CAUTION SHOULD BE URGED WHEN COURTS DECIDE THAT A TENANT IS A CO-INSURED UNDER THE LANDLORD'S POLICY

By Chinye Uwechue

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Courts should be very careful when deciding that a tenant is a co-insured under the landlord's policy because it could potentially fly in the face of justice and negatively impact established business practices that have existed for years in the insurance industry. There are at least two areas where such caution is imperative and they are with regard to actuaries and the doctrine of privity.

Fundamental to the business of insurance are actuarial tables designed to evaluate the likelihood of the occurrence of events and incidents so that inherent risks, associated with such events/incidents, can be converted into premiums in order to minimize corporate losses while at the same time affording adequate coverage to the insured. The assessment of risk is the bedrock for determining the quantum of reserves an insurance company must set aside to maintain solvency. Information is the life blood of accurate actuarial calculations. Without adequate information no risk can be fully assessed. Without adequate information it is almost impossible to determine what would constitute sufficient reserves. What has this to do with a tenant's claim that he/she is a co-insured? One word answer – "plenty".

When a landlord applies for insurance coverage he/she fills out an application form that is designed to elicit information from which the insurer can extract facts pertaining to risk. These facts are then used to, *inter alia*, (1) evaluate the risk of loss, (2) determine the level of reserves required, (3) determine the premium to be charged in order to allow the insurer to cover that risk without suffering unforeseen corporate losses.

When a lease agreement is entered into, if the landlord has no intention of providing insurance to his/her tenants, it is not likely that the full force of risks associated with those tenants will be fully divulged to the insurer so that when setting reserves and premiums the insurance company incorporates those risks. This means that potentially an insurance company could, post-loss, discover that it has (unbeknown to it) provided coverage to tenants it had no specific knowledge of

and for whom no premiums were collected and for a risk against which no reserves were set aside. In such a situation the court in trying to provide coverage for negligent tenants has managed to create an injustice towards the insurance company.

The doctrine of privity of contract creates a relationship between all the parties to an agreement so that absent an exception (e.g. third party beneficiary doctrine) only those who are parties to the contract can enforce its terms, benefit from its provisions and sue for breach of contract.

Deciding that a tenant, whom neither the insurance company nor the landlord were aware of as being an insured, is, post-loss, a co-insured could potentially impact the fundamental doctrine of privity of contract. One of the historical reasons for such a doctrine is, and has been, certainty in business/commercial relationships. At least certainty about who your contract involves and impacts. The contract in question in this instance would be the insurance agreement. The known parties would therefore be the landlord and the insurance company. The post-loss interloper would be the tenant in a situation where the landlord genuinely had no intention of providing coverage for the tenant and where consequently, the landlord's insurance company was unaware of the tenant's rights as a co-insured and was thus also unaware that its subrogation rights, as against the co-insured tenant, have been abrogated.

Justice is an admirable goal. However, a decision that extends insurance coverage to a negligent tenant (post-loss) under circumstances where neither the landlord nor the insurance company was aware (at the pre-loss stage) that the tenant was a co-insured under the insurance policy, cannot be justice.