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**RIGHT TO BE  
"MADE WHOLE"**

**PG 26**

**CAN YOU  
PROVE IT?**

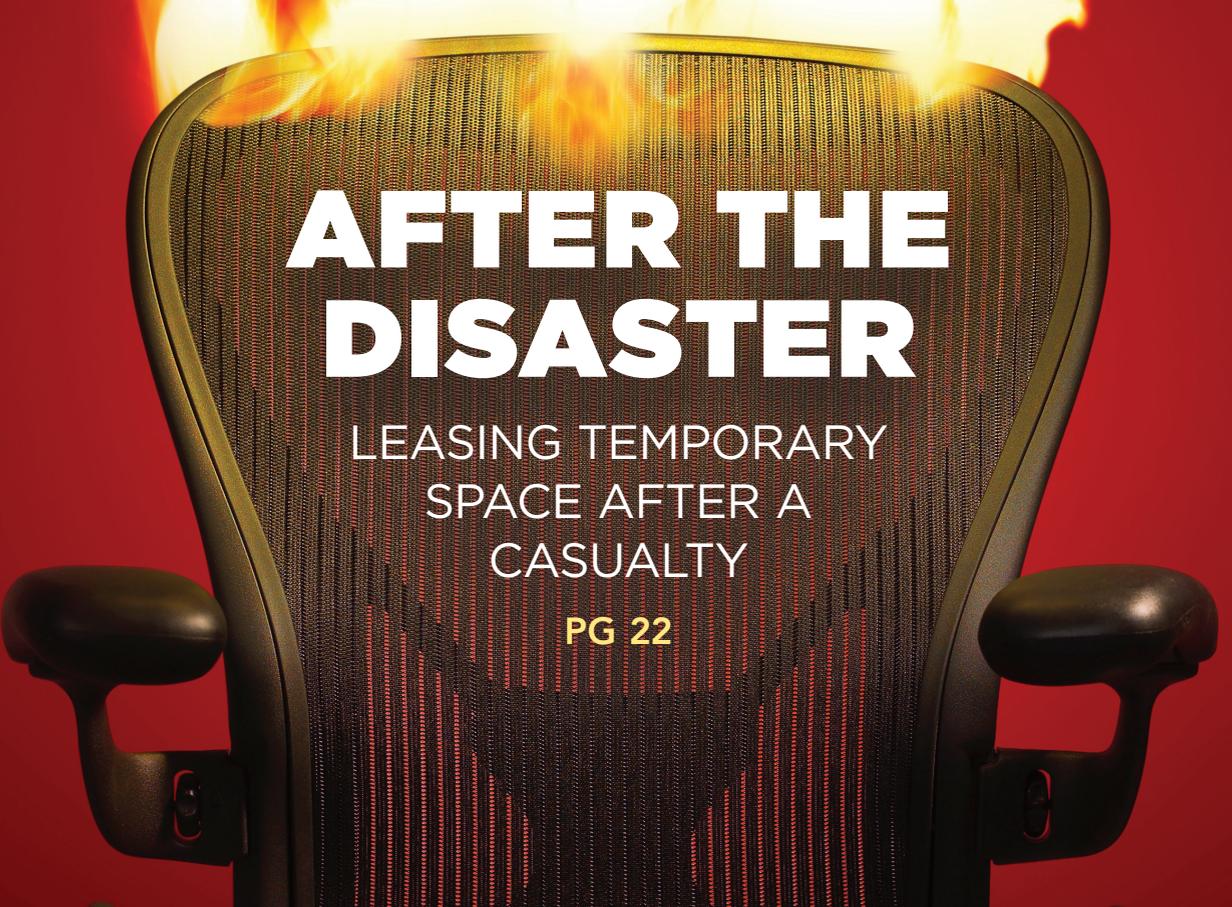
**PG 29**

**AVOIDING  
SPOILIATION**

**PG 32**

**ARSON  
EXCLUSIONS**

**PG 36**



## **AFTER THE DISASTER**

LEASING TEMPORARY  
SPACE AFTER A  
CASUALTY

**PG 22**

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# Leasing Temporary Space after a Casualty

PITFALLS  
AND  
PERILS

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Chris Cramer



One of the most difficult and often neglected areas of leasing comes after the destruction of property, when a homeowner or commercial tenant is forced into temporary space while the destroyed property is being rebuilt.

Imagine the scenario: Due to a flood, a fire or other casualty, a homeowner suddenly needs to find temporary shelter. Or, a retail shop owner or office tenant, against incredible odds, finds his or her business decimated and has to relocate to a temporary location without losing a beat. These are not easy prospects, but they are ones in which risks and inconveniences can be lessened, and the savvy insurance adjuster/agent can turn adversity into an advantage by working closely with a team of professionals to make sure that the damaged party gets back on his or her feet as quickly as possible.

When disaster strikes, some of the issues faced by residential homeowners are similar to those of commercial tenants, but each must address a unique set of challenges. Here is a summary of some of the general pitfalls and challenges.

There is an essential difference between the commercial and residential occupant. For the most part, the office tenant or retail shop owner is leasing space, while the homeowner owns his property. While these distinctions are not always valid (a residential tenant may be subject to a long-term lease and an office occupant might own an office condominium or even the entire building), most of the time they apply. The key for the damaged party is to identify key issues, act quickly and maintain flexibility while the original damaged structure is being repaired.

### **The commercial lease**

When the commercial tenant is forced to leave for temporary space, unless the building owner is providing space elsewhere in the building or shopping center, the tenant will look for another place and must quickly obtain space in order to operate the business. In either instance, the tenant must make sure that it is duly protected. If it is signing a temporary lease at the same structure (for example, an office

building moves the tenant to transient quarters in the building), then the parties may subject the new temporary lease to the same terms as the existing lease with certain modifications.

For example, the size of the space, the rental due, the termination rights of the parties and contingencies for delays are all areas to be negotiated. In many ways a new temporary lease is a more difficult animal when the tenant temporarily relocates to a location off-site. In this case, an entirely new lease needs to be dealt with and the tenant will need to shorten the negotiating time without compromising too much. Usually the landlord will require its form of temporary lease to be used, which may not be very different from its usual form. Generally, the tenant will want its attorney to review the proposed lease quickly but thoroughly, to avoid problems later. Here are some of the issues that the tenant should address:

- **Size of temporary space.** The size needs to be adequate and the square footage accurate. The tenant may wish to independently measure the space.
- **Flexibility to terminate or stay longer.** The tenant cannot know for certain when the damaged space will be repaired, so the length of the temporary lease may be difficult to determine. It is important to try to negotiate termination extension rights, even if they cost a bit more. The tenant may also wish to explore month-to-month options. Another possibility is to enter into a year term, with an option to terminate on 30 days' notice, perhaps for a fee.
- **Look closely at operating costs.** Since the lease is only temporary, the best way to address operating costs is to include them in the rent without any adjustment for increases. The lease should ideally be full-service so that the tenant knows what its total costs are each month.

WHEN DISASTER STRIKES, SOME OF THE ISSUES FACED BY RESIDENTIAL HOMEOWNERS ARE SIMILAR TO THOSE OF COMMERCIAL TENANTS.



- **Insurance issues can be key.** Sometimes a landlord's short form temporary lease is so streamlined that it leaves out certain critical provisions because "it is only a short-term lease." While the tenant may be tempted to ignore some of the complex language typically found in a commercial lease, this is not a good idea, particularly since the insurance provisions should not be neglected.

For example, the tenant should insist on a mutual waiver of subrogation clause to protect it against the prospect of a negligent employee accidentally damaging the building in which the leased space is located. With a properly drafted waiver, it is much more difficult for the landlord's insurer to pay a claim for a major casualty and then be subrogated to the rights of the landlord to sue the tenant.

- **Use Clause.** Particularly in a retail setting, the tenant must remain vigilant and remember to have the zoning checked and, regardless of the type of lease, make sure any required occupancy certificates can be obtained quickly.
- **Signage.** Since this is a temporary lease, signage rights will likely be limited. However, in some cases, temporary

signs will be very important to the tenant and will need to be addressed.

"There is a significant opportunity in creating an environment where leasing professionals can be used to provide assistance in relocating a commercial business using extra expense," said Erich Parker, large loss claims manager, commercial property for the Southeast regional op-

While the tenant may be tempted to ignore some of the complex language typically found in a commercial lease, this is not a good idea, particularly since the insurance provisions should not be neglected.

erations for Nationwide. "The coverage is in place for most policies, but it is seldom used or even suggested. Every business has the ability to be set up in a temporary or possibly permanent relocation. I have worked with temporary relocation companies to temporarily relocate pro-

fessional offices, retail businesses, restaurants, automotive services, and even gas stations. Using these services cannot only save the insurance companies a significant business income loss, but keep a business from losing valuable market share."

### The residential lease

The difficulty with relocation for the homeowner is that without input from outside experts, he or she may be tempted to sign a streamlined document because "it is only a temporary lease." The homeowner does so at his or her own risk, however, because even a simple residential lease is a legal document with potentially serious consequences. Many of the issues to be addressed are similar to those with which a commercial tenant must grapple.

A "loss of use" temporary housing provider or other real estate expert can be very helpful in helping the insured navigate the rental process. For high net worth persons, hiring an attorney is advisable because deposits and damages can be much greater and the insured has much more exposure to liability. One difference between the residential and the commercial tenant is that this could be the first lease the homeowner has ever signed, and unlike a printed mortgage, the lease is not nearly as standardized. A "standard lease" is a far cry from a Fannie Mae mortgage. So, with that in mind, here are some recommendations for homeowners:

- **Assemble the team — quickly.** The homeowner must work closely with the insurance adjuster, and preferably a Realtor (an individual who is a member of the National Association of Realtors) and/or a temporary housing company in locating and negotiating a temporary lease of space. Since the homeowner must uproot his family, speed is imperative. Often the Realtor can use a standardized lease form for a lease of a house provided by the local Board of Realtors.

Remember that the forms are protected under the copyright laws, so they can be used only by a licensed Realtor. Some of these forms are better than others, so they should be reviewed

by an expert. Often, the landlord will provide the form of lease, in which case the homeowner must use his professional team to scrutinize it quickly.

- **Flexibility is the key.** While the basic terms and insurance provisions should be carefully reviewed by professionals, the homeowner is justifiably looking forward to moving back to his repaired home as soon as it is ready. It is important that the lease permit the homeowner to terminate the lease on 30 days' notice.
- **Protection under the law.** Each state and many counties have laws that protect the tenant in a residential lease. Sometimes those protections are limited in short-term leases. If the tenant believes he may be in the new home for more than 90 days, it may be worthwhile to sign a year lease with the ability to terminate on 30 days' notice. That may help the tenant reap the benefit of statutory protections, some

of which require certain language to be inserted in the lease.

- **Remember the details.** The attorney, and sometimes the real estate agent, can help to identify issues in the lease.

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Sometimes those protections are limited in short-term leases.

Don't forget some of the important topics to be addressed so they don't come back to bite the homeowner. For example, the insurance provisions should be reviewed by the insurance agent. The repair and maintenance provisions should be scrutinized as

well, e.g., the homeowner should not be required to replace or repair the roof or the HVAC systems in a three-month temporary lease.

The process of moving to temporary space — whether commercial or residential — will often be stressful and inconvenient; but with the right information and team of experienced professionals, the risks and exposures of the move can be easily mitigated. 🍷

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