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Avoiding Reckless Mistakes When Using “Gross Negligence” in Wisconsin Real Estate Documents

Reinhart’s real estate attorneys are frequently called upon as local counsel to tailor purchase agreements, commercial leases, loan documents and other real estate documents prepared by out-of-state clients and their principal attorneys to fit the peculiarities of Wisconsin law. One issue that crops up regularly involves the use of the term "gross negligence." Unlike other states, Wisconsin courts have not recognized a distinction between “simple” and “gross” negligence since 1962, in *Bielski v. Schulze*, 16 Wis. 2d 1, 14-19 (1962).

In our capacity as local counsel, we frequently suggest replacing "gross negligence" with something more appropriate, such as "recklessness." For example, our team recently modified an exception to the borrower's indemnity provision in an out-of-state client's draft lease to swap "gross negligence" with "recklessness" to achieve an appropriate standard for the applicability of that exception. As originally drafted, the provision limited the applicability of the indemnity exception to situations of gross negligence by the commercial landlord or its affiliates.

Under Wisconsin law, however, that indemnity exception would have likely applied in the event of any negligence by the commercial landlord or its affiliates, as Wisconsin courts do not recognize the concept of "gross negligence." By simply replacing the terms, the team was able to maintain the intent of the parties to limit the applicability of the indemnity exception to situations in which the commercial tenant could show that recklessness of the commercial landlord or its affiliates was to blame for the claim or loss.

It is important to have local counsel review all documents that contain the term “gross negligence” to determine the right course of action. For more information and questions, please contact your Reinhart attorney.

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