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Hurricane Sandy Exposes Risks in Commercial Leases

November 15, 2012 – The devastation caused by Hurricane Sandy serves as an urgent and unfortunate reminder for commercial landlords, owners, and tenants to evaluate their respective rights and obligations under the "damage and destruction" clause that is likely contained in their leases. This clause sets forth the rights and obligations of parties to a lease should the demised premises or building be damaged or destroyed by flood, fire, or other casualty during the lease term. Among other things, a typical "damage and destruction clause" may permit a landlord/owner to terminate a lease in the event of such damage or destruction.

Although the "damage and destruction" clause is often considered "boilerplate" and, as a result, is often overlooked during lease negotiations, the precise language contained in the clause is critical in determining the parties' respective rights and obligations. The nature and extent of the damage and destruction required for the clause to apply will vary depending on the specific wording of the clause at issue. For example, with regard to the termination of a lease, New York courts have held that leases containing landlord/owner-favorable language that permits a landlord/owner to terminate the tenancy if the building is "so damaged" that the landlord/owner "decides to demolish or rebuild it" provide the landlord/owner with "a broader range of discretion" to terminate a lease than leases that require there to be a "total or substantial destruction" of the building. Under the latter language, New York courts have held that a landlord/owner is generally permitted to lawfully terminate the lease only if "in a practical sense [the building] has lost its character as a building" or if the "cost of restoration . . . exceed[s] 50% of the value of the building" before the event of casualty. In addition, if the clause covers "damage and destruction" to the *building*, as opposed to the *demised premises*, the landlord/owner may be entitled to terminate the lease even if the demised premises suffered no damage.

Of course, the landlord/owner would be well-advised to act reasonably and in good faith in terminating a lease due to the damage and destruction. For this reason, among others, it is critical that the landlord/owner carefully and thoroughly document the extent and nature of the damage and destruction as well as the anticipated costs of repair, restoration, or rebuilding. In addition, the landlord/owner is often required to adhere to strict notice requirements regarding

termination of the lease. Additionally, landlords, owners, and tenants should all focus on the critical evidentiary obligations that their leases may impose.

For further information regarding this issue and other commercial landlord-tenant issues, please contact either of the following attorneys:

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