

The Self-Insured Landlord— When Do Insurance Charges Give Rise to a Legal Claim?

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Is your landlord charging for insurance costs? Has the landlord provided documentation showing it has purchased insurance for the property? Does the documentation show that the insurance satisfies the requirements in the lease?

It is not uncommon for a large landlord to self-insure at least a portion of its insurance obligations or for a landlord to create a “captive” insurance company to insure its properties. In many cases, these programs do not satisfy the landlord’s insurance obligations under the lease and the costs of these programs are not properly charged to the tenant. What are a tenant’s rights with respect to a landlord’s insurance costs? The following three steps can help a tenant gather and analyze the facts to determine whether it has a claim against the landlord for improper insurance charges.

First, review the lease. Identify the landlord’s insurance obligations under the lease and the landlord’s right to charge the tenant for insurance costs.

Second, gather the information necessary to determine whether the landlord is complying with its insurance obligations under the lease. This step usually requires negotiations and sometimes squabbling with the landlord, but the tenant is entitled to this information.

Third, identify and assert claims against the landlord. If the landlord is self-insuring and charging those costs to the tenant and the lease does not permit that, the tenant may have a claim for breach of contract or even fraud.

Step 1: Review The Insurance Provisions in the Lease

The first step in identifying a tenant’s rights under any provision of a retail lease is to read the lease. Identify the landlord’s insurance obligations. A retail lease usually requires the landlord to obtain property and liability insurance for the common areas of the shopping center.

Some leases have specific requirements regarding the insurance. The lease may set a minimum deductible. The lease may require an insurer with a specific rating or location. The lease may require that the tenant be listed as an additional insured. It is helpful to compile a list of all of the landlord’s insurance requirements under the lease, so that you can identify what information you need to confirm with the landlord.

In addition, you should analyze what right the landlord has to charge the tenant for insurance costs. Most retail leases permit the landlord to charge the tenant for some amount of insurance costs. Often, the lease provides that the landlord may charge the tenant for its proportionate share of the insurance “premiums.”

Examine the lease provision carefully. Courts have found that when a landlord is permitted to charge for “costs of the insurance” or “costs of premiums,” these terms do not include all costs relating to insuring the properties, such as deductibles or self-insurance costs. Rather, “costs of insurance” and “premiums” include only the tenant’s proportionate share of the insurance premium paid by the landlord to a third party. See *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 636 F. Supp. 2d 869 (D. Minn. 2009).

Step 2: Request and Review Insurance Policy Information From the Landlord

Once you know the landlord’s insurance obligations and rights under the lease, the next step is to gather the facts necessary to determine whether the landlord has satisfied its obligations. While it is possible that the landlord has provided the tenant with detailed information regarding insurance costs, that is rarely the case. As with most CAM charges, the tenant should request back-up or reconciliations for all insurance costs charged to the tenant.

What should be requested will vary based on the landlord’s obligations under the lease. Typically, a tenant will want to request from the landlord: a list of all policies and the properties covered by each policy; copies of relevant portions of the policies; certificates of insurance; invoices showing the premium amount for the insurance; proof of actual claim costs incurred by the landlord (if charged to the tenant); and a detailed accounting of any administrative or other expenses charged to the tenant.

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The tenant's request for information may be denied or go unanswered by the landlord. Be persistent. You are entitled to the facts supporting the landlord's obligations under the lease. See *PV Properties, Inc. v. Rock Creek Village Associates Ltd. Partnership*, 549 A.2d 403, 410 (Md. Ct. Spec. App. 1988) (finding fiduciary obligation to provide backup for lease charges: "Reason and fairness require that the tenant be afforded some means of verifying the charges assessed against it."). In reality, if the tenant files a lawsuit against the landlord, the court will require the landlord to provide this information to the tenant. Therefore, the best way to persuade a landlord to provide this information is for the tenant to convince the landlord it is prepared to pursue the matter in court. If the landlord is interested in resolving the dispute, it is likely to provide the information to avoid a lawsuit.

Step 3: Identify and Assert Your Rights Against the Landlord

Once a tenant has examined the lease and gathered the facts, the tenant must determine whether it has a claim against the landlord. The most typical claim against a landlord for failure to satisfy its insurance obligations is a claim for breach of contract. If the lease requires that the landlord obtain insurance with an insurer with a specific rating or maintain a minimum deductible, the failure to do so is a breach

of the lease. But, there is no viable legal claim unless the tenant suffered damages as a result of the breach.

Often, the tenant suffers damages by being charged for insurance costs that are not in compliance with the lease. For example, if the landlord is required to obtain insurance with a third party qualified to do business in California and the landlord is permitted to charge the tenant its proportionate share of the cost of the insurance, the landlord cannot opt to self-insure and charge the tenant costs associated with maintaining the self-insurance program. These costs are not chargeable to the tenant, unless the lease permits those charges. The lease language is critical in determining whether there is a breach of contract claim for improper insurance charges.

Further, if the landlord misrepresented insurance costs to the tenant, the tenant may have a claim for fraud. In *Best Buy v. DDR*, the court held that the tenant could go forward with a fraud claim against the landlord based on reconciliation documents that referred to a self-insurance program as "insurance" and captive insurance premiums as "deductibles." If you suspect that the landlord is misrepresenting insurance or other charges, you should investigate it immediately. A tenant has an obligation to investigate when it has a reasonable suspicion of fraud.

If the tenant identifies a claim against the landlord relating to insurance costs, the tenant should send a demand letter to the landlord providing legal and factual support for the claim and demanding a remedy. To be effective, the tenant must persuade the landlord that the tenant is willing to pursue the claim in court if the landlord does not respond to the demand.

Conclusion

As landlords are more creative with their insurance programs, tenants must be more vigilant in asserting their rights under the lease. As with other kinds of lease disputes, it is up to the tenant to review the lease and obtain the facts to assert a claim against the landlord for improper insurance charges.

