

The Great Texas Freeze: Insurance Policies May Leave Landlords Out in the Cold

02.23.21

The historic February 13-17, 2021, winter storm caused billions of dollars in property damage across the state of Texas. Extreme low temperatures, heavy snow and ice storms and widespread power outages led to broken pipes and other weather-related system failures, flooding, destroyed landscaping, loss of inventory and equipment, and a myriad of other problems that will take affected property owners weeks and months from which to recover.

Many retail landlords in Texas are reviewing their property insurance policies and the insurance clauses in their leases to determine responsibility for and whether insurance covers the formidable repair costs they are facing. While the lease contract will allocate coverage requirements between the landlord and tenant, the language of their respective insurance policies will set forth which types of losses are covered or excluded and whether the insured party took all necessary steps to benefit from such coverage.

The following news alert highlights typical tenant insurance requirements in retail leases and what types of damages those policies do and do not cover, suggests immediate steps retail landlords should be taking, and discusses issues or disputes they can anticipate in the claim process.

What type of insurance do retail leases typically require tenants to carry and what types of damage do those policies cover and not cover?

- Commercial general liability insurance, which generally covers claims against the tenant related to a third party's bodily injury or property damage caused by the tenant's business activities itself. If a landlord can prove that its tenant did not properly safeguard the leased premises (e.g. drip faucets or keep the heat on [assuming the leased premises maintained power]), damage to the building could be covered by the tenant's general liability insurance or contractual indemnity insurance.
- Property insurance on all alterations, improvements, furnishing, fixtures, equipment and personal property at the premises, which covers claims for damage to tenant's property located at the leased premises. This insurance would cover damage to tenant's improvements and inventory and equipment within the premises as well as any stubbed-out or dedicated pipes, but not damage to landlord's pipes or flooding damage to the walls.
- In the event a tenant is not carrying the required insurance or if such insurance is not available, the landlord may still have a law suit against the tenant if the lease contains proper indemnification language.
- If the damage is so significant that operation from the leased premises is not possible for a significant period of time and the lease calls for abated rent, business interruption insurance and rental loss insurance may protect the tenant and landlord respectively during the period of reconstruction and rental abatement.

What steps should commercial property owners take in the aftermath and what kind of disputes can be anticipated?

- Locate all landlord and tenant insurance policies and certificates and ensure that all lease coverage requirements are met. The terms of the policy will always control, and exclusions and conditions should be read carefully. Landlord should confirm that the tenant's insurance broker properly placed the tenant insurance as landlord may have an errors and omissions claim on tenant's behalf for *such broker's failure* to do so.
- Carefully document all steps taken to protect property and losses related to the event. Carriers will require confirmation that all conditions to coverage were observed, including steps the tenant did or did not take that could trigger liability under tenant's policy.
- Gather evidence to support the value of any property lost and preserve and protect the property from further loss. Take all reasonable steps to minimize additional damage, including damage related to loss of business.
- Notify the carrier of the loss within any time limits imposed by the policy, and carefully document all notices and communications given to the carrier

- Insurance carriers may change coverage language going forward in response to this disaster. When the time comes to renew your insurance policy, carefully review the coverage exclusions to make sure the carriers are not treating frozen pipes the same way they now treat windstorms and hail.
- Going forward, require evidence prior to lease execution that the tenant has provided the lease to its insurance broker and provided the landlord with evidence of the required coverages and certificates.
- In the event your lease agreement does not have adequate insurance requirements, consider amending the lease to provide ample coverage for the next calamitous event.

Contact:

Jeff Bates | 512.370.2858 | jbates@winstead.com

Disclaimer: Content contained within this news alert provides information on general legal issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.