

In the Spotlight

The Bad Broker

Provision

By Jack Garson

The broker provision of a lease should acknowledge the broker or brokers entitled to compensation and provide representations that the parties have not worked with any other broker in connection with the lease. Typically, the parties also agree to indemnify each other for violating these representations.

TOO-LOOSE LANGUAGE

The typical representation language merely states that the parties, landlord and tenant, have not dealt with any other broker in connection with the lease. Notably, the parties then proceed to agree mutually to indemnify each other in the event of any breach of their representations. The following is a lease provision taken from an actual case (with slight modifications).

Landlord and Tenant each warrants to the other that in connection with this Lease it has not employed or dealt with any other broker, agent or finder, other than the Brokers (defined above). Landlord acknowledges that Landlord shall pay any commission or fee due to the Brokers, pursuant to a separate agreement. Tenant shall

indemnify and hold Landlord harmless from and against any claim for brokerage or other commissions asserted by any broker, agent or finder employed by Tenant or with whom Tenant has dealt, other than the Brokers. Landlord shall indemnify and hold harmless Tenant from and against any claim for brokerage or other commissions asserted by the Brokers to the extent Landlord fails to pay the Brokers as provided for in the separate brokerage agreement between Landlord and the Brokers, and by any other broker, agent or finder employed by Landlord or with whom Landlord has dealt.

The fundamental flaw with this broker provision is that it assigns responsibility to both parties for the same dealings. That is, if both parties deal with a third party, then both parties are responsible for indemnifying each other with regard to those dealings. Essentially, the mutual provisions negate, or cancel out, the indemnification obligations when both parties have dealt with the same broker.

TOO-TRUE SCENARIO

Consider the damage that this seemingly innocuous foible caused in a real-life case history: A tenant was seeking to relocate its business. This tenant, whom we will call NAIVECO, began casual discussions about its relocation

with a broker, whom we will call Mr. Opportunistic. NAIVECO did not formally engage Mr. Opportunistic, and Mr. Opportunistic did not request any brokerage agreement with NAIVECO. However, NAIVECO did tell Mr. Opportunistic about a property that



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NAIVECO was interested in. This property was owned by BIGREIT. NAIVECO observed that Mr. Opportunistic would be initiating a search and possibly discussions with BIGREIT about NAIVECO's possible relocation to BIGREIT's property. And, in fact, Mr. Opportunistic did talk with BIGREIT, and BIGREIT provided Mr. Opportunistic with a term sheet for a new lease with NAIVECO.

NAIVECO reviewed the term sheet and rejected it — with good reason. The proposed terms were well above prevailing market rents and did not include concessions that landlords were providing in the market at that time. Mr. Opportunistic appeared to give up and abandon the matter. Shortly thereafter, another broker — The Good Guys — approached NAIVECO and suggested that The

Good Guys could obtain for NAIVECO a great deal from BIGREIT or any other landlord for that matter. And that, in fact, is what The Good Guys did. The Good Guys began negotiations with BIGREIT and obtained a wonderful deal for NAIVECO. BIGREIT and NAIVECO signed a lease for the deal, including a provision like the one quoted above.

It was at about this point in time that Mr. Opportunistic finally showed some energy and creativity. He threatened to sue both BIGREIT and NAIVECO. And this time he actually followed through. Upon being sued, BIGREIT requested that NAIVECO indemnify BIGREIT. You see, NAIVECO had agreed to indemnify BIGREIT with respect to any claim asserted by any broker with whom NAIVECO had dealt (other than The Good Guys). NAIVECO likewise sought indemnification from BIGREIT, because BIGREIT had also agreed to indemnify NAIVECO with respect to any claim asserted by any broker with whom BIGREIT had dealt. And, as we know by now, both BIGREIT and NAIVECO dealt with Mr. Opportunistic.

A BETTER BARGAIN

The simple, but pervasive, problem here is that the parties failed to assign responsibility for third-party claims with the necessary specificity.

There are a variety of solutions to this problem, some of which inevitably will be influenced by the relative bargaining power of the parties. For example, a pro-landlord provision might take the following approach:

Tenant hereby warrants to Landlord that Tenant has not employed or dealt with any broker, agent or finder, other than the Broker in connection with this Lease. Tenant shall indemnify and hold Landlord harmless from and against any claim or claims for brokerage or other commissions asserted by any broker, agent, or finder employed by Tenant or with whom Tenant has dealt, other than the Broker.

In the foregoing provision, the landlord, presumably with sufficient bargaining power to do so, merely provides a one-sided provision that requires the appropriate representation by the Tenant (that the Tenant has dealt with no broker other than the defined “Broker”) and assigns to the Tenant all responsibility for commission claims from all parties other than the brokers expressly identified in the lease. For the landlord, this provision is quite the bargain regarding extraneous commission claims.

If we are going to insist on using 60-page leases, they might as well be thoughtfully and carefully drafted to reflect and protect the intent of the parties.

Similarly, a tenant with sufficient bargaining power might insist on indemnification from the landlord with respect to any claims asserted by anyone other than the broker that represents the tenant and that is expressly identified in the

lease. Of course, the tenant might relent and also represent that the broker identified in the lease is the only broker that the tenant has engaged with respect to this property.

ALLOCATING RESPONSIBILITY

In the case described above, the landlord and tenant might very well have recognized the participation, albeit limited, of Mr. Opportunistic and modified the lease to assign or share responsibility for fending off his potential, spurious claim. Or, one party, landlord or tenant, might simply have maintained a master lease that clearly assigns responsibility for extraneous broker claims to the party that first introduced the claimant to the transaction. In the case above, such a provision would have required the tenant to indemnify the landlord because NAIVECO introduced Mr. Opportunistic to the transaction. Back in the real world, BIGREIT, NAIVECO, and even The Good Guys chipped in to buy their peace with Mr. Opportunistic. The moral of the story is that lightning strikes. If we are going to insist on using 60-page leases, they might as well be thoughtfully and carefully drafted to reflect and protect the intent of the parties.

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