuation of benefits and provides for supplemental income, continuation of medical benefits beyond the statutory requirements, or other enhancements. Rather than be driven by strict compliance with the law's requirements, employers can

 

respond to requests for military leave in a manner which reinforces the "best practices" principles of leadership, initiative, and loyalty to employees.

What employers must do when employees request leave for active military service is governed by federal and certain state statutes. There has not been a major conflict affecting the civilian workforce since the Persian Gulf War a decade ago; since then the federal law on the reemployment rights of veterans has changed.

In 1994, statutory reemployment rights for military members were revised with the signing of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4333. Like its predecessors, USERRA guarantees the rights of military service members to take a leave of absence from their civilian jobs for active military service and to return to their jobs with accrued seniority and other employment protections.

## A. Employer Obligations to Employees Requesting Military Leave

Employers must provide to covered employees not in temporary positions:

1. An unpaid leave of absence for a period not to exceed five years to perform any form of military service, whether voluntarily or involuntarily called or activated, such as being placed on active duty, for annual training, and for training weekends. A cautionary note regarding the leave being unpaid: under the Fair Labor Standards Act, if an exempt employee works any part of a week, the salary for the entire week must be paid. Therefore, if an exempt employee works any part of a week, then spends the rest of the week in military service, the salary for the entire week must be paid. However, in that case the amount of the military pay for the week may be offset against the salary.

2. While on leave, the employee is entitled to those rights and benefits not determined by seniority and generally provided to individuals of similar status on a leave of absence.

3. Upon return from leave, reinstatement to the position that the employee would have held if his or her continuous employment had not been interrupted (the "escalator principle"). This

 

obligation includes making reasonable effort to train the employee to make him or her qualified for the escalator position. If the employee cannot be made qualified, the employee must be returned to the position he or she occupied when going out on leave.

4. Upon return from leave, all seniority and seniority-based rights and benefits as if the employee had remained continuously employed. Typical benefits covered under USERRA would include vacation allowances, pension credit and 401(k) contributions.

5. Continuation of medical benefits under the same terms and conditions as when actively employed if military service is less than 31 days;

6. Continuation of medical benefits during the leave under terms similar to those of COBRA; and,

7. Protection from discharge upon return to work except for cause for a period of time depending on the length of military service.

**B. Employee Obligations to Employers Under USERRA**

To be entitled to these benefits, employees must :

1. Give timely notice of their need to perform military service except as required by military necessity or unless impossible or unreasonable;

2. Apply for reemployment within a set time after release from military service. In the case of service of less than 31 days, the individual must normally return to work on the first work day after release from military service. In the case of service lasting between 31 and 180 days, the individual must normally reapply within 14 days after completing active service. In the case of service lasting more than 180 days, the individual must normally reapply within 90 days after the completion of service; and

3. Be released from active military service under honorable conditions (with an honorable or general discharge).

 

### C. Other Issues

USERRA also prohibits discrimination against service members in employment and provides training obligations for employers under certain circumstances. Employers do not have to reemploy a returning service member if "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable." In addition, employees hired for a brief, nonrecurring period without reasonable expectation that employment will continue indefinitely or for a significant time are not entitled to reinstatement rights.

It should be noted that some states provide additional rights to returning employees. Those rights may be more extensive than those under USERRA.

### D. Frequently Asked Questions

***What if an employee volunteers for military service?***

USERRA does not distinguish between volunteers and those ordered to perform military service. Employees are protected regardless of whether they volunteered or were ordered involuntarily to active duty.

***Must an employer pay an employee while he or she is on active duty?***

USERRA does not require employers to pay employees while on military leave. Some employers voluntarily have policies that make up the difference between military pay and allowances and an employee's regular pay. Employers should review such policies to ensure that the extent of these obligations are consistent with current business objectives. If an exempt employee works any part of a week, the salary for the entire week must be paid. Therefore, if an exempt employee works any part of a week, then spends the rest of the week in military service, the salary for the entire week must be paid. However, in that case the amount of the military pay for the week may be offset against the salary.

***Can an employer require an employee to use earned vacation time while performing military service?***

 

No, employees are entitled use to earned vacation while on leave but generally may not be required to do so.

***What is the "escalator principle?"***

Employers must treat returning service members as if they had remained continuously employed for purposes of the position as well as pay and benefits to which they return. For example, if similarly employed individuals who joined the company in 1996 currently earn $15 per hour, then a similarly situated returning service member who joined the company in 1996 should be paid $15 per hour even if he or she had been on active duty for extended periods during that time. As another example, if an apprentice electrician left the company for active military duty in 1999 and returned in 2001, the employee might be entitled to a position as a journeyman electrician.

***What about employees serving in the National Guard?***

National Guard members sometimes perform federal service (e.g., during annual training) and sometimes perform state service (e.g., during some disasters). USERRA only applies to National Guard members performing federal service, but many state laws afford similar protection to individuals performing state service. To determine compliance obligations under these circumstances, employers should obtain a copy of the employee's orders and consult with an attorney.

***Is there a limit on the length of military service under the USERRA protections?***

Under USERRA employees are only entitled to protection during cumulative periods of military leave of up to five years, but there are many exceptions to this general limitation. For example, leave time for active duty by order of a Presidential declaration would normally NOT count as part of the five year period.

 

## II. CRISIS IN THE WORKPLACE: TAKING CONTROL AND MINIMIZING BACKLASH

Apart from a military action requiring the call-up of employees into active duty, corporate employers must anticipate the possibility of a workplace crisis with the potential to cause company-wide repercussions, such as a natural disaster, a calamity debilitating to the employer's physical property, a physical attack on employees by a violent co-worker or third party, an abrupt closure or reduction of the business, or the sudden loss of a charismatic executive. Indeed, the attacks on the World Trade Center and the Pentagon were, among other things, extreme examples of workplace violence, following which affected employers invoked crisis communications, tightened physical security, administered coping mechanisms, and executed decisions to preserve financial viability. However devastating or unexpected such an event may be, the trained response of a prepared management team can shoulder the immediate impact and regain the control needed to stabilize the situation and move forward with an effective action plan.

### A. Preventing Workplace Violence and Its Resulting Liability

The recent attacks on the World Trade Center in New York City and the Pentagon near Washington, D.C. were, among other things, attacks on employees at work. While it is hard to imagine a repetition of workplace events of this magnitude, the probability of violent incidents at work resulting in death or serious injury to employees has risen dramatically in the past decade --- some reports prior to the events of September 2001 had put the increase as high as 300%. According to the federal government's National Institute for Occupational Safety and Health (NIOSH), homicide ranks as the leading cause of occupational death among women. Among all U.S. workers, homicide is the second leading cause of workplace death.

Employers have a legal obligation to provide a workplace reasonably free from hazards. They also have the obligation to take reasonable steps to insure individuals they employ and do business

 

with will not cause intentional harm to other employees. These duties are contained in a variety of federal and state safe workplace laws, as well as common law negligence standards. By understanding the scope of the duty to provide a safe and hazard free workplace, employers may be able to avoid the unthinkable and to be proactive in stabilizing the unpredictable.

### 1. Occupational Safety and Health Act

Pursuant to the "General Duty Clause" of the federal Occupational Safety and Health Act, employers have a responsibility to safeguard employees from recognized hazards which may cause serious physical harm or death. Under this clause, OSHA has issued citations to employers for exposing their employees to workplace violence. OSHA has published guidelines for preventing workplace violence at health care facilities and retail establishments, among others, indicating the agency's intention to continue to cite employers for workplace violence exposures under the Act's General Duty Clause. These guidelines provide a basis upon which employers in any industry or field may build an effective and good faith program to prevent and/or contain a violent workplace incident. Some states have promulgated independent workplace violence standards.

### 2. Common Law Liability for the Harmful Acts of Employees to Others

OSHA is not the only law imposing obligations upon employers to take every reasonable precaution to guard against workplace violence. Under the "common law" doctrine of negligent hiring or negligent retention, employers must protect workers from individuals who have demonstrated a propensity to behave violently towards others.

An employer owes a duty of care to those with whom its employees may forseeably interact as a consequence of their employment. This duty imposes an obligation on employers to hire and retain employees reasonably believed to be safe and competent. Breach of this duty can give rise to a cause of action for negligent hiring or retention.

 

A cause of action for negligent hiring or retention may be found when an employer:

1. hires or retains an "incompetent" employee;
2. knows or should have known the employee was unfit to perform the job;
3. acts in a negligent manner (failure to act may also be negligent).

The injury to the plaintiff must have been foreseeable, and it must have been proximately caused by the employer's negligence.

To succeed in proving an employer liable for the harmful acts of an employee it has hired, a plaintiff must prove the employee was unfit to perform the job for which he or she was hired or retained by showing a lack of credentials to perform the work or conduct establishing incompetence or unsuitability.

The plaintiff also must prove the employer had actual knowledge or would have known of an employee's incompetence had it made a reasonable inquiry into the employee's background. In fact, an employer has a duty to make a reasonable inquiry based on the nature of the position, the risk posed by a person in that position to others, and the harm to others if that risk becomes reality.

An employer may have a duty to investigate based on the background of the individual to be hired or retained. Negligent hiring/retention cases commonly involve employees with criminal records, and employers must consider whether to conduct a criminal record check and what the consequences are of failing to make inquiries or conduct an investigation.

Assuming an employer knew or should have known an employee was unfit to perform the job, the plaintiff must prove: 1) a reasonably prudent person knowing such information would not have hired/retained the individual; or, 2) a reasonable employer would have taken other appropriate measures to minimize the risk posed by the employee.

The plaintiff also must prove a person of ordinary care could have foreseen plaintiff's injury as a consequence of the employee's incompetence, or in other words, the employer should have

 

anticipated the harm. Additionally, when looking at the facts after the event, was the injury, in fact, caused by the defendant's negligence.

### 3. Controlling the Risk of Negligent Hiring/Retention

What can employers do to protect their employees and themselves from workplace violence? How can employers shield themselves from negligence suits brought by third parties who have been injured by violent employees?

Despite the challenges employers face in conducting the level of background investigation necessary to screen out potentially violent or disruptive employees, it is imperative for employers to take control of hiring and retention decisions and to have available the kinds of information necessary to make well-informed decisions. This necessitates knowledge of the restrictions on conducting background investigations, such as the federal Fair Credit Reporting Act and various state consumer protection laws, which apply to inquiries for employment purposes. Other restrictions apply to obtaining information about arrests and convictions as, for example, the EEOC position that disqualification of applicants based upon arrest records (which did not result in convictions) has an adverse or disparate impact upon minorities in violation of Title VII of the Civil Rights Act of 1964, as amended. Furthermore, some states limit an employer's ability to deny employment based upon a conviction record unless the conviction is job related (e.g., New York).

Nonetheless, employers can develop and implement screening processes, which stay within permissible bounds and safeguard the privacy rights of individuals while netting the kind of information that enables an employer to make a good hiring or retention decision. Indeed, in certain circumstances, such as where another employee has lodged a complaint of individual's violent or disruptive behavior, the employer must undertake an investigation of the incident and may be required to

 

delve into the individual's background. Knowing the rules beforehand will not only facilitate any necessary remedial action but will set a correct course for conducting a thorough and effective investigation.

### 4. Avoiding the Risk of Violating Rights of the Alleged Perpetrator

Dealing with a potentially dangerous employee may involve communicating about that individual to others, such as a supervisor or other employees, or in responding to a request for references from another employer. Any of these communications has the potential to expose an employer to a claim for defamation by an alleged perpetrator. (Note: In some jurisdictions, an attempt to limit this exposure by withholding information during a reference check may create liability for the employer if a subsequent employer hires the worker and the worker causes others injuries which would have been reasonably foreseeable had the information been disclosed.)

Defamation is defined as the communication or publication of false information, which discredits a person by damaging the individual's character or reputation, and the information must be published to a third party and result in harm to the individual, e.g., not being hired.

Employers have a "qualified privilege" (which is a defense to a claim of defamation) to communicate information about employees. This qualified privilege enables employers to freely communicate, without fear of defamation suits, IF the statement is made in good faith and communicated only to those who have a need to know. Employers are unnecessarily exposed to defamation claims whenever a statement is malicious or communicated to someone who does not "need to know" the information. Some states have enacted statutes specifically to protect employers giving information in response to reference requests.

Another potential claim against an employer by an alleged perpetrator involves the "false imprisonment" of the individual. Employees who are physically detained without justification by their employer may state a claim for false imprisonment. False imprisonment is defined as "the unlawful

 

violation of the personal liberty of another." Thus, employers should physically detain or restrain an employee only to control an extremely volatile circumstance with as little invasive force as possible and only until the appropriate policing authority is summoned to the scene.

Incidents of workplace violence sometimes involve individuals who may invoke the protection of the disability discrimination laws, such as the American with Disabilities Act, to avoid the negative employment consequences of their actions. The ADA, 42 U.S.C. §12101, et seq., prohibits employment discrimination against "otherwise qualified" individuals who meet the definition of disability on the basis of a mental or emotional impairment. An employee who is unable to refrain from physical violence or engages in violence or serious threatening behavior is, in all likelihood, not a "qualified" person under the ADA regardless of any established disability. However, liability for violating the rights of a disabled individual can be substantial, as can be the experience of defending claims of discrimination, and an employer should be prepared to take the necessary action to deal with a mentally or emotionally impaired individual within the limitations imposed by the ADA and other anti-discrimination laws.

### 5. Strategies for Taking Control of the Potential for Workplace Violence

A violent or disruptive workplace incident is often preceded by behavior or signs indicating the approaching storm. Recognizing those indicators and knowing how lawfully to take control of the situation before it becomes a workplace crisis could save lives, prevent injuries, and avoid workforce disruption and employer liability.

Warning Signs Which May Precede Violent Behavior

(1) Unusually high stress in the workplace, e.g., among employees who remain after a reduction in force.

(2) Physically intimidating behavior or threats by an employee.

(3) Significant changes in an employee's personal or work habits.

 

(4) Expressions by an employee of unusual or bizarre thoughts or introverted behavior following the lodging of complaints.

(5) An employee's fixation with weapons signaled by repeated discussion of weapons or exhibiting a weapon to get the reaction of other employees.

(6) Depression.

(7) Recent discipline for inappropriate behavior or harassment.

(8) Self-destructive behavior, such as abuse of drugs or alcohol.

(9) Marital or family problems.

(10) Employees who appear angry or paranoid.

(11) Employees with a history of interpersonal conflict.

(12) Obsessive behavior of a hostile or romantic nature towards co-workers.

"Profile" of a Violent or Disruptive Employee

The following factors may profile an individual disposed to engage in violent or disruptive behavior in the workplace. Before taking any adverse employment action, an employer should seek the advice of a competent mental health professional and/or employment counsel to determine whether an employee who exhibits a combination of these characteristics or behaviors poses an actual problem:

(1) History of violent behavior

(2) White male in his 30's or 40's

(3) Depends on job for self-esteem and sense of identity

(4) Few outside interests

(5) Noticeable swings in mood

(6) Usually alone

(7) Little or no family or social support

 

(8) Withdrawn

(9) Disgruntled -- blames others for his/her problems

(10) Directly or indirectly threatens and intimidates people

(11) History of substance abuse

(12) Serious stress in personal life -- feels out of control

(13) Fascination with weaponry- possible military history or gun collector

Implementation of Protective Measures

To reduce the risk for employees, customers and others, employers (with employee input) should implement protective measures based on information about workplace risk factors and take steps which would reduce or eliminate the risk. To achieve this, an employer should consider:

(1) installing security lighting around the employer's premises;

(2) providing adequate security in parking areas, common areas, stairwells, cafeterias, and lounges;

(3) limiting access to work areas to employees and authorized visitors only;

(4) prohibiting former employees from entering the premises without prior authorization;

(5) installing alarms and surveillance cameras, where appropriate;

(6) increasing staff to avoid any employee working alone;

(7) training for supervisors and employees in conflict resolution and non-violence techniques;

(8) scheduling regular rounds of police surveillance of the premises;

(9) limiting access to the premises during high risk hours (e.g. late at night and early in the morning);

 

(10) conducting thorough background investigations on job applicants (as described earlier);

(11) providing counseling and outplacement for employees whose employment has been involuntarily terminated.

Workplace Policies and Procedures for Preventing Harassment and Violence

To comply with mandates of the U. S. Supreme Court and other federal and state courts, as well as the Equal Employment Opportunity Commission and other fair employment practice agencies, all employers should develop and implement a policy prohibiting harassment and violence of any kind and encouraging employees to report all complaints of harassing or violent behavior to the designated management official. All reports should be documented, as well as the findings of the investigation. These reports should include statements of the reporting individual and other individuals who may have information relevant to the report. Observations or statements by the individual accused of misconduct also should be recorded. When appropriate, local law enforcement authorities should be notified. Once the investigation is completed, management should take appropriate action to counsel, discipline or terminate the offender as soon as possible.

All supervisors and managers should be trained on the harassment policy and the procedures for reporting and investigating complaints. All employees also should be trained in the employer's anti-harassment policy, including what kinds of behavior are considered to be inappropriate in the workplace and what the consequences are for engaging in prohibited behavior. Employees should understand the procedures for making and investigating a complaint, and they should be assured they will not be retaliated against and should immediately report any additional inappropriate behavior.

 

Measures To Reduce The Risks Of Workplace Disruptions

(1) Conduct a comprehensive assessment of company policies regarding workplace violence.

(2) If no policies exist, develop written policies.

(3) Provide a means for communicating policies to all employees.

(4) Provide training and education to all employees regarding warning signs of potentially violent employees.

(5) Train managers in termination procedures, conflict resolution and observations skills.

(6) Educate managers about situational variables that may increase the likelihood of violence.

(7) Educate managers about personality characteristics that are correlated with potentially violent employees.

(8) Train supervisors to effectively manage a distraught or angry employee.

(9) Establish a confidential toll-free hot line.

(10) Include a general assessment of dangerousness on employee evaluations.

(11) Conduct periodic attitude surveys and/or behavioral observation programs.

(12) Establish a trauma response program which includes an assessment of post-traumatic stress reactions.

(13) Most importantly, employees need to know that upper level management considers providing a safe and hostile-free workplace a top priority.

 

Preventive Measures To Handle An Angry Or Distraught Employee

(1) Be a good observer, notice any changes in an employees' behavior. Do not accept simple answers or explanations about the problem behavior.

(2) Document observable behavior. Be specific.

(3) Be prepared for the meeting with the employee. Know what you want to say and how you want to say it.

(4) Get to the point quickly and provide examples of what behaviors you are referring to.

(5) Ask the employee for his or her input. Asking questions is a good technique for allowing the manager to retain control over the situation even though the employee is talking.

(6) Ask how you can help. Have the employee come up with solutions with you.

(7) Identify what steps the employee must take to effectuate change in his or her conduct, which may include modifying aspects of the work environment.

(8) Plan for at least two to three follow-up meetings to check on progress. If necessary, modify plan with the employees' input.

Procedures To Reduce The Risk Of An Angry Or Violent Reaction By A Terminated Employee

(1) There should be a clear termination policy applied consistently to all employees.

(2) The employee should be treated with dignity and respect.

(3) Expect the employee to react and not necessarily be rational. Losing a job is one of the most psychologically stressful events someone can experience.

(4) Be honest and direct about reasons for the termination.

(5) Describe the behaviors and business reasons for the termination. Avoid moral judgments and personal accusations or vague descriptions such as "Your poor attitude".

(6) In most instances it may be prudent to have a Human Resource person present.

 

(7) Offer outplacement or EAP services if possible. These services have been shown to lessen the psychological impact of job loss.

(8) In cases of termination due to downsizing, acquisitions or mergers, do not side with the employee regarding the fairness of the decision. This will not be seen as an understanding gesture, but rather exacerbate negative feelings.

(9) Clearly state company benefits.

(10) Follow all procedures recommended for managing an angry employee.

**B. Religious and Ethnic/National Origin Discrimination in the Workplace: Minimizing the Backlash**

One of the effects of the recent terrorist activities has been a renewed sensitivity to discrimination based on religion, national origin and ethnicity. Title VII prohibits discrimination in employment on these bases, 42 U.S.C.A. §2000, and employers are required to reasonably accommodate employees' religious beliefs and practices.

In light of the heightened concerns about incidents of workplace discrimination based on these factors, the Equal Employment Opportunity Commission issued a special alert dated September 14, 2001, urging employers to be particularly vigilant to "instances of harassment or intimidation against Arab-American and Muslim employees."

> In the wake of this week's tragic events, Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission (EEOC), called on all employers and employees across the country to promote tolerance and guard against unlawful workplace discrimination based on national origin or religion.
>
> "We should not allow our anger at the terrorists responsible for this week's heinous attacks to be misdirected against innocent individuals because of their religion, ethnicity, or country of origin," Chair Dominguez said. "In the midst of this tragedy, employers should take time to be alert to instances of harassment or intimidation against Arab-American and Muslim employees. Preventing and prohibiting injustices against our fellow workers is one way to fight back, if only symbolically, against the evil forces that assaulted our workplaces Tuesday morning."

 

EEOC encourages all employers to do the following:

Reiterate policies against harassment based on religion, ethnicity, and national origin;

Communicate procedures for addressing workplace discrimination and harassment;

Urge employees to report any such improper conduct; and

Provide training and counseling, as appropriate.

Ms. Dominguez exhorted all individuals to heed the words of President Bush, who said yesterday: "We must be mindful that as we seek to win the war [against terrorism] we treat Arab-Americans and Muslims with the respect they deserve."

EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, national origin, sex, and retaliation for filing a complaint. For example, Title VII precludes workplace bias based on the following:

Religion, ethnicity, birthplace, culture, or linguistic characteristics;

Marriage or association with persons of a national origin or religious group; Membership or association with specific ethnic or religious groups;

Physical, linguistic or cultural traits closely associated with a national origin group, for example, discrimination because of a person's physical features or traditional Arab style of dress; and

Perception or belief that a person is a member of a particular national origin group, based on the person's speech, mannerisms, or appearance.

"Our laws reaffirm our national values of tolerance and civilized conduct. At this time of trial, these values will strengthen us as a common people," Ms. Dominguez said. "The nation's workplaces are fortified by the enduring ability of Americans of diverse backgrounds, beliefs, and nationalities to work together harmoniously and productively."

A plaintiff may bring suit for employment discrimination based on his or her religious beliefs, ethnicity or national origin harassment because of his or her religion, ethnicity, or national origin, or failure of an employer to reasonably accommodate his or her religious practices. Some circuits have created a three-part analysis for establishing a prima facie case of religious discrimination. Under that analysis the plaintiff must establish: "(1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he has informed his employer of his religious belief; and (3) he was

 

disciplined, discharged, or otherwise damaged as a result of his assertion of the conflicting religious belief." The central issues in this area of the law revolve around the statutory exemptions from the general rule against religious discrimination, the constraints of the First Amendment, the definitions of the terms "religion" and "religious practices," and the extent of reasonable accommodation an employer is obligated to provide.

### 1. The Constraints Of The First Amendment

The First Amendment's protection of the free exercise of religion imposes limits on Title VII's prohibition against discrimination on the basis of sex, race, or national origin by religious institutions. For example, in Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985), the Fourth Circuit refused to apply Title VII to a female pastor's claim she had been denied a position at a church because of her sex and her association with blacks. The court held an inquiry into the matter would constitute "excessive government entanglement" into the affairs of the church in violation of the First Amendment. Id. at 1169.

However, in E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982), an employee of a non-profit corporation affiliated with the Seventh-Day Adventist Church claimed she had been discriminated against because of her sex. In deciding there existed no First Amendment bar to the claim, the Ninth Circuit noted the plaintiff's responsibilities did not "go to the heart of the Church's functions . . . ." Id. at 1277. In another case on the subject, the Court of Appeals for the District of Columbia Circuit held the First Amendment bars judicial review of a sex-discrimination claim by a nun denied tenure at Catholic University. EEOC v. The Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996).

### 2. Definition Of Religion And Religious Practices

Another issue raised by Title VII which has generated litigation is the scope of the terms "religion" and "religious practices." Section 701(j) states that "religion" includes all aspects of religious

 

observance and practice, as well as belief . . .. 42 U.S.C.A. §2000e(j). The EEOC defines religious practices as including "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. §1605.1 (1985).

Two notable cases in this area are Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025 (E.D. Va 1973), aff'd, 508 F.2d. 504 (4th Cir. 1974), and American Postal Worker's Union v. Postmaster General, 781 F.2d 772 (9th Cir. 1986). In Bellamy, the Fourth Circuit held membership in the Ku Klux Klan was political and not entitled to Title VII's religious protection. 368 F. Supp. at 1025. But in American Postal, the Ninth Circuit held opposition to the draft on moral grounds is protected. 781 F.2d at 772.

Examples of "religious beliefs" held to be protected under Title VII include: (1) "Old Catholic" belief employee had to keep her head covered at all times; (2) wearing of an anti-abortion button with a picture of a fetus; (3) a Jehovah's Witness' refusal to work on military tanks; and (4) the refusal to take unpaid leave for a religious observance. On the other hand, personal beliefs held not to be protected under Title VII include: (1) eating a certain brand of cat food to enhance well-being; (2) Baptist's claimed belief in adultery; and (3) claim to be unable to work on Sundays when the employee had worked on Sunday in the past.

### 3. The *De Minimis* Standard for Undue Hardship under Title VII

Section 701(j) imposes a duty on employers to "reasonably accommodate" an employee's religious practices provided such accommodation does not cause "undue hardship" to the employer's business. 42 U.S.C.A. §2000e. Though the statute does not specify the relationship or the scope of these terms, the Supreme Court has created a very broad standard for determining what actions by an employer will constitute undue hardship, holding if the burden as the employer is more than "de minimis," it is "undue." Thus, although an employer still is required to make some attempt at

 

accommodation (unless it can show it is unable to take any action), the presence of the undue hardship defense for religious discrimination results in the dismissal of many religious discrimination claims.

In Trans World Airlines, Inc., v. Hardison, 432 U.S. 63 (1977), the Supreme Court addressed the issue of whether T.W.A. had to accommodate an employee who refused to work during his church's Sabbath. The company attempted to rearrange the employee's work schedule, but the plan was blocked by a union on the basis of a collective bargaining agreement. Id. at 79. T.W.A. also offered to help the employee find another position within the company. Id. at 77. T.W.A. argued, however, it should not be forced to hire a replacement because doing so would cause lost efficiency or higher wages, and thereby subject the company to undue hardship. Id. at 95. The Supreme Court agreed. It stated "to require T.W.A. to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." Id. at 84. The Supreme Court also expressed concern that forcing T.W.A. to accommodate the plaintiff by compelling a co-employee to work on the Sabbath "would involve unequal treatment of employees on the basis of religion." Id. at 84-85.

In the aftermath of Hardison, cases have gone both ways concerning whether there was undue hardship on the employer stemming from an employee's demand to have his or her religious practices accommodated. The common themes throughout these cases are, however, that employers are not required to make accommodations which will result in: (1) discrimination against co-employees; (2) breach of a seniority system; (3) the payment of a premium wage for a substitute; or (4) loss of efficiency.

Both federal and state legislators are becoming increasingly concerned with "personal" issues which can become problems in the work environment. Employers must be sensitive to the individual rights of their employees and balance those rights against the right to a productive workforce. The days of making employment decisions based upon personal beliefs and preferences are gone, giving way to statutes and regulations designed to protect individual employees. As it is impossible to prevent

 

personal issues from invading the workplace, employers must learn to handle those issues in a way that conforms to the numerous discrimination laws but does not sacrifice the quality of their workforce, their products, or their services.

## III. EMPLOYEE MONITORING, INVESTIGATIONS, AND PRIVACY RIGHTS

The devastating attacks of September 11, 2001 on thousands of employees in the New York City and Washington, D. C. areas have called into question the security of every American workplace. Enhancing the security and safety of the workplace involves tightening up not only the physical surroundings but the conduct of employees who populate them. Among the ways employers can retain more control over what happens at their workplaces is to monitor the actions of employees. However, there are many restrictions, both practical and legal, on what measures employers can lawfully take to monitor workplace behavior.

### A. Monitoring Telephone Usage

Employers always have monitored employee job performance for work product quality, efficiency, and productivity, but they have traditionally relied on supervisors to do this. Increasingly, employers are using technology to track employee workplace performance, sometimes through monitoring telephone calls. In some industries, listening to an employee's telephone conversations enables the employer accurately to assess the employee's contact with clients and the public. In these industries, such as catalogue sales and telemarketing, employees understand that they may be monitored. However, in other work situations, according to one national workplace privacy poll, 81% of Americans believe employers do not have the right to monitor an employee's telephone calls. Indeed, some studies link electronic monitoring with increased stress and feelings of social isolation, according to the "Journal of Applied Psychology."

Nonetheless, many employers monitor telephone calls under an exception to the Federal Wiretapping Act, which allows surreptitious monitoring in the "ordinary course of business." A general

 

policy of monitoring does not by itself establish an ordinary course of business. Rather, every particular monitoring activity must be considered separately to determine whether it occurred in the "ordinary course of business."

For example, one court found the "business extension exception" was a safe harbor to an employer where a supervisor had reasonable suspicions an employee was disclosing confidential information to a competitor and had warned the employee of his suspicions. The court held the supervisor acted in the ordinary course of business by listening in on an extension phone while the parties discussed business information. In another case, the exception applied when, after overhearing a phone conversation in which an employee berated supervisors, an employer turned on a taping system to record the remainder of the conversation. The court held the exception applied because the conversation occurred during office hours, between co-employees, and concerned scurrilous remarks about supervisors. Likewise, an employer could monitor the business calls by its employees, who were customer service representatives, to supervise employee training and service, but not all calls.

Notably, the "business extension exception" did not protect a liquor store owner who suspected a burglary of being an "inside job" involving one of his employees. The employer installed a device to record surreptitiously all calls made or received at the store. The plaintiff employee, who was married, was having an affair with a second plaintiff, who was also married. The employer recorded about 22 hours of calls, many of them sexually provocative. The employer was unable to implicate the plaintiff in the burglary but did learn she sold her paramour a keg of beer at cost for which she was terminated. The employer argued, among other things, the monitoring came within the "business use" exemption. The court disagreed and found the employer had violated the Federal Wiretapping Act by using the recording device.

Similarly, another court held the exception could not protect an employer when it attached a "voice logger" to record all phone calls. A security guard employed by a subcontractor of the

 

company claimed the taping violated the Federal Wiretapping Act. The court held the taping was not protected by the business extension exception because the logger was not "a telephone or telegraph instrument, equipment or facility," and there was no business justification for "the drastic measure of 24-hour a day, 7-day a week recording of telephone calls."

### B. Monitoring E-Mail

The Electronic Communications Privacy Act of 1986 regulates the monitoring of electronic communications, including e-mail. The ECPA provides criminal and civil penalties against any person who intentionally intercepts an electronic communication.

The applicability of the ECPA to private employers monitoring their employees' e-mail is unresolved by the federal courts. As mentioned above, the statute includes several exceptions, including one for monitoring done in the "ordinary course of business" for the provider of the communication service or for situations where one of the parties to the communication gives prior consent. The statute also allows the provider of the service to record the fact that a communication was made to protect the provider from fraudulent, unlawful, or abusive use of such services. Finally, the disclosure of stored electronic communications is permitted with the consent of one party to the communication or when incident to the rendition of the service or to the protection of the rights or property of the provider of that service.

Court decisions involving monitoring employee e-mail have balanced the employer's legitimate business needs against the employee's privacy expectations. In a recent Pennsylvania case, an employee was discharged for sending "inappropriate and unprofessional comments" via e-mail. The employer had assured its employees that all e-mail communications would remain confidential and privileged and would not be intercepted and used as the basis for discipline or termination. Nonetheless, the plaintiff's communications were intercepted and were used as the basis for the termination of his employment. The employee sued for wrongful discharge and claimed the employer violated public

 

policy by terminating him in violation of his common law right to privacy. The court rejected the employee's claim, stating:

> [W]e do not find a reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system, notwithstanding any assurances that such communications would not be intercepted by management. Once plaintiff communicated the unprofessional comments to a second person . . . over an e-mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost. Significantly, the defendant did not require plaintiff, as in the case of an urinalysis or personal property search, to disclose any personal information about himself. Rather, plaintiff voluntarily communicated the alleged unprofessional comments over the company e-mail system. We find no privacy interests in such communications.

### C. Monitoring Use of the Internet

The Internet is being used by many employers to supplement or substitute for more traditional sources of information, such as print publications, research services, and the like. However, many employees are using the Internet for a multitude of non work-related purposes, including downloading free computer games, checking stock quotes, and reading the "sports page." Employee misuse of employer provided Internet access has gone beyond downloading games. Open viewing of sexually explicit Web sites like Penthouse, using Playboy screen savers, posting lewd jokes on online company bulletin boards, or other inappropriate conduct may create a "hostile working environment" and provide the basis for a sexual harassment claim. The Telecommunications Act of 1996, imposes criminal liability for transmitting or allowing to be transmitted "indecent" materials over online and computer networks to which minors have access. While this law limits the liability of companies whose employees illegally spread obscene material without management's knowledge, employers nonetheless may be liable for creating or tolerating a hostile work environment.

Many companies attempt to take control of the Internet as an effective workplace tool by having official policies on employee use, informing employees they may be monitored, and expressly barring employees from downloading offensive material. Others have no official policy and actively encourage employees to go on line as much as possible to gain insight on competitors and customers.

 

Policies restricting employee use of the Internet and email to business use only may run afoul of employee rights under the National Labor Relations Act. The former general counsel of the National Labor Relations Board has taken the position that blanket prohibitions on the use of such electronic communication systems for only business purposes may run afoul of otherwise lawful no-solicitation and no-distribution rules.

### D. Monitoring Issues Before, During and After Employment

Even in the age of rapidly evolving technology, an employer's need to control and direct what is happening in the workplace covers much broader ground than simply monitoring the electronic communications of its employees. There are many more traditional means of gathering information and monitoring behavior that can be useful in taking control of workforce security, safety, competency, and productivity. However, the protection of individual privacy is often cited as a reason to be wary of many of these tools, and corporate counsel needs to be mindful of the legal tension that exists when considering and administering such monitoring methods.

#### 1. Arrest and conviction records

State laws on the use of such information vary widely and may prohibit inquiries about arrests or require the arrest information contained in a job application be withheld from anyone interviewing the applicant, other than those in the personnel department or in charge of employment. Some states may require an employer to advise an applicant in writing when rejected because of a conviction record, while others require employers to inform applicants that a conviction will not necessarily result in refusal of employment.

#### 2. Psychological testing

Psychological testing should be job-related and narrowly tailored to serve the employer's purpose. In addition to concerns about privacy rights, employers performing psychological testing also

 

must comply with the EEOC's regulations on pre-employment testing and the restrictions imposed by the Americans with Disabilities Act.

**3. Genetic testing**

Several states, such as Connecticut, Florida (only with informed consent), Maine, New York, North Carolina, Wisconsin and Texas have enacted laws prohibiting the use of genetic testing in the employment process. Other states, as well as the U.S. Congress, are considering such legislation since scientific breakthroughs are making it easier to identify genes linked to disease. Other laws, such as the Americans with Disabilities Act may prohibit or limit such testing, and court challenges typically allege constitutional rights against unreasonable search and seizure and due process.

**4. Credit checks**

Employers' use of credit reports in screening applicants for employment triggers the federal Fair Credit Reporting Act. As amended in 1997, the FCRA provides specific notice and disclosure requirements before using a consumer reporting agency to obtain information that may be used in the screening process. If an employer denies employment based on a consumer report, it must, among other things, give the applicant the name and address of the agency which supplied the report. If an employer uses an investigative consumer report, which involves obtaining information about the applicant through personal interviews with others, the employer must meet more stringent notice and disclosure requirements. Many states have their own versions of the FCRA with varying requirements concerning notice, disclosure, and rights.

**5. Lawful Activities Outside the Workplace**

Many states, such as Arizona, Connecticut, the District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, South Carolina, South Dakota, West Virginia and Wyoming, have enacted legislation prohibiting employers from discriminating against individuals who

 

use tobacco products outside the workplace. A number of states, e.g., New York and California, also prohibit employers from discriminating against individuals on the basis of their lawful activities outside the workplace

**6. Medical information**

Under the ADA, an employer may not ask about an applicant's physical or mental limitations prior to making the applicant a conditional offer of employment. Employers may not limit, segregate, or classify a job applicant or employee in a way which adversely affects the person's opportunities or status. The ADA, the federal Family and Medical Leave Act and several state statutes also require employers to maintain medical files separate and apart from personnel files and to limit their access only to individuals with a need-to-know.

**7. Polygraph testing**

The federal Employee Polygraph Protection Act of 1988 prohibits most private employers from using lie-detector tests to screen job applicants. To test current employees, an employer must reasonably suspect the employee was involved in a workplace theft or other incident causing economic loss to the employer.

**8. New hire reporting requirements**

The Welfare Reform Act of 1996 requires states to establish and maintain a directory of information on all newly hired employees to be used for tracking and enforcing child support obligations. Enforcement responsibility is delegated to the states to require employers (or anyone transacting business in the state) to report the name, address, and social security number of each new employee to the state labor department.

**9. Personal items on employer's premises**

An employee's expectation of privacy may extend to areas of personal use within the workplace or on the employer's premises, such as employee lockers, desks, office space, and parking

 

lots. It may also include personal mail received at the workplace. However, an employer's right to retain control over "private" uses of company property and premises may be established through a clearly worded and communicated policy reserving management's rights to access those spaces and to conduct limited searches of even personal items contained in those spaces. Again, it is the reasonableness of the expectation of privacy which determines whether there has been a violation of rights, and the employer's policy diminishes that expectation of privacy rights.

**10. Strip searches**

Workplace strip searches create a serious threat to an employee's privacy and the potential for enormous liability for the employer. They should be avoided.

**11. Undercover agents**

Use of undercover agents for reasonable surveillance of employees may be within permissible bounds if not done overzealously. For example, an employer may use an investigator to obtain evidence of fraudulent workers' compensation claims or to gather other evidence to be used in defending a claim of disability discrimination. In fact, according to one recent private study, 67% of the companies surveyed use investigators to collect or verify information concerning personnel. However, as with all intrusions into an employee's personal affairs, the employer should have a reasonable likelihood of obtaining the sought after information to justify the surveillance.

**12. Medical files**

Employers who use employees' medical records must ensure their confidentiality and limit access to them. Failure to do so could result in a suit for invasion of privacy or for violating state or federal law, such as the Americans with Disabilities Act or the Family and Medical Leave Act. Federal law and some state laws require medical records to be kept in confidential files, separate and apart from a personnel file.

 

**13. Publication of private facts - duty to warn**

An employer's publication of private facts has been held to be an invasion of an employee's privacy. However, failure to disclose private information, in some circumstances, also may constitute negligence, and an employer's failure to warn an employee or a subsequent employer of a potentially dangerous employee or situation may create liability.

**14. HIV testing**

OSHA's Bloodborne Pathogens Standard requires employers to make HIV testing and pre- and post-testing counseling available to employees who could be "reasonably anticipated" to come into contact with blood and other potentially infectious materials as a result of performing their job duties. Employers must maintain the confidentiality of medical records containing information about employees' physical and mental health.

**15. Fetal protection policies**

A policy designed to protect pregnant female workers from inadvertent exposure to substances harmful to a fetus has been held to violate federal anti-discrimination law. International Union United Auto Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991).

**16. Personnel files**

Some states have statutes requiring an employer to provide a copy of the personnel file, or parts of it, to a current or former employee. Furthermore, employers may be compelled to disclose personnel files during the discovery phase of employment related litigation. Employers may seek a protective order for the personnel files or limit their disclosure to specified individuals.

**17. Publication of Facts Surrounding Termination**

An employer exposes itself to liability for defamation and even libel when it publishes to a third party information falsely accusing a former employee of actions injurious to his or her reputation. Although an employer enjoys a qualified privilege regarding the disclosure of information

 

about a former employee, management should provide information of a sensitive nature on a strictly "need to know" basis.

### 18. Disclosure to union representative

A union may request relevant information concerning a terminated employee during the grievance/arbitration procedure. How much information an employer must disclose to the union involves balancing the employee's privacy interests with the union's right to information to fulfill its obligation as the representative of the employees. In a leading case on disclosure of information to a union representative, Detroit Edison Co. v. National Labor Relations Board, 440 U.S. 301 (1979), the Supreme Court of the United States held that a union was not entitled to confidential test scores of unit employees without their consent.

## E. Conclusion

Protecting employee privacy rights undoubtedly will continue and likely will increase despite the heightened awareness of the vulnerability of most workplaces to acts of violence, disruption and harassment. In fact, as technology allows an employer to monitor areas not previously monitored, the "right to be let alone" may become the personal oasis in a technological desert. Employers can take control, however, and work within the confines of the various statutory and common law protections afforded employee privacy. For example, employers can take advantage of the broad exceptions to the statutory prohibitions against monitoring telephone calls and electronic communications. Concerning common law rights to privacy, employers should give applicants and employees notice of intended monitoring, ensure that monitoring is directly related to the purposes and functions of the employee's job, use reasonable and unobtrusive means to monitor employees when necessary; and safeguard the confidentiality of private information obtained about employees.

 

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# LEGAL AND SECURITY ISSUES IN THE POST SEPTEMBER 11 WORLD

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As a result of the events of September 11 and thereafter, corporations are seeking to implement new legal policies and security procedures to protect their plant, equipment, physical and intellectual assets, employees, and their ability to continue their business operations, regardless of terrorist acts or other external events such as natural disasters. This requires the development and implementation of a Disaster and Emergency Management Plan and a legal audit to work with that plan. Some or all of the areas discussed below may be included in developing such a plan, depending on the needs and desires of the corporation:

## LEGAL ISSUES TO BE CONSIDERED REGARDING DISASTER MANAGEMENT

1. Review potential liability for failure to train or properly prepare for terrorist events;

2. Update personnel policies to allow businesses to perform the maximum permissible background checks on potential hires and existing employees and to allow continuing checks at timed intervals or at the discretion of the corporation;

3. Consider employee and management continuity issues and the types of emergency contact lists and practices that a company should have in place;

4. Evaluate legal requirements for back-up and redundancy systems for document preservation, particularly for regulated industries and government contractors;

5. Review current insurance policies and determine the type of insurance coverage a company should have (*e.g.*, business interruption, relocation expense, computer damage and interruption, restoration of critical documents, key man life insurance, property, terrorism, etc.);

6. Consider the need and requirements for a due diligence program for terrorism protection;

 

7. Review company and other welfare benefit plans to ensure coverage for mental and physical injuries suffered as a result of a terrorist event;

8. Establish agreements with strategic business partners to supply redundancy for key business systems;

9. Establish and review procedures for employee reporting of suspicious events and people

10. Set up succession planning for key employees;

11. Review current and pending government restrictions as a result of terrorist issues;

12. Review leases and other business documents for appropriate protection from a terrorist event;

13. Establish policies for cooperation with the FBI and other law enforcement agencies, absent a subpoena, without violating rights of employees and others

## SECURITY ISSUES REGARDING DISASTER MANAGEMENT

- Physical infrastructure vulnerability assessment (including structural integrity, HVAC and fire protection, and evacuation/protection of employees);
- Critical infrastructure protection analysis;
- Continuity of operations and business resumption plan;
- Identify essential functions for business continuation;
- Communications plan for warning and notification;
- Delegations of authority and orders of succession;
- Alternate facilities analysis;
- Cyber-terrorism and information assurance including protection of computers, communications network and essential records and databases;
- Develop disaster response team;
- Weapons of mass destruction terrorism preparedness;
- Establish protocols and identify sources of assistance to employees and their families.

Specifically, the plan may include:

Employees
- Employee screening procedures
- Employee evacuation plan and training
- Employee emergency contact plan
- After-event victim/family assistance plan
- Executive protection plan

Office, Plant and Equipment
- Physical and technical security survey
- Protection Plan
- Intrusion and theft vulnerability assessment
- Alternate site redundancy analysis
- Hardware and software systems vulnerability assessment
- Systems protection plan
- Alternate/Redundant systems implementation

Continuity of Business
- Disaster management plan
- Leadership preservation
- Workforce preservation
- Alternate operations/manufacturing capability
- Alternate supplies/raw materials sources
- Alternate distribution networks

Weapons of Mass Destruction
- Identification and description of weapons
- Instructions on what to do in the event of an attack
- Definition of relationships with police, fire and hospital organizations
- Definition of evacuation routes, use of first aid
- Decontamination training plan
- Protective equipment specification and procurement methods

A sample plan may look, in part, as follows:

Disaster Contingency Action Plan

1. Communications Plan
    A. Designate communications center and coordinator;
    B. Designate staff to communicate with employees, emergency workers, building management, government agencies, utility companies, postal officials, customers, insurance company and media;
    C. Designate staff to obtain critical records located off-site;
    D. Develop plans to manually perform computer functions for critical tasks.

2. Staffing Plan
    A. Identify key staff and designate those to work in emergency situation;
    B. Prepare and test transportation for employees to emergency off-site location;
    C. Identify key tasks in priority order to be performed to keep the business minimally operational.

3. Emergency off-site location and equipment plan
    A. Identify possible off-site facility to continue business;
    B. Identify critical equipment needed such as computer hardware and telecommunications equipment;
    C. Designate staff to arrange for immediate forwarding of telephone and mail service to another location.

4. Financing Disaster Recovery
    A. Establish a disaster recovery fund or appropriate designated lines of credit;
    B. Designate a budget line item for annual expenses for disaster recovery planning.

5. Disaster Recovery Resources
    A. Develop a list of disaster recovery vendors, off-site vendors, and equipment vendors including disk restoration vendors, fire and flood clean-up vendors;
    B. Develop a list of disaster recovery planners and support groups to share specialized knowledge and techniques.

 