

INSURANCE ISSUES IN LEASES

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I. INTRODUCTION

In this chapter we will provide you with an understanding of the types of insurance coverage necessary in a lease and, most important, why they are needed. Much of this chapter is written from the landlord's perspective. You can, however, view the dialogue from either the landlord's or tenant's point of view.

The impact of Katrina and other named storms on the insurance marketplace has been crippling in terms of sharply reduced coverages, diminished limits available, imposition of higher deductibles as well as hefty price increases. This situation will probably continue for the short term, but certainly not for the term of the lease. Thus, while giving some recognition to the current difficulties, the parties should strive to provide the broadest possible coverage when some modicum of normalcy returns.

II. RISK MANAGEMENT—UNDERSTANDING WHY

Typically, the landlord seeks to have the tenant carry the broadest coverage possible thereby minimizing the exposure of loss to the landlord's policies. In considering the tenant's view on the types of insurances to be committed to in a commercial lease you'll likely want to keep to the necessary minimum the types and amounts of insurance coverage to be provided, thereby minimizing the insurance expense to the tenant. Overall it is very important to realize that, whether landlord or tenant, each party should cover the risks of loss created by their operations and by their mere presence.

Consider that the landlord, typically the owner of a building, will provide insurance to cover physical loss to the building itself, the resulting rent loss, and the liability for the public areas (common areas) in and around the building. Similarly, the tenant should carry insurance to replace its property, including tenant's improvements and betterments, and any resulting loss of business income and liability emanating from its operations

within the building. In addition, the tenant would purchase insurance to cover any injury to its employees and to cover the use of automobiles in and around the premises. If the tenant's operations included special risks such as a restaurant, the tenant would also purchase special coverage to cover the liability arising from the sale of alcoholic beverages and valet parking service, if applicable. The tenant will likely be required to pay any increase in the landlord's insurance costs created by the tenant's occupancy of the premises.

The landlord can also be a ground lessor, granting a long-term lease to a developer for the construction of a building. No matter what type of lease is involved, there are typically two parties: one that owns the property or the rights to use something, and the party wishing to use or occupy the premises. In either case, each party has assets to protect from exposure to physical loss or damage, such as fires, and loss created by exposure to public liability. In addition, the party granting the lease will want the other party to not only insure the exposures created by its use of the premises, but also extend its coverage to the landlord. This extension of coverage to the landlord from the tenant's insurance coverage can be as simple as naming the landlord as an additional insured pursuant to a contractual obligation to do so in order to fulfill an indemnification requirement or as complex as assuming the responsibility for all insurance on the premises, including all primary insurance on behalf of, and in protection of, the landlord. Note that coverage for damage to the premises that is owned, rented or occupied by the insured is excluded from the contractual coverage part of the liability policy.

Preleasing of buildings under construction presents several other elements to consider. In this case the landlord is constructing a building and obtaining financing therefor, predicated on the occupancy by the tenant when the building is completed. In this case the terms of the lease should not allow the tenant to cancel the lease if there is a delay in completion of the project. This will be particularly important to any potential mortgagee. At minimum, the landlord in this situation may be forced into payment of financial penalties to the tenant in the

event of a delay. The landlord may in turn mitigate its financial exposure to loss by passing the financial penalties along to the general contractor erecting the building or purchasing insurance coverage. Issues—such as project delays caused by force majeure—may be open items that are uninsurable or insurable at too great a cost.

III. BASIC TYPES OF INSURANCE

Two major areas of insurance coverage that should be considered in every lease are property insurance (first party), and public liability insurance (third-party liability). Specialty coverages such as environmental liability insurance, covering not only clean up of environmental accidents and liability to neighboring properties, should be considered as well. This latter coverage is of particular importance in a lease of premises for a manufacturing concern, storage of environmentally sensitive materials, automobile repair and service facilities, and dry cleaners.

In a typical landlord-tenant lease the landlord would want the tenant to carry the following basic insurance coverages:

- *Property insurance.* Following basic risk management principles where each party is responsible for providing insurance coverage for its own property the landlord might require the tenant to insure the following: “Tenant at Tenant’s own expense shall insure all its own personal property including but not limited to, improvements and betterments, personal property, stock and supplies, furniture and fixtures. In addition Tenant shall purchase business interruption insurance to cover interruption in its operations caused by an inability to use the Premises due to loss.”
- The preferred type of insurance coverage in the property area is so-called “All Risk” insurance as opposed to “Fire and Broad Extended” coverage. Make no mistake: The “All Risk” or special causes of loss policy is the broader, preferred, and most prevalent form in use today. The limits

of coverage in this area should be 100 percent of the replacement cost value of the tenant's property.

- *Rental income insurance.* Often misunderstood is the requirement of which party provides the rental income insurance. The answer is simple: If rent abates, then the landlord purchases the insurance. If rent does not abate to the tenant, the tenant's ongoing obligation to pay rent to the landlord can be covered by the tenant's purchase of rental or business interruption insurance. Business interruption insurance covers the tenant's net profit and fixed continuing expenses. If the rents do not abate, this becomes a continuing expense and is covered under the tenant's policy.
- *Liability insurance.* The tenant should provide the following types and minimum levels of liability insurance coverage for the protection of itself and the landlord: Commercial General Liability insurance covering liability emanating from the tenant's use and occupancy of the premises, including that of tenant's employees, customers, agents and invitees. If the tenant is involved in providing a product that may potentially create an exposure itself, such as food or cosmetics, then coverage known as "products and completed operations" should be provided. The amount of insurance in a customarily purchased Commercial General Liability policy is \$1 million per occurrence and \$2 million in the annual aggregate. If multiple locations are insured on the same policy a per-location aggregate adds some depth to the coverage and should be specified. (Please note that the often-referred-to Comprehensive General Liability insurance policy has not been commonly used in the United States since the late 1980s. The current form is the Commercial General Liability insurance policy.)
- Other types of liability insurance coverage that should be purchased by the tenant include: commercial automobile insurance (including Owned (if any), Hired and Non-Owned Autos); Workers' Compensation and Employers' Liability, as required by state law; and Umbrella or Excess Liability. It

is this last coverage that provides meaningful limits of insurance coverage. For small tenants with exposure to the public, \$5 million to \$10 million may be a reasonable minimum of insurance coverage to be provided. For a tenant occupying a large space for the purpose of public assembly, such as a restaurant or movie theater, the appropriate amount of liability insurance should be much higher.

IV. LANDLORD'S VIEW

- Primarily one would want the tenant to get back into business following a loss, be it direct property damage, business interruption or both. It's good business for the sake of continuity and further, it saves the leasing commissions involved in signing a new tenant as well as avoiding a loss of rents following restoration.
- Following the principle that today's losses have a negative impact on future premiums, most of this burden should be transferred to the tenant within the lease. Therefore, the tenant's sole right of recovery for damage to its personal property within the demised premises would be against its own property insurer. The mutual waiver of subrogation then prevents the tenant's insurer from seeking recovery from the landlord and/or its insurer (and helps to preserve a cleaner loss history for the landlord). Any deductibles selected by the tenant would be its responsibility.
- The same principle (i.e., preserving the landlord's clean loss experience) applies to Commercial General Liability insurance, with the tenant naming the landlord as an additional insured under the tenant's policy. Most larger tenants and several others will be structuring their General Liability programs with sizable Self-Insured Retentions (SIRs) up to, say, \$250,000 per occurrence. Their risk management departments are therefore advising store managers in the field to resist all claims and, if possible, push them on to landlords.

Note that certificates of insurance (most notably the ACORD 25) do not in themselves give the landlord Additional Insured status under the tenant's policy. This can only be accomplished by endorsement to the actual liability policy. There are dozens of Additional Insured endorsements. There are, however, four basic means by which to convey liability coverage in an insurance policy:

1. Broad Additional Insured language, contained in some liability policies, extends Additional Insured status to anyone to whom the insured has agreed, in a written contract, to extend coverage, provided this obligation is made prior to the loss.
2. A blanket Additional Insured Endorsement adding a class or type of additional insureds.
3. A specific Additional Insured Endorsement, naming a specific person or entity and attached to the tenant's policy.
4. An agreement in the lease that "the tenant will indemnify the landlord for any and all liability costs and expenses emanating from the tenant's use and occupancy of the premises and that of their employees, agents and invitees, etc." This agreement may be covered under the limited contractual liability coverage contained in a Commercial General Liability policy. Note: Damage to the leased property itself is excluded in the Coverage A exclusions to the contractual liability coverage part. Coverage for damage to a premises that is owned, rented or occupied by the insured is excluded from the contractual coverage part of the liability policy.

The first item requires review of the tenant's liability policy. The next two can be evidenced on the actual endorsement or, for new agreements, through the use of an insurance binder signed

by the insurer. The last, the indemnification agreement, is crafted by the landlord's attorney. The carrier will usually defend any "Additional Insureds" that have been properly endorsed onto a policy granting such status to another party.

Caution: Additional Insured status extending coverage from the tenant's liability policy to the landlord only responds to a liability caused by the tenant at that location. The landlord's liability can be covered only through a policy that specifically names the landlord as an "Insured."

Model clauses covering tenant's insurance can be found at the end of this chapter as Exhibit I, Tenant's Insurance.

V. OTHER CONSIDERATIONS

A. Indemnity Agreement

This should be provided by the tenant or landlord; however, it is most appropriate from tenant to landlord to the extent that loss arises from the tenant's use and occupancy and that of the tenant's employees, agents, and invitees.

B. Self-Insurance by Tenant

If a tenant customarily self-insures certain risks it will request that this practice be acceptable in terms of meeting the lease requirements. Typically, the landlord will permit this only if the tenant maintains a minimum net worth requirement. Two cases, with cautionary overtones, come to mind:

- The tenant, a supermarket chain, provided the anchor in 18 of the client's 21 strip centers. Their leases provided for a \$250,000 General Liability Self-Insured Retention so long as the tenant's net worth exceeded \$100 million. (It was \$130 million at the time of signing.) Several years later, after an LBO (leveraged buy-out), the net worth disappeared and the balance sheet reflected top-heavy debt sitting over negative net worth. As this was a key tenant the landlord was powerless to enforce this minimum net worth provision.

- The tenant had a net worth of \$1.9 billion and the client's counsel was pleased, having negotiated a minimum net worth requirement (in order to self-insure) of \$200 million. Imagine the disastrous operating losses that would diminish the net worth by \$1.7 billion! Where in the pecking order of payments for payroll, to vendors, etc., would payments to third-party claimants stand? Further, what attorney would want his or her client, the landlord, to be forced into the shoes of the liability insurer? Parties claiming to be self-insured should be able to demonstrate that they are self-insured. This may include a review of the parties' self-insurance program or certification that they are self-insured and approved as such by a state Insurance Department.
- The client owned and operated several community strip centers anchored by major chain stores. Since each center was too small to support a full-time on-site employee, most claims would have reported to the management of that anchor. Knowing of their SIR, the manager would on occasion move to location of the claim from their demised premises to a common area, transferring the liability to the landlord.

C. Landlord's Insurance

The model clauses at the end of this chapter (Exhibit II, Landlord's Insurance) clearly show the slant towards the landlord's interests.

D. Tenant's Share of Insurance Costs

In cases where the tenant pays part of the landlord's insurance costs, instead of limiting "costs" to merely insurance premiums these costs should be expanded to include, but not be limited to:

- Losses within a SIR or deductible;
- Service fees paid to brokers, consultants, and third-party administrators;

- Premiums for coverages and limits reasonably deemed necessary by landlord;
- Allocated costs derived from master policies with blanket coverages for numerous properties within a portfolio.

E. Tenants' Audits

The new growth industry for shopping center operators (particularly those with regional malls) is contentious tenant audits. While no one would contest a tenant's right to audit CAM (common area maintenance) charges, there has been a disturbing trend lately to employ the services of contingent fee auditors. These firms, because of the nature of their compensation, contest every single charge and will generally hold up an entire settlement over a minor disputed charge.

Note in Exhibit III (Tenant's Share of Costs) that in order to forestall this event, the definition of Tenant's Auditor (found in a later section of the lease) precludes the utilization of these onerous types of auditors.

F. Net Leases

Whereas an owner's insurance is coverage-oriented, designed to provide the most comprehensive coverages available, net tenants (especially on triple net leases) are basically cost-driven. It therefore becomes extremely important to specify that the tenant fulfill the same insurance requirements as the landlord would for itself. These are contained in Exhibit IV, Insurance Requirements for New Net Leases.

G. Waiver of Subrogation

Leases will, on occasion, refer to each party's insurance policy permitting waivers of their right to recover loss against another. While virtually all property and liability policies permit this as part of their standard forms, the actual waiver of recovery can only be accomplished in a lease and only if agreed to prior to

loss. Further, in most jurisdictions, the waiver must be mutual in order to be enforceable.

A waiver of right to recover damages can apply not only to property losses but liability as well. Property and liability insurance policies generally treat the subject nearly the same.

Property Insurance: Most standard property insurance policies permit the policyholder (insured) to waive the rights they may have to recover damages against another party following a loss. This granting of permission in effect voids the insurers rights of subrogation that they have in the policyholder's insurance policy. Please note the waiver of rights to recover from another must be done in writing and prior to the loss. Manuscript property policies many times prohibit such a waiver and may require a specific endorsement.

Liability Insurance: Commercial General Liability policies permit the insured to waive its rights to recover damage against another however the waiver of these rights must be affected prior to loss. The waiver by the insured in effect waives the insurer's rights of subrogation against another party. Should a party to a contract require an actual endorsement reflecting this acknowledgment by the insurer that their rights are waived because the insured waived their rights you would request an endorsement "Waiver of Transfer of Rights of Recovery Against Others to Us" CG 24 04 ("us" being the insurer). This specific endorsement will include the name of the "Person or Organization".

The subject of a Waiver of Subrogation is a complex one. Volumes have been written on the legal doctrine of subrogation. For the purpose of this discussion, note the following:

- The insurance policy states only whether the insurer grants to the insured permission to waive their rights.
- The parties waive their right of recovery against each other in the lease or agreement.

- Most property (first-party coverage) and liability (third party) policies permit the insured to waive subrogation only if it is done prior to loss.

H. Rents Insurance

Rents insurance is one of the most misunderstood clauses within a property insurance policy. Many documents (leases, mortgages, etc.) frequently contain a requirement that the other party maintain rents coverage for 12 months. Since underwriters need a base upon which to apply a rate, the insured will normally submit building values at replacement cost plus 12 months of rental income.

The true coverage in force, on an Actual Loss Sustained basis, (the most desirable form), provides ongoing indemnification for loss of rents until such time, with the exercise of due diligence and dispatch, as the premises are restored to the condition immediately prior to the loss (subject, however, to the limit of liability in the policy but not limited to its expiration date). Thus, for the total loss of a small structure, rents may be lost for only six months; a large loss in October in the Snow Belt might take the insured through two winters to rebuild. Further, in cases like hurricane devastation of Louisiana, Alabama and other states — where there was a shortage of materials, contractors and a labor force—some rebuilding would take more than three years.

The governing clause in the lease as to which party is to provide rents insurance is the abatement clause. If the rent abates at time of loss, then the landlord should provide the insurance coverage. A tenant's insurer will not pay for rents if its insured has no legal obligation to pay for rents (i.e., abatement of rent upon casualty). In the converse, if rents do not abate, the tenant should be maintaining this insurance.

I. Extended Period of Indemnity

Following a loss, and once restoration has been completed, there may be no rush of tenants (both previous and prospective) to reoccupy the premises. This was the case when Hurricane

Katrina caused such destruction that homes and virtually all area commercial properties were destroyed, jobs were lost, and the economy will take years to recover. Business Interruption or Rental Loss insurance covers "the loss of net profit and fixed continuing expenses during the period that, with due diligence and dispatch, the premises are restored to a condition that existed prior to loss." It is at the point of "restoration to a condition that existed prior to loss" that indemnity under Rental Loss and Business Income forms of insurance would stop. The period from completion of reconstruction until a new tenant is found is not insured under the basic Rents Form.

The Extended Period of Indemnity Endorsement provides for additional coverage during the lease-up period that can be purchased for various time frames ranging from 30 days to two years. Exhibit V shows an Indemnity and Insurance Release and Waiver.

J. Improvements and Betterments (I&Bs)

Regardless of the ownership and restoration clause in the lease, the owner should have in place a property insurance policy that states, "Improvements and betterments shall be deemed the property of the insured, any lease or contract to the contrary notwithstanding, and any loss shall be so adjusted." This feature, along with a top-flight replacement cost endorsement, can give a landlord a decided competitive advantage when rebuilding in terms of offering prospective tenants fully improved space.

Typically, tenant improvements and betterments are insured by the tenant. The tenant's insurance policy will replace, by the terms of the policy, the destroyed property. These I&Bs are the build-out of the space, slab-to-slab and wall-to-wall. Removable property (desks, copy machines, files, stock and supplies) is considered personal property, not I&Bs. Should the tenant decide not to rebuild the I&Bs, the tenant's policy pays the depreciated or remaining asset value. If the I&B were installed as part of a 20-year lease and one year remained on the lease and the improvements were not restored, the policy might well pay only

5 percent of the replacement cost—thus the need for the clause stated above.

K. Leasehold Interest

In cases where advantageous long-term leases, perhaps with renewal options, were signed at the bottom of a rental market the tenant may have a greater financial (and therefore insurable) interest in the premises than the owner. A case in point involved an upscale beauty salon in midtown Manhattan. The entire 13,000 square foot building was leased in the mid-1970s at \$8 per square foot with four 12-year renewal options escalating at 25¢ per square foot increments to reach \$9. The tenant purchased leasehold interest insurance and computed the amount by engaging the services of a rental appraiser and insuring the discounted present value of the difference between the projected fair rental value into the future and the lease obligations. When the building was completely destroyed by fire, the tenant collected \$6 million and the landlord, \$2 million.

L. Demolition and Increased Cost of Construction

The typical replacement cost clause in a property policy provides for replacement with “like materials and workmanship.” If, however, the local building codes have been tightened since original construction or the Americans with Disabilities Act points to certain non-conforming uses, then this coverage will come into play. Whether the building insurance is provided by the landlord or the tenant, it is important to obtain the broadest possible language for these enhancements. The standard ISO (Insurance Services Office) form provides only for compliance with minimum requirements in force at the time of loss. Following Hurricane Andrew in Florida and the Northridge, California, earthquake the affected localities passed much more restrictive building codes. Thus, the wording in this clause should refer to all laws regulating rebuilding in effect at the time of reconstruction.

M. Specialty Coverages

Certain tenancies carry special risks that, in turn, should be covered by specialty coverages, which might include:

- Dry cleaners—solvent disposal;
- Other polluters;
- Valet parking;
- Liquor dispensers—either a bar or retail liquor store
- Environmental
 - Removal of existing pollution (contractor)
 - Coverage for unknown pollution
 - Coverage for known pollution for which no clean-up is required
 - Cost Cap Coverage (to control remediation expenses).

VI. CASE STUDIES

In showing the application of these principles to specific situations, seven case studies are presented below:

Case Study 1—Key tenant lease, high-rise office building in New York City

Review of a tenant lease in a recent real estate financing transaction for an old-style high-rise office building in midtown Manhattan revealed special conditions as follows:

- A tenant leasing 10 stories in a 28-story high-rise office building had a provision in its lease that allowed it to void the entire lease should any one of the floors be damaged by fire or other peril that rendered that floor untenable. The key

to trigger this escape provision was the failure on the part of the landlord to complete restoration of the damaged floor within 90 days of the date of occurrence.

- The issue was the extent of damage to the floor; for this illustration we will assume a total burnout of the floor with smoke and water damage above and below.
- The lease required the landlord to immediately commence reconstruction efforts. Furthermore, it required the landlord to complete repairs to the damaged property and to turn over the property to the tenant for reconstruction of tenant improvements and betterments within 90 days of the date of the occurrence.
- Failure of the landlord to complete reconstruction within the prescribed time allowed the tenant to terminate the entire lease and vacate all ten floors.
- Review of the landlord's insurance policy found that the rental income clause contained a provision that covered *direct damage only* and specifically excluded loss of rental income due to the enforcement of a lease provision that extended the loss beyond the area of direct damage.

The observation was that there were a number of lease provisions that were unreasonable, as follows:

- The time for reconstruction of the damaged premises was too short. Even with permits, architectural plans, and a construction crew standing by, the landlord would be hard pressed to complete reconstruction to the extent necessary to avoid the lease cancellation within 90 days.
- The tenant was able to vacate the entire lease for all floors in the building if the landlord was unable to complete repairs to the single floor.

The situation arose during an actual mortgage refinancing of the premises following a major renovation and upgrading of the

building. In this particular situation, the landlord was initially unable to renegotiate a more reasonable performance standard for reconstruction with the tenant. The insurance company providing property and rent loss insurance was initially unwilling to modify its coverage forms. The solution for the lender was found when the landlord (the borrower) negotiated a coverage extension with its insurance company backed by an indemnity agreement from the landlord to the insurance company.

Case Study 2—Key anchor tenant lease, shopping center

The next group of scenarios is often found in key tenant anchor store leases in shopping centers. These issues often come up given the tenant's ability to negotiate from a position of strength, and the landlord's desire to have the anchor store as an attraction for the overall shopping center.

The tenant is required to carry insurance with terms and conditions that are less favorable than might be purchased by the landlord or would be considered to be poorer than might be purchased by a prudent corporate purchaser of coverage. These shortcomings might include:

- Absence of flood and/or earthquake insurance;
- The ability to self-insure based on the net worth of the tenant;
- Inadequate liability limits;
- The requirement that the tenant insure the property only for loss caused by fire and extended coverages.

The likelihood is that the tenant already carries insurance during the normal course of business that exceeds that required by the landlord. However, the tenant does not want to be under a contractual obligation to purchase insurance that may or may not be available at a later date. In addition, the tenant is trying to ease its administrative burden of preparing different certificates

of insurance for each and every shopping center in which its stores are located across the country.

This situation can result in the landlord being afforded less insurance coverage than is appropriate for the size and location of the building and, in a few cases, the landlord relying on the tenant's promise to self-insure.

Proposed partial solution (also applies to triple net leased properties). Landlord purchases contingent insurance coverage which provides:

This insurance will become primary if the insurance coverage provided by others is deficient, canceled or uncollectible.

Case Study 3—California Earthquake

For a property located in the state of California, a landlord may neglect to include a provision requiring the tenant to purchase earthquake insurance. The result to the landlord is that it is not sure whether the tenant will be able to rebuild following an earthquake. Another downside issue is the way in which any potential mortgagee will look at this shortcoming in the tenant lease. It is likely that, if the lender is doing its due diligence, it may view the shortcoming in required coverage as placing not only the asset but the resulting cash flow in jeopardy. Consider that should the key tenant be unable to rebuild with insurance proceeds following a serious loss, there would also be a loss of percentage rents created by a loss of sales in the remaining undamaged portion of the shopping center.

Case Study 4—Landlord of multiple old-style high-rise office buildings

Many older buildings have leases that may have been originally drafted 30 or 40 years ago. As such, the language in many of these leases could be described as somewhat antiquated. The leases may have numerous serious problems for the landlord. Another issue is the landlord's failure to monitor the

tenant's insurance and the extensions of coverage required to be provided to the landlord.

The following is a list of some of the issues drawn from actual situations:

- The tenant was required to carry liability insurance in the amount of \$100,000 per person and \$300,000 for all persons injured in a single accident.

Note: The limits shown are typical of automobile insurance and are no longer appropriate for a lease. Liability insurance forms now are written in increments of \$1 million. A more appropriate level of insurance for a tenant in a high-rise office building today might be along the lines of \$5 million to \$20 million depending on the area occupied by the tenant and its use of the premises. In the case of a restaurant, \$20 million or more of liability insurance should be required, as well as a provision that the tenant carry special coverage for such items as products liability, liquor liability and garage keepers legal liability, if valet parking is provided. When setting the insurance requirements for a tenant, consideration should be given to risks associated with its specific use and occupancy of the premises.

- The tenant was required to carry insurance only for fire and broad extended coverages.

Note: The tenant should have been required to provide coverage for its I&Bs, furniture and fixtures, stock and supplies, and for its loss of business income, all on a so-called "All-Risk" basis. In addition, the tenant and landlord should have executed an agreement to mutually waive recovery against each other. Some leases contain a waiver of subrogation to the extent covered by insurance. This latter type of subrogation waiver would now depend on a very comprehensive insurance specification. Many old-style high-rise office buildings have been known to experience problems with water damage. First, fire and broad extended coverages do not respond to pay losses to the tenant's

property caused by the overflow of air conditioning systems or water leaks. Second, with the requirements as stated and with the limited waiver of subrogation (i.e., to the extent covered by insurance), the leaking water pipes would probably not be a covered peril. The net result: the landlord winds up with a claim from the tenant for damage to the property and ultimately on the liability loss history of the landlord.

- Older tenant leases may lack a requirement for additional coverages such as hired, non-owned automobile liability insurance and workers' compensation insurance.

Case Study 5—Strip Shopping Center

In the design of the insurance to be required of tenants in a strip shopping center, the landlord failed to require the tenant to purchase Boiler & Machinery insurance. This type of center typically contains separate heating and ventilating and air conditioning systems, in addition to separate electrical services, for each retail store. Loss to an air conditioning system resulted in the tenant looking to the landlord to repair or replace this system. The tenant maintained that had the landlord's intent been that the tenant be responsible for the HVAC system, it would have said so in the lease.

- The lease should clearly state in all cases who is responsible for which property, including insurance coverage in the event of loss.

Note: Boiler & Machinery insurance is often overlooked in tenant leases. This coverage is relatively inexpensive and includes coverage, if purchased on a comprehensive form, for all mechanical and electrical systems in addition to boilers and pressure vessels.

Case Study 6—High-tech office building

The high-tech era of communications has brought about the construction of high-tech buildings to accommodate occupancies

such as stock brokerage firms, high-tech companies, and others whose business depends upon electrical power and communications services and therefore ceases to function with even the smallest interruption. In these cases, the tenant asserts penalties against the landlord in the event of an interruption of services to the premises in excess of a specified period of time. It is important in the evaluation of risk that consideration be given by the landlord to providing emergency backup power and protection of telephone communications equipment, including satellite communication equipment. The design of the insurance program for the landlord may be discussed by the tenant in a leasing situation. In addition, the landlord should maintain insurance coverage, including business interruption and extra expense, for loss of these services to the premises.

Case Study 7- Roof leak, retail tenant

Heavy rains penetrated an existing damaged roof causing extensive damage to stock of a high-end ladies wear tenant. Tenant (and their insurer) sought recovery from the Landlord but could not prevail due to:

- Lease provision absolving Landlord of any responsibility for damage to tenant's personal property.
- Waiver of Subrogation language in lease wherein each party (Landlord and Tenant) waived their insurer's right to subrogate against a third party.

Incidentally, the tenant's rather high deductible, which was costly to the individual store, had been dictated by corporate practices.