

INSURANCE ISSUES IN INDUSTRIAL AND OFFICE LEASES

By Jim Hochman & David Liebman, SIOR

Negotiating insurance provisions in commercial leases is both an art and a science, heavily dependent on the given transaction and the parties' realistic assessments of their risk tolerance. This article (Part 1) and our next article (Part 2) in the next issue of *The SIOR Report* highlight several areas for consideration. These areas are hardly all inclusive. Your clients are well advised to consult with commercial insurance experts before signing the final lease. We consulted with and thank Daniel Weil, senior vice president, Property & Casualty Group, of Chicago-based Alliant/Mesirow Insurance Services, who contributed to these articles.

1. Reasonable Limits for Comprehensive General Liability (CGL): What is a reasonable CGL limit for a landlord to require of a tenant? A limit of \$1,000,000 per occurrence is common. However, higher limits may be called for depending on the property and the nature of the tenant's use. An experienced insurance advisor's assistance is often required for special uses.

2. Certificates of Insurance ("COI") and Notice of Cancellation: Can and should a landlord/owner ("Landlord") require a COI from the tenant, and vice-versa? For the Landlord, yes: Landlords should always require tenants to carry their

own coverage and confirm evidence of coverage on an annual basis. A Landlord requiring notice of cancellation of coverage from the Tenant's insurer, with ample time to replace coverage, is equally appropriate. This allows the Landlord to shift risk and allows for oversight and effective risk management. As to the Tenant requiring the same of a Landlord, this is possible but not common and depends on the subject property, nature of the tenant's use and transaction specifics, including the tenant's leverage in the deal (i.e., a large user).

3. Subrogation: The subrogation right, if not waived, allows the insurer of one party to "step into the shoes" of that party and pursue claims against the other to recover damages paid by that insurer on claims made under the policy. To prevent this "double recovery" possibility by insurers, it is strongly recommended that both Landlord and Tenant request and obtain mutual waivers of subrogation.

4. Business Interruption (BI) and Extra Expense (EE) Insurance:

a. Who should have this coverage? Typically, all businesses have exposure to business interruption, or at a minimum, lost revenue and/or additional (extra) expenses that come into

effect as a result of casualties, property claims, and losses. It is common and not unreasonable for Landlords to require tenants to carry some level of BI and/or EE insurance. Be careful to properly assess the risks insured: for example, a warehouse user of high-value electronics and computers should maintain higher property and BI or EE coverage than a distributor of textbooks.

b. What does BI or EE insurance cover in the event of a casualty? In the event of a loss, BI covers the expenses a business incurs and which continue to be incurred even though the business is not in operation, as a result of the loss or casualty. Typically the coverage limit is defined by a calculation that identifies those losses and expenses that arise from, and continue through a casualty. EE covers expenses a business would incur in an effort to continue operating after a property loss, such as rent for temporary space, temporary communications systems, and advertising its relocation.

Insurance provisions in a lease are not usually addressed by brokers; they are handed over to the attorneys, but the broker's insight and experience could add value. Your client's insurance professional is often the key advisor on these provisions. ▾