ANNOTATED LEASE INDEMNITY AND INSURANCE SPECIFICATIONS

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ACREL – INSURANCE COMMITTEE
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PROFESSIONAL ACTIVITIES

Board Certified in Real Estate Law: Commercial, Residential and Farm and Ranch
Life Fellow, Texas Bar Foundation
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LAW RELATED PUBLICATIONS*

CONDOMINIUMS: *Documentation for the To-Be-Built Office Condominium*, State Bar of Texas, Advanced Real Estate Drafting Course (2005).

FORECLOSURE: TEXAS FORECLOSURE MANUAL (State Bar of Texas – 1990, 2nd ed. 2006, and 2008, 2010 Supplements). (Available from State Bar of Texas). *Ins and Outs of Deed of Trust Foreclosures - Practical Tips for the Practitioner*, State Bar of Texas, Advanced Real Estate Law Course (2005).

RISK MANAGEMENT: *Annotated Risk Management Provisions (Focus on Texas Real Estate Forms Manual's Retail Lease)*; *Allocating Extraordinary Risk in Leases: Indemnity/Insurance/Releases and Exculpations-Condemnation (Including a Review of the Risk Management Provisions of the Texas Real Estate Forms Manual's Office Lease)*; *Risk Management*; and *Shifting of Extraordinary Risk: Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation and Exculpation*, State Bar of Texas, Annual Advanced Real Estate Drafting Course (2007, 2003, 2002) and the Annual Advanced Real Estate Law Course (2006); *Additional Insured Endorsements to Liability Policies: Typical Defects and Solutions*", State Bar of Texas, Advanced Real Estate Drafting Course (2008); and *CGL Coverage of Defective Work*, ACREL Fall Program October 2009; *Distress and Insurance*, ACREL Fall Program October 2010; *Insurance Issues in Distressful Times*, State Bar of Texas, Advanced Real Estate Drafting Course (2011); *Annotated Insurance Specifications*, State Bar of Texas, Advanced Real Estate Law Course (2011).

SALES: *"As Is" in a Contaminated World*, St. Mary's School of Law, Texas Land Title Institute (2009), *The Law of "As Is"*, State Bar of Texas, Agricultural Law Course (2009); and *Field Guide for Due Diligence on Income Producing Properties* (2000) and *Papering The Deal: From Land Acquisition to Development*, State Bar of Texas, Advanced Real Estate Law Course (2004).

* Copy of articles may be downloaded from website: www.gdhm.com.

HONORS AND ACCOMPLISHMENTS

American College of Real Estate Lawyers (2007 – 2011); The Best Lawyers in America (Real Estate) (2000 - 2011); Who's Who in America (1995 - 2011) and Who's Who in American Law (1985 - 2011); and Texas Monthly, Super Lawyer - Real Estate (2001-2011). Established the Palmer Drug Abuse Program in Corpus Christi in 1979 and in Austin in 2000 as programs helping teens and young adults recover from alcohol and drug abuse.

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ANNOTATED LEASE INDEMNITY AND INSURANCE SPECIFICATIONS

Bill Locke

Contractual Risk Allocation.

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is shifted in a contract are by the use of representations and warranties, insurance covenants, express assumption of liabilities, indemnity, exculpation, release and limitation of liability provisions. Every provision of a contract is either restating the rule that would be supplied by the court in the absence of the provision or is expressly shifting a risk from one party (the "***party to be protected***") to the other (the "***protecting party***"). The most common method of risk management is through contractual provisions for insurance. The success of an entity's approach to contractual risk transfer can be considered successful if it meets the following criteria:

- Risks retained are appropriate and affordable.
- Risk as an element of the overall transaction and negotiation is incorporated at the onset.
- Indemnity, insurance, and other pertinent conditions are not so onerous that contact negotiations drag on unnecessarily delaying the transaction or necessitating the use of second-rate service providers to accomplish the contract's purpose.
- Contractual conditions allocating risk are not so onerous that a court disallows their operation at a future point in time.
- Insurance requirements are clear, using recognized terms that can be interpreted both at the time the contract is negotiated and in possible future disputes.
- Insurance and other support for the indemnity is in place when a loss occurs.
- A thorough insurance monitoring process keeps the transferee in compliance with the insurance requirements.
- The performance of the contract is monitored and regularly evaluated.

Criteria quoted from CONTRACTUAL RISK TRANSFER Strategies for Contract Indemnity and Insurance Provisions (International Risk Management Institute, Inc. 2011).

Texas Real Estate Forms Manual Lease.

This article contains a discussion of the insurance provisions in the basic, office and retail lease forms contained in the Texas Real Estate Forms Manual of the State Bar of Texas, including the waiver of claims, waiver of subrogation provision and its companion Insurance Addendum. These forms are set out in the left hand column and this article author's comments are set out in the right hand column and are referred to in this article as the **Annotated Lease Form** and the **Annotated Insurance Addendum**. Further comments on insurance principles are contained in **Endnotes** at the back of the article following the insurance industry's standard forms.

Supplemental Forms.

Following the Annotated Lease Form and the Annotated Insurance Addendum are two forms drafted by the author for use with the Lease and the Insurance Addendum: a **Supplement to Insurance Addendum** and a **Supplement to Risk Management Provisions**. The Supplement to Insurance Addendum is also set out in a two column format with the form in the left hand column and the author's comments as to supplemental form in the right hand column. References are made to the Endnotes and the Standard Industry Forms.

Appendix Forms: Standard Insurance Industry Forms.

Included in this article is an Appendix of 21 forms. Accompanying some of these **Appendix Forms** is a commentary on the risk or peril covered, and the form's coverage limitations and exclusions.

Risk of Casualty Loss and Injuries in Leased Premises.

Leases, being a creature of property law and contract, have the following special risks and risk allocation issues:

- Upon casualty loss, what happens to the lease, does it terminate or does it continue?
- If due to a casualty loss the premises become untenantable, what happens to the rent?
- Who is responsible for the restoration of the premises?
- Are there premises located in special hazard areas, such as flood zones, hurricane or earthquake areas?
- Are there tenant improvements and betterments to the premises?
- Does the tenant's operations at the premises result in invitees coming to the premises or the use of contractors, business autos, and high pressured boilers at the premises?
- Are there special environmental hazards or other extraordinary risks associated with tenant's use of the premises?
- Who is responsible for injuries occurring on the premises?
- Is the protecting party financially capable of funding the loss or injury without insurance?
- If rent and income by the parties is interrupted due to the occurrence of the peril, will the financial stability of either or both of the lease parties be materially adversely affected?
- Is insurance available to fund protection against these risks at a commercially affordable rate? What minimum coverage limits are reasonable? What deductibles are acceptable? What coverage exclusions and limitations are acceptable?

Heightened Risk Concern Arising During Periods of Financial Distress.

When one of the parties to a transaction is in financial distress (the "***distressed party***"), the parties to be protect should ask the following questions:

- Is there an increased risk for the occurrence of bodily injury or property damage?

- Are my insurable interests insured?
- How do I know they are insured?
- Am I relying on the distressed party to provide liability or property insurance to protect my insurable interest?
- If so, will I be notified in advance of cancellation of the insurance?
- What if the distressed party does not pay the insurance premium?
- What happens if the distressed party does not contact the insurer or cooperate with the insurer after the occurrence of an insured loss or peril?
- If the insured loss or peril occurs, is my insurable interest adequately protected?
- Who will adjust the loss?
- To whom will the insurance proceeds be paid?

Unfavorable answers to these questions will determine if there is a risk that insurance will not appropriately or adequately afford protection to the parties to be protected (a "***financial distress risk***"). See Locke and Maloney, *Insurance Issues in Distressful Times*, State Bar of Texas, Advanced Real Estate Drafting Course (2011) for discussion of the special concerns raised where there is a financial distress risk. Further discussion of the indemnity provisions contained in the Manual's Lease form may be found at Locke, *Annotated Risk Management Provisions: Indemnity and Liability Insurance (Focus on Texas Real Estate Forms Manual's Retail Lease)*, State Bar of Texas, Advanced Real Estate Drafting Course (2007) and *Allocating Extraordinary Risk in Leases: Indemnity/Insurance/Releases and Exculpations/Condemnation (Including a Review of the Risk Management Provisions of the Texas Real Estate Forms Manual's Office Lease)*, State Bar of Texas, Advanced Real Estate Law Course (2006).

Also see the following articles: Comiskey, *Builder's Risk Requirements and Strategies*, State Bar of Texas, Construction Law Conference (2010); Comiskey and Johnston, *"Casualty" Clauses in Commercial Leases*, State Bar of Texas, Advanced Real Estate Drafting Course (2002); Johnston, *Insurance and Indemnity in Real Estate Transactions*, State Bar of Texas, Advanced Real Estate Law Course (2010); Saltz, *Insuring Tenant Alterations*, PROBATE & PROPERTY 45 (Jan./Feb. 2006); Saltz, *Allocation of Insurable Risks in Commercial Leases*, American Bar Association, REAL PROPERTY, PROBATE AND TRUST JOURNAL 480 (Fall 2002); Shidlofsky, *Surviving a Casualty Loss "Unlocking the Da Vinci Code (a/k/a Insurance)"*, State Bar of Texas, Construction Law Conference (2005).

Annotated Lease

Manual Form	Comments
TEXAS REAL ESTATE FORMS MANUAL (2 ed.), Chapter 71 Leases. – Basic, Office, Retail and Industrial. **LEASE** **Basic Terms** … **Premises** Approximate square feet: ____ sq. ft. Name of Shopping Center: _____ Street address/suite: _____ City, state, zip: _____	
… **Tenant's Rebuilding Obligations:** If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: _____. …	**Allocation of Rebuilding Obligation** See **Lease ¶ E.5** below – Casualty/Total or Partial Destruction.
Definitions … "**Common Areas**" means all facilities and areas of the [Shopping Center/Building and Parking Facilities that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the [Shopping Center/Building], including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.	
… "**Injury**" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain. …	**Indemnification for Injuries** The defined term "Injury" is used in the indemnity provisions of the Lease, ¶¶ A.18 and C.6. ¶A.18 provides that "Tenant agrees to ... indemnify ... Landlord from any Injury occurring in any portion of the Premises." ¶C 8 provides that "Landlord agrees to ... indemnify ... Tenant from any Injury occurring in any portion of the Common Areas." "Injury" is defined in the Manual Lease forms as meaning 3 types of occurrences and the associated liability arising out of such occurrence: property damage, injuries to persons including their death, and "personal and advertising injury." This last form of liability incorporates by reference the definition of such term as contained in Tenant's liability insurance.
"**Landlord**" means Landlord and its agents, employees, invitees, licensees, or visitors.	**"Landlord" and "Tenant"** The terms "Landlord" and "Tenant" are used in the Basic Provisions to name the parties to the Lease and are defined in the Definitions as including a laundry list of other persons that are not parties to the Lease. The laundry list is not identical for each party to the Lease. The definition of "Tenant" additionally includes the Tenant's contractors as "Tenant." The purpose for

	adding a laundry list of other persons not a party to the Lease as being within the defined term "Landlord" or "Tenant" is a risk allocation purpose, both to define the Indemnified Persons (the person who are protected by the indemnity) and to define the broad scope of the indemnity (the persons whose negligence caused the Injury and for which the Indemnified Persons are to be protected by the Indemnifying Person).
… "**Operating Expenses**" means all reasonable expenses, including real property taxes, that Landlord pays in connection with the ownership, operation, and maintenance of the building, except principal and interest on any debt, expenditures classified as capital expenditures for federal income tax purposes, and expenses for which Tenant is required to reimburse Landlord.	The Lease does not list as an Operating Expense insurance premiums paid by Landlord. Presumably this expense falls within "all reasonable expenses". Also, not specifically addressed as an Operating Expense are payments made for insurance deductibles, retentions and co-payments. Tenants may object to pass-through of deductibles as an Operating Expense if, for example, the deductible is used to make a repair that should be classified as a capital expense. If tenant improvements are to be insured by Landlord's property insurance, then Landlord may wish to recoup from the Tenant the cost of the additional premium attributable to the increase in property value attributable to the Tenant's above-building standard improvements.
… "**Tenant**" means Tenant and its agents, contractors, employees, invitees, licensees, or visitors.	See comment immediately above.
A. Tenant agrees to— … 9. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.	**Repair, Replacement and Maintenance Obligation** Tenant's obligation excludes repair, replacing and maintaining the portion of the Premises allocated to the Landlord. Manual Lease ¶ C.4 allocates to the Landlord the obligation to repair, replace and maintain the (a) roof, (b) foundation, (c) Common Areas, (d) structural soundness of the exterior walls, doors, corridors, and windows, and (e) other structures or equipment servicing the Premises. These provisions of the Manual Lease do not fall into the trap that some lease drafters make by providing that the Tenant is responsible to make repairs or replacements caused by its negligent acts or omissions. That approach would run counter to the property insurance and waiver of claims/waiver of subrogation provision in the Lease.
18. INDEMNIFY, DEFEND, AND HOLD LANDLORD HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF TENANT'S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR**	**"Indemnify"** "Indemnify" is a shifting of the risk of a loss from a liable person to another. However, many times scriveners use an indemnity provision when they do not know whether the Indemnified Person is a potentially liable person. Sometimes, the indemnity provisions are no more than a restatement of existing duties, "I will indemnify you for my wrongs;" "You will indemnify me for your wrongs." However, it is not necessary that the words "indemnify" or "indemnity" be used or even that the promise be in writing. 14 TEX. JUR. 3d *Contribution and Indemnification* § 14 Form (1997); 26 TEX. JUR. 2d *Statute of Frauds* § 29. **"Defend"**

STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD. …	Care should be taken in crafting the scope of and exclusions from the liabilities indemnified, such as providing for the defense of the indemnified party by the indemnifying party ("indemnify, ***defend***, and hold harmless"), settlement authority, and choice of laws applicable. The duty to defend is a separate and distinct responsibility. In *Farmers Texas Mutual County Insurance v. Griffin*, 955 S.W.2d 8, 821 (Tex. 1997), the court addressed the separate duty of an insurer to defend its insured and explained "[a]n insurer's duty to defend and duty to indemnify are distinct and separate duties. Thus, an insurer may have a duty to defend but, eventually, no duty to indemnify." The court gave an example of how the duties may diverge, "a plaintiff pleading both negligent and intentional conduct may trigger an insurer's duty to defend, but a finding that the insured acted intentionally and not negligently (i.e., not within the policy's coverage) may negate the insurer's duty to indemnify." *See also Reser. v. State Farm & Fire Casualty Co.*, 981 S.W.2d 260, 263 (Tex. App.–San Antonio 1998, no pet.) noting that the duty to defend is unaffected by the ultimate outcome of the case. "**8 Corners Rule**" The Fifth Circuit stated the "8 Corners Rule" as follows in *Primrose Operating Co. v. National American Ins. Co.*, 382 F.3d 546, 552 (5th Cir. 2004): > Texas employs the "eight corners" or "complaint allegation" rule when determining whether an insurer has a duty to defend. *Potomac Ins. Co. v. Jayhawk Med. Acceptance Corp.*, 198 F.3d 548, 551 (5th Cir. 2000). The eight corners rule requires the finder of fact to compare only the allegations in the underlying suit–the suit against the insured–with the provisions of the insurance policy to determine if the allegations fit within the policy coverage. The duty to defend analysis is not influenced by facts ascertained before the suit, developed in the process of litigation, or by the ultimate outcome of the suit. *See also Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118 (Tex. App.–Hou. [1st Dist.] 2003, pet denied); *E & L Chipping Co.*, 962 S.W.2d 272, 274 (Tex. App.–Beaumont 1998, no pet) - if the pleadings do not allege facts that trigger the indemnity, the Indemnifying Person is not required to defend the Indemnified Person; *Tesoro* 125. The "duty to defend" cases have primarily arisen in construing an insurer's duty as opposed to the duty of an Indemnifying Person. However, the authority of insurance cases has been recognized as being relevant in interpreting the duties of Indemnifying Persons. *English v. BGP Intern, Inc.* 174 S.W.3d 366 (Tex. App.–Hou. [14th Dist.] 2005, no pet. h.) at fn 6: > We recognize that most of the cases addressing this issue, and many of the cases we have cited, involve the duty to defend in the insurance context. However, we find little reason why the principles regarding an insurer's duty to defend should not apply with equal force to an indemnitor's contractual promise to defend its indemnity. .... Based on our interpretation of this provision, it appears BGP agreed to both *defend and indemnify* English in suits arising from

> BGP's operations when those operations began before 100 percent of the landowners had consented. Giving reasonable effect to every word used in the contract, and understanding the separate and distinct nature of the two duties, we hold that BGP agreed to defend English-separate and apart from its duty to indemnify-from suits falling within the terms outlined in the contract.

Fisk Electric Co. v. Constructors & Assoc., Inc. 888 S.W.2d 813, 815 (Tex. 1994) stating "[T]he standard for determining whether a contractual indemnitor has a duty to defense is the same as in cases involving an insurer's duty." See *generally Gen. Motors Corp. v. Am. Ecology Envtl. Svcs. Corp.,* 2001 WL 1029519, at 6-8 (N.D. Tex 2001) which applied the same principles regarding the duty of an insurer to defend in the insurance context to the duty of an Indemnifying Person who has contractually agreed to defend its Indemnified Person.

"Claim "; "Action"; "Loss"; "Liability"; "Attorney's Fees"; "Costs"

Indemnities have sometimes been classified as an "indemnity against liability." *Russell v. Lemons,* 205 S.W.2d 629, 631 (Tex. Civ. App.—Amarillo 1947, *writ ref'd n.r.e.*). In the case of a promise to indemnify against "***liability***," a cause of action accrues to the indemnified person only when the liability has become fixed and certain, as by rendition of a judgment. Possibility that liability triggering indemnity will be incurred in pending action is a "future hypothetical event" within meaning of rule that Uniform Declaratory Judgments Acts gives court no power to pass upon hypothetical or contingent situations. *Boorhem-Fields, Inc. v. Burlington Northern Railroad Co.,* 884 S.W.2d 530 (Tex. App.—Texarkana 1994, *no writ*); § 37.001 TEX. CIV. PRAC. & REM. CODE ANN..

"All Claims"

The Texas Supreme Court in *Fisk Elec. Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813 (Tex. 1994) found that the following language **did not** meet the express negligence test:

> ...[t]o the fullest extent permitted by law, [Fisk] shall indemnify, hold harmless and defend [Constructors] ... from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees [arising out of or resulting from the performance of Fisk's work].

Constructors brought a third party cause of action against Fisk seeking indemnification against the claim of Fisk's employee against Constructors. The court held that Fisk had no duty to indemnify Constructors, since the indemnity did not expressly cover Fisk indemnifying Constructors for Constructors' negligence. The court then found that since Fisk had no duty to indemnify Constructors, Fisk had no liability for Constructors' attorneys fees in defending against Fisk's employee's suit. *Id.* at 815.

"Damages"

In drafting the classes of liabilities covered by an indemnity care should be given to the scope of covered items. For example, are

	"***punitive damages***" of the Indemnified Person to be covered? Are the punitive damages of an employee or an agent covered, if the employer is not liable? For a discussion of "punitive damages" see *Alamo Nat'l Bank v. Kraus,* 616 S.W.2d 908, 910 (Tex. 1981) and TEX. CIV. PRAC. & REM. CODE §§ 41.001 *et seq.* "**Defense Costs**": **Precondition - Express Negligence Test Satisfied** In *Fisk Electric Co. v. Constructors & Assoc.s, Inc.*, 888 S.W.2d 813 (Tex. 1994), the supreme court found that the express negligence requirement for the enforcement of an indemnity agreement is not an affirmative defense to be alleged and proved by the defendant Indemnifying Person, but rather is a rule of contract construction. The court held that Fisk's obligation to pay attorney's fees arose out of its duty to indemnify. Absent a duty to indemnify, there is no obligation to pay attorney's fees. The supreme court declined to carve out an exception to the express negligence rule for contracts which although they did not expressly indemnify the Indemnified Person for its own negligence, clearly, expressly or broadly covered the Indemnified Person's defense costs. *Also see Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App.—Houston [1st Dist.] 1995, *writ denied*), holding no right to attorney's fees absent an enforceable indemnity provision. **Attorney's Fees** The expense of defending a liability suit and in subsequently enforcing the contractual indemnity are reimbursable when the Indemnified Person recovers contractual indemnification from the Indemnifying Person. An Indemnified Person's attorney's fees in defending a liability suit are recoverable from the Indemnifying Person as "indemnified damages" even though not expressly mentioned in the indemnity provision. Attorney's fees may be awarded to the Indemnified Person pursuant to TEX. CIV. PRAC. & REM. CODE § 38.001(8) in connection with a suit against the Indemnifying Person for its breach of its contract of indemnity. *Arthur's Garage v. Racal-Chubb,* 997 S.W.2d 803 (Tex.App.--Dallas 1999, *no writ*). The purpose of indemnification is to make the Indemnified Person whole. *Tubb v. Bartlett,* 862 S.W.2d 740, 751 (Tex. App.—El Paso 1988, *writ denied*); *Continental Steel Co. v. H. A. Lott, Inc.,* 772 S.W.2d 513, 517 (Tex. App.--Dallas 1989, *writ denied*); *Texas Const. Assoc., Inc. v. Balli*, 558 S.W.2d 513 (Tex. Civ. App.—Corpus Christi 1977, *no writ*); *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200 (Tex. Civ. App.—Houston 1959), *rev'd on other grounds*, 325 S.W.2d 126 (1959) *and vacated on other grounds*, 326 S.W.2d 915 (Tex. Civ. App.-- Houston 1959); *Barnes v. Calgon Corp.,* 872 F. Supp. 349, 353 (E.D. Tex. 1994). **Costs** However, a different rule may apply to "costs" and "expenses" beyond attorney's fees. In *Arthur's Garage v. Racal-Chubb,* 997 S.W.2d 803 (Tex. App.—Dallas 1999, *no writ*) the court held that failure of the indemnity provision to expressly cover the Indemnified Person's litigation costs prevented recovery of the following expenses incurred by its attorney: filing fees, courier fees, postage, telephone expenses, long distance charges, and fax charges. The court considered these costs to be included

within the hourly billing rates and reasonable fees of the attorney, unless the indemnity contract expressly covered these items as an Indemnified Matter.

Allocation of Costs of defense if defending Indemnified Person and Persons Not Indemnified

An example where an Indemnified Person was not fully protected is the case of *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex. App. [14th Dist.] 2000, *writ denied*). In *Hess* the court found that a portion of the attorney's fees Hess incurred in defending a suit brought by an injured employee of the Wood Group was not covered by the Wood Group's indemnity. Hess sought and obtained reimbursement from the Wood Group for the $200,000 it had paid to settle the claim, but was denied the right to recover 100% of the $141,743.75 in attorney's fees it incurred in defending the claim. The trial court's finding that the $200,000 settlement of the claim was reasonable was upheld by the court of appeals despite the fact that another defendant (Graham) was released in the settlement agreement. The court found that the settlement amount was reasonable as to the potential liability of Hess alone. However, Hess in defending the claim, also was defending a claim against Graham for Graham's negligence. Hess had agreed to indemnify Graham. The Wood Group had indemnified Hess. The trial court held that the Wood Group indemnity did not include Hess' contractual obligation to indemnify Graham; and thus did not include the portion of Hess' fees incurred in defending Graham.

Settlement by Indemnifying Person Negates Indemnity for Defense Costs Incurred by Indemnified Person

No case has determined whether an Indemnified Person can recover against the Indemnifying Person under a contractual indemnity for its attorney's fees in defense of an indemnified liability, if the Indemnifying Person settles the claim. It has been held in a case involving common law indemnity that the Indemnifying Person's settlement of a third party's claim, which if proved would establish a common law right of indemnification by the Indemnified Person, eliminates attorney's fees incurred by the Indemnified Person in defending suit by the third party. In *Humana Hospital Corp. v. American Medical Systems, Inc.*, 785 S.W.2d 144 (Tex. 1990), quoting its holding in *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 446 (Tex. 1989), the supreme court in *Humana Hospital* held that there is no right of indemnity against a defendant who is not liable to the plaintiff. The court found that since the settlement did not include a court determination that the Indemnifying Person, American Medical, was negligent, the Indemnified Person, Humana, could not obtain indemnity for its defense costs.

Manual's Commentary

The following is a quoted portion of the commentary in chapter 71 Leases, p. 71-2 of the Texas Real Estate Forms Manual (2 ed.) § 71.1:4 Cautions: Risk Allocation:

> **Indemnities and Waivers:** The indemnity provisions of the multitenant building or project lease forms are designed to protect the respective parties from their own ordinary negligence (but not

gross negligence or willful misconduct) on a geographic basis; that is, the tenant indemnifies the landlord for any damage or injury occurring within the premises, whether or not the ordinary negligence of the landlord is a cause of the damage or injury, and the landlord indemnifies the tenant for any damage or injury occurring within the common areas, whether or not the ordinary negligence of the tenant is a cause of the damage or injury. The waiver of subrogation provision contained in the multitenant building or project lease from releases both parties from liability for property damage and loss of revenues up to the limits of the property insurance coverages required to be carried under the lease, notwithstanding the ordinary negligence of the party causing the property damage or loss of revenues. The indemnity and waiver provisions are designed to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

Manual's Approach to Reciprocal Indemnities in the Lease

The Texas Real Estate Forms Manual Basic, Retail and Office Leases contain mutual indemnities. In Lease ¶A 18 Tenant indemnifies Landlord. In Lease ¶C 6 Landlord indemnifies Tenant. Each indemnity is a broad form indemnity, indemnifying the Indemnified Person for all liabilities due to the occurrence of an Injury, even if the cause is the sole or concurrent negligence of the Indemnified Person. The Tenant's indemnity is for Injuries occurring in the Premises. The Landlord's indemnity is for Injuries occurring in the Common Areas.

Each indemnity complies with the express negligence and fair notice requirements which are imposed by the court on provisions shifting liability for negligently caused injuries from one liable person to another. Therefore, each indemnity is enforceable as a means of shifting the risk of liability to the Indemnifying Person for Injuries caused in whole or in part by the sole or concurrent negligence of the Indemnified Person.

Indemnifying another person for liability caused by the Indemnifying Person's "one's own negligence" has long been recognized in Texas. *Ohio Oil Co. v. Smith*, 365 S.W.2d 621, 624 (Tex. 1963); *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987).

An indemnity provision indemnifying the Indemnified Person against his own negligence must be conspicuous enough to give the Indemnifying Person "fair notice" of its existence. The concept of "fair notice" was introduced into Texas indemnity law by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 634 (Tex. 1963). The fair notice principle focuses on the appearance and placement of the provision as opposed to its "content." In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the supreme court adopted the conspicuousness standard of

§ 1.201(10) of the Texas UCC, applicable to the sale of goods, and applied it to indemnities and releases in a case involving the sale of services. Section 1.201(10) of the Texas UCC provides

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: A NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if its is in larger or other contrasting type or color. But in a telegram any term is "conspicuous."

TEX. BUS. COMM. CODE § 1.201(10) (Vernon 1994). *Also see Banzhaf v. ADT Sec. Sys.*, 28 S.W.3d 180 (Tex. App.– Eastland [11th Dist.] 2000, *writ ref'd*), finding an indemnity to be conspicuous that was set forth in enlarged, all capital lettering. The lettering is dark, boldface type so that it contrasts with the lighter, smaller type of the remaining contractual paragraphs ... The indemnity provision ... is directly above the signature line. A reasonable person's attention is attracted to the indemnity provision when looking at the contract... The indemnity provision is on the back page (of a 1 page document), but the contract itself specifically directs the reader's attention to the paragraph in which is it contained. On the front of the contract, just above the signature line for Herman's is the directive: "ATTENTION IS DIRECTED TO THE WARRANTY, LIMIT OF LIABILITY AND OTHER CONDITIONS ON REVERSE SIDE."

See Greer and Collier, *The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas After Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 SO. TEX. L. REV. 243 (1994). *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978) upheld a provision on reverse side of purchase order where front side contained reference in large red print, partly in bold, incorporating provisions on reverse side; *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990) upheld an indemnity provision contained on front of one page contract in separate paragraph; *Dresser Industries v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) struck down indemnity located on back of work order, in a series of uniformly numbered paragraphs, with no heading and with no contrasting type; *K & S Oil Well Service, Inc. v. Cabot Corp., Inc.*, 491 S.W.2d 733, 737-38 (Tex. Civ. App.–Corpus Christi 1973, *writ ref'd n.r.e.*) struck down indemnity hidden on reverse of contract in paragraph headed "warranty;" *Rourke v. Garza*, 511 S.W.2d 331, 334 (Tex. Civ. App.—Houston [1st Dist.] 1974), *aff'd* 530 S.W.2d 794 (Tex. 1975); *Safeway Scaffold Co. of Houston, Inc. v. Safeway Steel Products, Inc.*, 570 S.W.2d 225, 228 (Tex. Civ. App.—Houston [1st Dist.] 1978, *writ ref'd n.r.e.*); *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex. App.– Houston [14th Dist.] 2000, *writ ref'd*) - indemnity not conspicuous if in same size and type as the balance of a 1 page document; *Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503 (Tex. App.–Texarkana 1999, *writ denied*) - indemnity provision not conspicuous if in same size and type and without a separate heading identifying the paragraph was an indemnity in a 22 paragraph, 13 page document, also court not persuaded that the conspicuousness requirement applied only to "forms." An indemnity provision was held not to meet the conspicuousness requirement in *U.S. Rentals, Inc. v. Mundy Service Corp.*, 901 S.W.2d 789 (Tex.

App.—Houston [14th Dist.] 1995, *writ denied*) when it was buried on the back of a rental contract with all provisions printed in the same respective type and sizes, and the heading did not alert the reader that it created an indemnity obligation ("LIABILITY FOR DAMAGE TO EQUIPMENT, PERSONS AND PROPERTY"). The Supreme Court in *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex.1997), found that a release was not conspicuous when it was set in a type font too small to read even though the heading was in larger font (heading was 4 point font and the terms of the release were in smaller font); the release was outlined in a box; the heading was all caps, in bold type and read "RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT"; and above the signature line appeared the caption in all caps, bold-faced centered and underlined type the following statement "I UNDERSTAND MOTORCYCLE RACING IS DANGEROUS. YES, I HAVE READ THIS RELEASE." The court did not accept the argument that the release was conspicuous because of its small contrasting type.

In order for an indemnity to cover the liabilities caused by the Indemnified Person's negligence, the indemnity must meet the express negligence and fair notice tests. The Texas Supreme Court in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987) held an indemnity provision to be unenforceable because it did not specifically state that the contractor (Daniel) would indemnify Ethyl for Ethyl's own negligence. The court overruled the clear and unequivocal standard as well as the three exceptions to the standard listed in *Fireman's Fund Insurance Co. v. Commercial Standard Indemnity Co.*, 490 S.W.2d 818 (Tex. 1972). In *Ethyl*, an employee of the contractor was injured while working on a construction project for the owner. After the employee settled his claim for workers' compensation benefits, the employee sued the owner who, in turn, sued the contractor (employer) seeking indemnity. The jury found the owner 90% negligent and the contractor 10% negligent. The owner sued the contractor for indemnification on the following indemnity provision:

> Contractor (Daniel) shall indemnify and hold Owner (Ethyl) harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor, Contractor's employees, subcontractors and agents or licensees. (Emphasis added by author.)

In holding that Ethyl was not entitled to indemnification by the contractor, the court stated

> parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract.

The language which courts have recognized as being effective to cover expressly an Indemnified Person's negligence has taken many forms, for example, "...without regard to the causes thereof..."; "regardless of which such claims are founded upon the negligence of the (Indemnified Person)"; "whether the same

	is caused or contributed to by the negligence of (the Indemnified Person)." The Texas Supreme Court in *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358 (Tex. App.—Dallas 1989), *aff'd* 817 S.W.2d 50, 56 (Tex. 1991) approved the following language as meeting the express negligence test: > 14.9 Operator's Indemnification of Contractor: Operator (Diamond Shamrock n/k/a Maxus) agrees to ... indemnify ... Contractor (Moran Bros.) ... from and against all claims ... of every kind ... without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees... on account of bodily injury, death or damage to property. ... > 14.13 Indemnity Obligation: Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by such parties under the terms of this Contract, including without limitation, paragraphs 14.1 ... be without limit and without regard to the cause or causes thereof ... strict liability, or the negligence of any party, whether such negligence be sole, joint or concurrent, active or passive. (Underlining added.) In *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990), the Texas Supreme Court held the indemnity provision set out below met the express negligence test and required Christie, Inc. to indemnify Enserch for Enserch's negligent supervision of Christie, Inc.'s work as an independent contractor hired to service Enserch's pipeline. Parker, an employee of Christie, Inc., was asphyxiated when a gasket blew out causing a valve to leak natural gas into the concrete manhole vault where Parker was working. Parker's estate brought a wrongful death action against Enserch. The court first held that Enserch owed a duty of care to the employees of Christie, Inc., even though Christie, Inc. was an independent contractor, since Enserch had retained control of the manner that Christie, Inc. was to carry out its servicing contract. Enserch had furnished a procedures book for Christie's employees which outlined the procedures to be followed while working on the pipeline, and Enserch representatives frequently visited the job site and supervised Christie's employees. The supreme court followed the exception announced in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) to the general rule of *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976). The general rule adopted in *Abalos* is that an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. However, the court in *Redinger* created an exception by holding that "one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Id*. at 418 [citing RESTATEMENT (SECOND) OF TORTS § 414 (1977)]. The court upheld the following provision as requiring Christie, Inc. to indemnify

Enserch for Enserch's negligent supervision:

> (Christie) assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained or alleged to have been sustained in connection with or to have arisen out of or incidental to the performance of this contract by (Christie), its agents and employees, and its subcontractors, their agents and employees, regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of (Enserch), (Enserch's) representative, or the employees, agents, invitees, or licensees thereof. (Christie) further agrees to indemnify and hold harmless (Enserch) and its representatives, and the employees, agents, invitees and licensee thereof in respect of any such matters and agrees to defend any claim or suit or action brought against (Enserch), (Enserch's) representative, and employees, agents, invitees, and licensees thereof ... . (Court's emphasis.)

The court found that it was clear that "any such matters" in the second sentence referred to the claims or actions described in the first sentence and the contract as a whole was sufficient to define the parties' intent that Christie indemnify Enserch for the consequences of Enserch's own negligence. Therefore, the indemnity language and the reference to Enserch's negligence did not need to be in the same sentence.

Permian Corp. v. Union Texas Petroleum Corp., 770 S.W.2d 928 (Tex. App.—El Paso 1989, *no writ*). An employee of a subsidiary of Permian, the contractor, sued Union Texas for negligently causing the employee injuries while the employee was performing services for Union Texas. The El Paso Court of Appeals found the following indemnity by Permian expressly indemnified Union Texas against liabilities arising out of its negligence:

> Contractor (Permian) hereby indemnifies and agrees to protect, hold and save Union Texas ... harmless from and against all claims ... including but not limited to injuries to employees of Contractor ... on account of, arising from or resulting, directly or indirectly, from the work and/or services performed by Contractor ... and whether the same is caused or contributed to by the negligence of Union Texas, its agents or employees. (Emphasis added by the court.)

"Occurring"

The indemnity language does not expressly address the time of the occurrence. Injuries can occur after the end of the Term of a lease due to acts or omissions occurring during the Term of a lease. The indemnity does state that the indemnity survives the end of the Term of the Lease, but this may address the survivability of the indemnity as to Injuries occurring during the Term of the Lease. The timing issue is addressed by adding the words "either before or after the end of the Term" after

	"occurring in any portion of the Premises." **"Premises"** "Premises" is defined in the Basic Terms section of the Retail Lease. The risk allocation scheme adopted in the Texas Real Estate Forms Manual for Leases is to allocate responsibility to the Tenant for all Injuries occurring in the Premises and to allocate to the Landlord responsibility for all Injuries occurring in the Common Areas. The Retail Lease contains reciprocal indemnities with the Tenant indemnifying the Landlord for all Injuries occurring in the Premises and with the Landlord indemnifying Tenant for all Injuries occurring in the Common Areas. **Independent of Tenant's Insurance** This language is added to address those cases in which the court has sought to interpret the Indemnifying Person's indemnity in cases of ambiguity by examining the scope of an Indemnifying Person's insurance covenant and the risks covered thereby to determine the intended breadth of the indemnity to scope and limits of the insurance. **Not Be Limited by Comparative Negligence Statutes or Worker's Compensation Insurance** This language notes that the indemnity is intended by the parties not to be limited by the statutory risk allocation schemes set up in the comparative negligence statutes and the Workers' Compensation Act. A contractual indemnity by the employer of the injured person is necessary to overcome the Workers' Compensation Bar so as at least to pass back to the employer the employer's percentage of responsibility (if not all of the employee's damages in excess of the statutory workers' compensation limits to the employer's liability) which might otherwise be borne by the Indemnified Person absent the indemnity. The contractual indemnity should also be drafted to pass back to the employer the costs of defense of the employee's claim. In *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983) the Texas Supreme Court held that an employer's negligence could not be considered in a third-party negligence action bought by an employee arising out of an accidental injury covered by workers' compensation insurance. The jury had determined that the accident was attributable as follows: plant owner's negligence (Petrofina) – 43%, employer's negligence (Hydrocarbon Construction) – 42%, and employee's negligence (Varela) – 15%. The supreme court reversed the trial court's reduction of the damage award from $606,800 to $243,924, or 43% of total damages. The supreme court held that the Workers' Compensation Act is an exception to the Comparative Negligence Statute [then Article 2212a, § 2(b)] and disallowed contribution from the employer. The enforceability of a contractual indemnity passing back to the employer a third party's negligence over the "Worker Compensation Bar" has been upheld. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990). The Texas Workers' Compensation Act provides that a subscribing employer has no liability to reimburse or hold another person harmless for a judgment or settlement resulting from injury or death of an

	employee "unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability." Texas Workers' Compensation Act, TEX. LABOR CODE § 417.004, repealing TEX. REV. CIV. STAT. ANN. Art. 8308-4.04, formerly Art. 8306, § 3(d). **Survives Termination of Lease** This provision is added to assure the Indemnified Person that the contractual indemnity does not terminate like the other covenants on the end of the Lease Term. Note, however, that the indemnity does not expressly state that it covers Injuries occurring after the end of the Lease Term but attributable acts or omissions of the Indemnified Party prior to the end of the Lease Term. The indemnity should be revised to address Injuries occurring in the Premises after the Term attributable to acts or omissions of Tenant during the lease term. **"Caused"** The concept of causation has been addressed by authors of indemnity provisions using a variety of terminology, such as "caused by," "arising out of," and "due to". **"Due To"** The phrase "due to" has been held to require "a more direct type of causation" than the phrase "arising out of." *Utica National Ins. Co. of Texas v. American Indemnity Co.*, 141 S.W.3d 198 (Tex. 2004) held that arising out of" does not require direct or proximate causation, while the phrase "due to" requires a more direct type of causation. **"Caused By"** *McDaniel v. Anheuser-Busch, Inc.,* 987 F.2d 298 (5th Cir. 1993) holding the indemnitor was not obligated to defend the indemnitee against all claims and suits, or for costs incurred in defense of baseless claims, since the indemnity clause required only that the indemnitor indemnify for injuries caused by acts or omissions of the indemnitee. **"Arising Out Of"** The phrase "***arising out of***" has been the subject of recent cases. In *General Agents v. Arredondo*, 52 S.W.3d 762 (Tex. App.—San Antonio [4th Dist.] 2001, *no writ*) the court broadly construed the exclusion for "injuries arising out **of** a contractor's and subcontractor's operations" contained in a contractor's commercial general liability policy as not being limited to injuries caused by an act of the contractor or subcontractor. The court found that "all that is required is a "causal connection." The court cited the following authorities for this conclusion: > Cf. Midcentury Ins. Co. v. Lindsey, 997 S.W.2d 153, 156- 57 (Tex. 1999)("For liability to 'arise out of' in the context of an 'additional insured' endorsement does not require that named insured's act caused accident.") Indeed, in more recent cases, the Fifth Circuit has recognized that the phrase "arising out of" is "understood to mean "originating from," "having its origin in," "growing out of," or "flowing from." *American*

> *States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir. 1998)(quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951)). Thus, a "claim need only bear an "incidental relationship" to the excluded injury for the policy's exclusion to apply." *Bailey*, 13 F.3d at 370 (quoting *Continental Cas. Co. v. Richmond*, 763 F.2d 1076, 1080-81 (9th Cir. 1985).

The court in *Sieber & Callicutt, Inc. v. La Gloria*, 66 S.W.3d. 340 (Tex. App.–Tyler 2001, *no writ*) found, in a case where the negligence of the Indemnified Party (La Gloria) and the negligence of the Indemnifying Party (Sieber & Callicutt) was determined to be equal, that the negligence of the Indemnifying Party was a "substantial factor" and "a proximate cause" of the liability although not the only factor in causing the Indemnified Matter (liability to the estate of a deceased employee of the Indemnified Party, La Gloria). La Gloria settled the wrongful death action and sued Sieber & Callicutt on Sieber & Callicutt's indemnity in its maintenance contract with La Gloria. The trial court found that there was a reasonable risk that La Gloria would have been found grossly negligent (the manway cover was in extreme disrepair), Sieber & Callicutt also was negligent (by running a hot water line into the tank and not advising La Gloria), and La Gloria and Sieber were equally negligent. The Indemnifying Party (Sieber & Callicutt) urged the court to find that the "***arising in any manner***" language in the indemnity did not "provide a lower causal connection than proximate cause" and thus it should not be required to indemnify La Gloria, even for Sieber's proportion of causation. The court rejected Sieber's argument noting that the trial court found that Sieber was negligent and that a component of negligence is proximate cause. Since the indemnity provision expressly provided for Sieber to indemnify La Gloria for Sieber's proportionate share of liability, Sieber was liable to La Gloria for one-half of the settlement.

The Beaumont Court of Appeals, in *Faulk Management Services v. Lufkin Industries, Inc.*, 905 S.W.2d 476 (Tex. App.—Beaumont 1995, *writ denied*), upheld the following provision as covering injuries to an employer's employees caused by the sole negligence of the Indemnified Person (premises owner) even though injuries to the contractor/employer's employees was not specifically mentioned, and the indemnity provision was worded in terms of injuries "caused by the (contractor/employer)" and did not expressly mention that it covered injuries "caused by" the Indemnified Person

> By signing the below statement, the seller (meaning Faulk Management as the "seller" of janitorial services) agrees to ... indemnify ... Lufkin Industries, Inc. against loss ... caused by the seller, its employees, agents or any subcontractor arising out of or in consequence of the performance of this contract.
>
> It is the intention of the Seller and/or Contractor to indemnify Lufkin Industries, Inc. even in the event that any such claims, demands, actions or liability arises *in whole* or in part from warranties, express or implied, defects in materials, workmanship or design, condition of

> property or its premises and/or *negligence* of Lufkin Industries, Inc. or any other fault claims as a basis of liability for Lufkin Industries, Inc.

"In Connection With"

Indemnified liabilities may be contractually limited to such injuries as "arise out of" or are "***in connection with***" the work being performed by the Indemnifying Person. If the indemnity is so limited, then it might be held not to cover the negligent acts of the Indemnified Person that are unrelated to the performance of the scope of the work by the Indemnifying Person. *Sun Oil Co. v. Renshaw Well Serv., Inc.,* 571 S.W.2d 64, 70-71 (Tex. App.—Tyler 1978, *writ ref'd n.r.e.*); *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806, 832 (Tex. App.—Ft. Worth 1961, *writ ref'd*); and *Martin Wright Electric Co. v. W.R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied*, 397 U.S. 1022 (1970). The court in *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806 (Tex. Civ. App.—Ft. Worth 1961, *writ ref'd*) found that the indemnity agreement of a subcontractor did not include injuries to the subcontractor's employees who had been injured through the negligence of employees of the contractor engaged in work unrelated to the subcontract. However, this result might also be explained as being an attempt by pre-*Ethyl* courts to limit indemnity agreements with the "clear and unequivocal" test. *See Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 479 (5th Cir. 1993). In another case, the court held that the subcontractor's indemnity did not extend to the death of the subcontractor's employee caused by the negligent acts of the contractor's employees. *Brown & Root, Inc. v. Service Painting Co.*, 437 S.W.2d 630 (Tex. Civ. App.—Beaumont 1969, *writ ref'd*). The death of the employee of the subcontractor did not "occur in connection with" the subcontracted work, notwithstanding the fact that the employee was engaged in sublet work at the time of the employee's death. The work being performed by the employee of the general contractor was not connected to the work being performed by the employee of the subcontractor. The *Brown & Root* indemnity clause reads:

> Subcontractor agrees to indemnify and to save General Contractor ... harmless from and against all claims ... which may be caused or alleged to have been caused in whole or in part by, or which may occur or be alleged to have occurred in connection with, the performance of the Sublet Work.

See also Westinghouse Electric Corp. v. Childs-Bellows, 352 S.W.2d 806 (Tex. Civ. App.—Ft. Worth 1961, *writ ref'd*); *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963); *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963); and *Alamo Lumber Co. v. Warren*, 316 F.2d 287 (5th Cir. 1963). In *Sun Oil Co. v. Renshaw Well Service, Inc.*, 571 S.W.2d 64 (Tex. Civ. App.—Tyler 1978, *writ ref'd n.r.e.*), the court found that the indemnified person was not entitled to indemnification against injury to a worker injured while driving from the work site after completion of the work. In *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied* 397 U.S. 1022 (1970), the court refused to extend the subcontractor's indemnity to include the death of a subcontractor's employee killed while leaving work after putting his tools away where the death was caused solely by the

contractor's negligence.

"In Whole or In Part": Comparative Indemnity-Indemnifying for One's Own Share of Injury Caused by the Concurrent Negligence of the Indemnified Person and the Indemnifying Person

The "***in whole ... by ... Landlord***" language expressly addresses the issue as to whether the Indemnifying Person's indemnity covers an Injury caused "solely" by the negligence of the Indemnified Person. The "***in part ... by ... Landlord***" language expressly addresses the issue as to whether the Tenant's (the Indemnifying Person's) indemnity is only as to Injuries caused solely by the acts or omissions of the Landlord (the Indemnified Person) or also covers Injuries caused in part by other persons. However, This language may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or comparative negligence. The indemnity provisions do not expressly state that the Indemnified Person is indemnified for the liability it has due to the negligence of the Indemnifying Person. This may result in the Indemnified Person being indemnified by the Indemnifying Person for the portion of the liability attributable to the Indemnified Person's negligence but not for the portion attributable to the Indemnifying Person's negligence.

For example, if an employee of the Tenant is injured in the Premises and suit results. Under the facts of the case, the employee's injuries are the result of the joint negligence of "Landlord" and "Tenant." The injured employee is barred from suing its employer (the Tenant) by the Workers' Comp Bar and thus sues the Landlord. Landlord calls on Tenant to defend Landlord from suit relying on Tenant's indemnity in Lease ¶A.18. Tenant defends. The jury determines that Landlord was 20% negligent and Tenant was 80% negligent. Jury determines damages to the employee are $1,000,000. Landlord seeks indemnity and contribution from Tenant. Tenant pays the 20% allocable to Landlord's 20% share of the award = $200,000. Tenant does not pay the $800,000 attributable to its negligence. Tenant argues that it did not indemnify Landlord for the share of the liability attributable to Tenant's share of the negligence! The Texas Supreme Court in *Ethyl* held that, if indemnity is sought by the Indemnified Party for the concurrent negligence of the Indemnifying Party, the indemnity has to so expressly state. The court termed this claim as one for "***comparative indemnity***." The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

> Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. ... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987).

"But Will Not Apply To"; "Except Sole Negligence of the Indemnified Person"

The drafter of an indemnity clause cannot use the exclusion clause as a means of impliedly including within the coverage clause by implication items not excluded. In *Singleton v. Crown Central Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987), the Texas Supreme Court found that the following provision **failed** the express negligence standard since the provision stated what was not to be indemnified claims resulting from the sole negligence of the premises owner rather than expressly stating that the premises owner was to be indemnified from its own negligence.

> Contractor agrees to ... indemnify ... owner from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... ***excepting only*** claims arising out of accidents resulting from the ***sole negligence*** of owner. (Emphasis added by author.)

Linden-Alimak, Inc. v. McDonald, 745 S.W.2d 82 (Tex. App.—Ft. Worth 1988, *writ denied*). *Texas Utilities Electric Co. v. Babcock & Wilcox*, 893 S.W.2d 739 (Tex. App.—Texarkana 1995, *no writ*).

"**Whether**"; "**Including, Even If"; "Regardless Of…."**

"Whether" has been interpreted to mean "***including, even if*** ... ." in *B- F-W Const. Co., Inc. v. Garza*, 748 S.W.2d 611 (Tex. App.—Ft. Worth 1988, *no writ*). The Fort Worth Court of Appeals held that the language "***regardless of*** any cause or of any fault or negligence of Contractor" expressly stated the intent of the parties that the subcontractor would indemnify the contractor against the contractor's negligence. The indemnity provision stated

> Subcontractor (Garza Concrete) shall fully protect, indemnify and defend contractor (B-F-W) and hold it harmless from and against any and all claims, demands, causes of action, damages and liabilities for injury to or death of Subcontractor, or any one or more of Subcontractor's employees or agents, or any subcontractor or supplier of Subcontractor, or any employee or agent of any such subcontractor or supplier, arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to any work or operations of Subcontractor or Contractor or any other contractor or subcontractor or party, or otherwise in the course and scope of their employment, and regardless of cause or of any fault or negligence of Contractor. (Emphasis added by author.)

"Ordinary Negligence"

In Lease ¶A.18 Tenant indemnifies Landlord against Landlord's liability for Injuries occurring in the Premises even if the Injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord. This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Tenant for "all liabilities arising out of use of the

Premises", "such as the liability of the Landlord due to its negligence or strict liability or for injuries to the Tenant's employees arising out of the sole or concurrent negligence of the Landlord. It thus indemnifies "Landlord" for the "Landlord's" sole and contributory negligence. In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co*., 725 S.W.2d 705, 707 (Tex. 1987) adopted the "express negligence" requirement. In *Ethyl*, the court observed

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that true intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine. The express negligence test replaced the "clear and unequivocal" test....

The express negligence requirement is a rule of contract interpretation and therefore is to be determined by the court as a matter of law. *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 814 (Tex. 1994). The indemnity must expressly state that it indemnifies the indemnified person for liabilities caused in whole or in part by its negligence and not leave it to inference. For instance, "x will indemnify y for all loss arising out of the acts or omissions of y except for loss caused by the gross negligence or willful misconduct of y" will not be enforced to indemnify y for loss caused by its negligence.

"Strict Liability"

In order to protect an Indemnified Person for liability incurred by it under the doctrine of strict liability (liability without fault), the indemnity provision shifting this liability to the Indemnifying Person in order to be enforceable must expressly state that the Indemnifying Person indemnifies the Indemnified Person for its strict liability. In ¶A.18 Tenant covenants to indemnify Landlord all liabilities that are imposed on Landlord for Injuries occurring in the Premises, "even if (the) Injury is caused ... by the strict liability of Landlord." The fair notice doctrine has been extended to cases involving strict liability. The Texas Supreme Court held in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.,* 890 S.W.2d 455 (Tex. 1994) that an indemnity agreement will include indemnification for strict statutory liability only if the agreement expressly states that the Indemnifying Person is to be liable for the Indemnified Person's strict liability. The court found that fairness dictates that such an "extraordinary shifting of risk" must be clearly and specifically expressed as to non-negligence based statutory strict liability in order to be enforced. The court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.,* 890 S.W.2d 455 (Tex. 1994) in passing recognized that indemnity provisions shifting liability arising out of strict products liability are similarly enforceable, if fair notice has been given. *Citing Rourke v. Garza,* 511 S.W.2d 331, 333 (Tex. Civ. App.—Houston [1st Dist.] 1974), *aff'd*, 530

S.W.2d 794 (Tex. 1975)--in which the indemnity clause was held not to have been worded sufficiently so as to include strict products liability; *Dorchester Gas Corp. v. American Petrofina, Inc.* 710 S.W.2d 541, 543 (Tex. 1986)--also, which held that the indemnity clause in question did not clearly require the indemnitor to indemnify the indemnitee against strict products liability. The Dallas court in *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.—Dallas 1999, *no writ*)[an alarm security products liability case where the tenant indemnified the alarm company from claims by third parties, which included the claim of the landlord] found that the following provision clearly and specifically covered the Indemnified Person's negligence, breach of warranty, and strict product liability:

> When purchaser (Arthur's Garage), in the ordinary course of business, has the property of others in his custody, or the alarm system extends to protect the property of others, purchaser agrees to and shall indemnify, defend, and hold harmless seller, its employees and agents for and against all claims brought by parties other than the parties to this agreement. This provision shall apply to all claims, regardless of cause, including seller's performance or failure to perform, and including defects in products, design, installation, maintenance, operation or non-operation of the system, whether based upon negligence, active or passive, warranty, or strict product liability on the part of seller, its employees or agents, but this provision shall not apply to claims for loss or damage solely and directly caused by an employee of seller while on purchaser's premises.

See also Helmerich & Payne Int'l Drilling Co. v. Swift Energy Co., 180 S.W.3d 635 (Tex. App.–Hou. [14th Dist.] 2005, no pet. h.).

One of the most common forms of strict liability impositions arises under the environmental laws. The Fifth Circuit has addressed indemnifications for strict liability under environmental protection laws in *Fina, Inc. v. ARCO*, 200 F.3D 266 (5th Cir. 2000). In *Fina* the court had to determine the enforceability of two indemnity provisions, the first in a 1969 sales contract between ARCO and BP Oil Company (the "ARCO/BP Agreement") as to a refinery located in Port Arthur, Texas being acquired by BP from ARCO, and the second in a 1973 sales contract between BP and Fina (the "BP/Fina Agreement") whereby Fina acquired the refinery from BP. Fina sued BP and ARCO for $14,000,000 in investigatory and remedial response costs it incurred after it discovered contamination at the refinery in 1989. Fina sought contribution from BP and ARCO under CERCLA. BP counterclaimed that the liability was covered in Fina's indemnity of BP in the BP/Fina Agreement. ARCO counterclaimed that the liability was covered by the indemnity in the ARCO/BP Agreement was assumed by Fina by the BP/Fina Agreement. The BP/Fina Agreement contained an express choice of laws provision choosing Delaware law. The ARCO/BP Agreement was silent as to applicable law. The indemnity provisions are the following:

> ARCO/BP Agreement. BP shall indemnify,

> defend, and hold harmless ARCO ... against all claims, actions, demands, losses or liabilities arising from the ownership or the operation of the Assets ... and accruing from and after Closing ... except to the extent that any such claim, action, demand, loss or liability shall arise from the gross negligence of ARCO.
>
> BP/Fina Agreement. Fina shall indemnify, defend and hold harmless BP ... against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets ... and accruing from and after closing.

As to the BP/Fina Agreement the court first determined that it would uphold the parties choice of Delaware law as the court could not discern a fundamental public policy of the State of Texas that would be violated by applying the "clear and unequivocal" test applicable to the enforceability of indemnity provisions covering the Indemnified Person's negligence. The court then held that the "all claims" language in the BP/Fina Agreement clearly covered liabilities arising under CERCLA, even though CERCLA was not enacted until 1980. The court noted that unlike Texas no Delaware case had addressed the applicability of the clear and unequivocal test to claims based on strict liability. The court found that the same policy reasons that existed in Texas' extension of the express negligence doctrine to strict liability cases also existed in Delaware to extend the clear and unequivocal test to strict liability claims in interpreting indemnities.

The court rejected BP's argument that normal contract rules of interpretation should apply to interpreting the indemnity. BP argued that the clear and unequivocal test should not apply to indemnification for prior acts giving rise to potential future liability (with "past" and "future" being determined by reference to the time at which the indemnity provision was signed). The court rejected BP's argument that under Texas law the express negligence doctrine is inapplicable to indemnities for past conduct giving rise to potential future liability and therefore similarly the court should find that Delaware would not apply the clear and unequivocal test to potential future liability for past acts. The court stated,

> Even as to Texas law, it is not at all clear that BP's conclusion is correct. The language used by the Texas courts is ambiguous: "Future negligence" might refer to future negligent conduct, but it also might refer to future claims based on negligence. True, the Texas rule does clearly distinguish between (1) indemnification for past conduct for which claims have already been filed at the time the indemnity provision is signed and (2) indemnification for future conduct for which claims could not possibly have been filed at the time the indemnity provision was signed. Still, no Texas case has addressed the applicability of the rule to the rare situation in which a party attempts to invoke the protection of an indemnity agreement against a claim filed *after* the indemnity was signed but arising from conduct that occurred *prior* to signing of the indemnity.

The court held that under Delaware law the indemnity in the BP/Fina Agreement did not clearly and unequivocally require Fina to indemnify BP for its strict liability under CERCLA that arose after the indemnity agreement (the *"future claim"*) for conduct prior to the indemnity agreement. As to ARCO's "circuitous indemnity obligation" being enforceable against Fina, the court held that the ARCO/BP Agreement did not pass the fair notice test under Texas law and would not pick up strict liability claims for ARCO's future strict liability for its past conduct. The court noted that Fina's claims under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq*., and § 361.344 of the Texas Solid Waste Disposal Act similarly would not be barred by the indemnity.

See Dent v. Beazer Materials and Services Incorporated, 156 F.3d 523 (4th Cir. 1998). Conoco (the landlord and the Indemnified Person leased to Beazer (the tenant and the Indemnifying Person) a parcel of property. The indemnity provided that "[Beazer] agrees to save [Conoco] harmless from any and every claim arising out of the use by [Beazer] of the demised premises." Den (the owner of an adjoining parcel) sued Conoco to recover environmental "response" costs under CERCLA. The court concluded that Conoco was entitled to indemnity because the response cost claim arose out of Beazer's use of the leased premises.

"Gross Negligence"

Gross negligence is more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5). The test for gross negligence contains both an objective and a subjective component. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 21, 22 (Tex. 1994). Objectively, the defendant's conduct must involve an extreme degree of risk, which is a function of both the magnitude and the probability of the anticipated injury to the plaintiff. *Also see Wal-Mart Stores, Inc. v. Alexander*, 878 S.W.2d 322, 325-26 (Tex. 1993). Subjectively, there must be evidence that the defendant had actual, subject awareness of the risk involved, but nevertheless was consciously indifferent to the extreme risk. The defendant knew about the peril, but its acts or omissions demonstrated that it did not care. *Moriel*, at 21; *Alexander* at 326; *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1998). *Also see Universal Services Co., Inc. v. UNG*, 904 S.W.2d 638 (Tex. 1995) for a case arising under the common law definition of "gross negligence." The fact that a defendant exercises "some care" does not insulate the defendant from gross negligence liability. *See Moriel*, 879 S.W.2d at 20 (discussing cases before *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 921-22 (Tex. 1981) that erroneously focused on "entire want of care" part of the gross negligence definition in reasoning that "some care" defeated a gross negligence finding. In 1995 the Legislature substituted "malice" for gross negligence as the prerequisite for punitive damages. However, the Legislature also defined "malice" with a definition mirroring the definition of "gross negligence" in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994). TEX. CIV. PRAC. & REM. CODE § 41.001(7).

Gross negligence included within term "negligence". In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.,* 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court observed, in a footnote to the opinion, that it was not deciding whether indemnity for one's own gross negligence or intentional injury may be contracted for or awarded by Texas courts. The court stated that "[p]ublic policy concerns are presented by such an issue ... ." *Id.* at 726 n.2. Texas allows insurance coverage for punitive damages derivative of gross negligence. *American Home Assur. Co. v. Safway Steel Products Co.,* 743 S.W.2d 693 (Tex. App.—Austin 1987, *writ denied*); *Home Indemnity Co. v. Tyler,* 522 S.W.2d 594 (Tex. App.—Houston [14th Dist.] 1975, *writ ref'd n.r.e.*). Recently, the San Antonio court of appeals held that an indemnity for one's own negligence also included all shades and degrees of negligence, including one's own gross negligence. *Webb v. Lawson-Avila Const., Inc.,* 911 S.W.2d 457 (Tex. App.—San Antonio 1995, *writ dism'd by agreement*). *Also see Sieber & Callicutt v. La Gloria*, 66 S.W.3d 340 (Tex. App. [12th Dist.] 2001, *no writ*) where the court assumed without discussion that negligence of the Indemnified Party included its gross negligence.

Haring v. Bay Rock Corp., 773 S.W.2d 676 (Tex. App.—San Antonio 1989, *no writ*). In this case involving a wrongful death action, the San Antonio Court of Appeals held the following provision did not meet the express negligence test since the negligence of the alleged indemnified person (oil and gas lessee) is not mentioned. The provision is worded as a disclaimer by the operator as to any liability except for gross negligence, and not as an indemnification by the operator for the operator's "disclaimed" but not expressly disclaimed negligence.

> [Operator (Bay Rock Corp.)] shall have no liability to owners of interests in said wells and leases (Haring) for losses sustained, or liabilities incurred, except such as may result from gross negligence or from breach of the provisions of this agreement.

"Willful Misconduct"

The court in *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 232-33 (Tex. App.—Houston [1st Dist.] 1994, *writ denied*) interpreted an exclusion from a contractor's indemnity contained in a construction contract between a commercial landlord and its contractor for "any claim aris(ing) out of the sole and gross negligence or willful misconduct of Owner (the commercial landlord, the Indemnified Person)"as including as an exclusion the landlord's "***knowing***" violation of the warranty of commercial habitability and/or "knowing deceptive trade practice" in its lease with the injured tenant. This case involved a shoe store that was put out of business in the landlord's shopping center by repeated flooding arising out of the action of a backhoe operator of a subcontractor of landlord's construction contractor. The case involved dual theories of recovery, the negligence of the contractor and the knowing deceptive trade practice and breach of warranty of the landlord. The backhoe operator accidentally broke a sewer line, and covered it up after he discovered his error instead of reporting the accident. The tenant reported to the landlord that water was seeping from a leak in the slab outside of its premises. The landlord, who was unaware of the backhoe operator's actions, repeatedly reassured

	the tenant after each of several floods, that it had corrected the problem when, in fact, it knew it had not. The court held that the intent of the parties by excluding gross negligence, also must have intended to exclude knowing conduct of the landlord, which is a "more culpable standard than gross negligence." The court noted that to hold otherwise would be to hold that the intent of the parties was that the indemnitees would not be entitled to indemnity for an act done with the mental state at the low end of the "continuum" of culpable mental states, but *would* be so entitled for an act done with a mental state that is higher on the scale, ***i.e.,*** an act that is *more* culpable than another for which they indisputably are not entitled to indemnity. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984). The issue of the enforceability of an indemnity for an intentional tort (Tenneco's misappropriation and improper use of confidential information obtained in bidding process) was raised in *Tenneco Oil Co. v. Gulsby Engineering, Inc.,* 846 S.W.2d 599 (Tex. App.—Houston [14th Dist.] 1993, *writ denied*). However, the court of appeals was able to sustain the trial court's summary judgment in favor of Tenneco on the grounds that the indemnity provision in the contract with Gulsby Engineering specifically covered patent infringement suits, and therefore included Tenneco's and Gulsby's joint and several liability for having infringed the unsuccessful bidder's patent.
… **C. Landlord agrees to—** … 6. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF LANDLORD'S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**	**Landlord's Indemnity** See analysis of the mutual indemnity by the Tenant above. Landlord's indemnity is for all Injuries occurring in any portion of the Common Areas, even if the Injury is caused in whole or in part by the negligence of the Tenant.
E. Landlord and Tenant agree to the following: 1. *Alterations.* Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.	**Ownership of Tenant Improvements** The Manual's Lease provides that tenant made alterations "will become the property of Landlord." This statement does not identify the point in time as of when the Landlord "owns" the improvements. If ownership transfers at the point of alteration, does the Tenant have an insurable interest in the improvements? Lease ¶ 5.a *Casualty/Total or Partial Destruction* provides that if the Premises can be restored within 90 days, Landlord is to restore the roof, foundation, exterior walls and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations and Tenant is to perform its Rebuilding

	Obligations. The Manual's **Insurance Addendum** at ¶1.A provides that Tenant is to carry property insurance to cover the Tenant's Rebuilding Obligations. As noted in the **Supplement to Insurance Addendum I.B.2** consideration should instead be given to allocating this responsibility to the Landlord's property insurance, especially in a case where ownership of the improvements is transferred to the Landlord as provided in the Manual Lease.
… 3. *Insurance.* Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.	**Role of Insurance Addendum** The Texas Real Estate Form Manual's Lease forms rely on an **Insurance Addendum** to detail the insurance coverages required to be maintained by the parties. Manual Ch. 41 contains general explanations of the various insurance terms used and choices in the Addendum (for example, "comprehensive general liability" versus "commercial general liability", "business owners' policy", "employer's liability insurance", "excess liability insurance", "umbrella") and a short commentary on portions of common additional insured endorsement forms applicable to the leases (for example, ISO Additional Insured Endorsement Forms CG 20 10 07 04 - Owners, Lessees or Contractors, CG 20 11 01 96 Managers or Lessors of Premises, and CG 20 26 07 04 - Designated Person or Organization). These ISO Additional Insured Endorsement Forms are not contained in the Manual but are set forth in full as **App. Forms 3, 4, and 6**. Following each of these ISO Additional Insured Endorsement Forms is Author's Commentary on the Endorsement. (Insurance Addendum ¶ A.1). The Insurance Addendum at Insurance Addendum ¶ A.1 contains a "check the box" choice between a ❑ commercial general liability policy (occurrence basis) or ❑ business owner's policy and a "check the box" choice of the following designations and various lines of coverage added by endorsement to the standard coverage of the selected liability form: ❑ designated location general aggregate limit, ❑ workers' compensation, ❑ employer's liability, ❑ business automobile liability, ❑ excess liability or ❑ umbrella liability (occurrence basis). (Insurance Addendum A.2). The Insurance Addendum provides at Insurance Addendum ¶ A.2a that the liability policy is to be endorsed to name the Landlord and its Lienholder as "additional insureds" and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract;" at Addendum ¶ A.2b that the additional insured endorsement must not exclude coverage for the sole or contributory ordinary negligence of Landlord or Lienholder; at Insurance Addendum ¶ A.2c that the property insurance must contain waivers of subrogation of claims against Landlord and Lienholder; and at Addendum ¶ A.2d that Tenant is to deliver to Landlord copies of the certificate of insurance and copies of any additional insured and waiver of subrogation endorsements. (Insurance Addendum ¶ A.3). The Insurance Addendum at Insurance Addendum ¶ A.3 contains the further requirement that Landlord's approval is required with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates; the amounts of any deductibles; and the

	creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.
4. *Release of Claims/Subrogation.* LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITH THE SHOPPING CENTER, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY.**	**"Release of Claims"** The waiver of subrogation provision (Lease ¶ E. 4) is both a release of claims between the parties as to property damages by reason of fire or the elements and a covenant to notify the insurance issuers of the release and to have the insurance companies endorse, if necessary, the policies so as to prevent invalidation of the policies because of the release. The waiver of subrogation provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test. The release is written in conspicuous type and meets the requirements of the fair notice test. The Insurance Addendum supplements this contractual waiver of the property insurance carrier's right of subrogation only as to the Tenant's property insurance. Insurance Addendum ¶ E.2c provides that the Tenant's property insurance policies must contain waivers of subrogation of claims against Landlord and Tenant. The Insurance Addendum does not contain a reciprocal provision requiring that the Landlord's property insurance policies contain a waiver of subrogation claims against Tenant. **"Each Other"** Use of the phrases "each other" and the "releasing party's property insurance" indicate that the terms "Landlord" and "Tenant" are the named parties to the lease as opposed to the additional persons listed in the Definitions section as being the "Landlord" or the "Tenant". If so, does the "releasing party" release the other party's "agents, contractors, employees, invitees, licensees, or visitors if the property damage or loss of business or revenues is caused in whole or in part by their negligence? Texas courts strictly construe releases and will not extend them to unnamed persons. In *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971), the court held that a release discharges only those tortfeasors that it specifically names or otherwise specifically indemnifies. The Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) approved the decisions in *McMillen*, and in *Lloyd v. Ray*, 606 S.W.2d 545, 547 (Tex. Civ. App.—San Antonio 1980, *writ ref'd n.r.e.*) and *Duke v. Brookshire Grocery Co.*, 568 S.W.2d 470, 472 (Tex. Civ. App.—Texarkana 1978, *no writ*) holding that the mere naming of a general class of tortfeasors in a release does not discharge the liability of each member of that class. A tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortuous event is not in doubt. *Also see Angus Chemical Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138 (Tex. 1997) where the court held that the release by an injured party of a tortfeasor does not release the tortfeasor's insurer; *Illinois Nat. Ins. Co. v. Pereez*, 794 S.W.2d 373 (Tex. App.—Corpus Christi 1990, *writ den'd*).

Limited to Property Damages

Note the release is only as to claims or liabilities for damage that are covered by the releasing party's property insurance (or that would have been covered by the required insurance if the party fails to maintain the property coverage required by the lease). The parties are not releasing each other for the (b) and (c) portion of "Injuries" as defined in the Definitions. Also, there is no companion contractual waiver of the liability insurance carrier's right of subrogation against the party causing the non-property damage Injury.

Waiver of Subrogation

See **Endnote III.A.2** Waivers Of Subrogation Or Waiver Of Recovery. See **App. Form B.3** Commercial Property Conditions ¶ I. Transfer of Rights of Recovery Against Others To Us – The ISO property policy for leased premises allows the parties to waive the insurer's rights in advance by a waiver of claims in the lease. The ISO property policy also allows the landlord to waive the insurer's subrogation right even after a loss.

Most leases, including the leases in the Texas Real Estate Forms Manual, contain a provision addressing the rights between the parties in the event that the property is damaged by the negligence of the other party.

The lease, such as the leases in the Texas Real Estate Forms Manual, may provide that the party whose property is damaged waives claims against the other negligent party and that the damaged party will look to the property insurance for recovery. Further the lease may provide that the right of subrogation of the insurer is waived or that the party obtaining the insurance will also obtain an endorsement to the property policy whereby the insurer waives its rights of subrogation to recovery its insurance proceeds against the negligent party.

In circumstances where the lease does not contain a waiver of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, ***equitable subrogation***. A majority of courts follow the rule that a lessor's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an ***implied coinsured***. Some of these courts have concluded that the landlord's agreement to procure property insurance covering the building implies an obligation by the landlord to insure the building for the benefit of both the landlord and the tenant. Others of these courts have reasoned that the tenant has indirectly paid for the insurance, either through rent or through expense pass through. The better practice to address this risk in the lease. See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11. INSURANCE LAW, Keeton and Widiss, §4.4(b). *Metal Works, Inc. v. North Star Reinsurance Corp. v. Continental Ins. Co.*, 624 N.E.2d 647 (1993); *Cook Paint & Varnish Co.*, 418 F.Supp 56 (N.D. Tex. 1976); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. 1975).

Texas follows the minority rule. *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956See FRIEDMAN ON LEASES (5th ed. 2011), § 9.12 No Implication of Co-Insured Status Unless Explicitly and Unambiguously Stated Otherwise in the

	Lease. The minority jurisdiction rule is based on the common-law presumption that a tenant is liable for the tenant's own negligence and the equitable principle of subrogation. **Waiver of Subrogation Endorsement** Since there is no recognized standard property policy form, like the ISO liability form, it is prudent to examine the property policy in connection with drafting the lease and to condition the lease, if necessary, on obtaining a subrogation waiver from the insurer. **Waiver of Subrogation from Subtenant's Insurers** Landlord may appropriately require subtenants to secure a waiver of subrogation from their insurers. **Exclusion from Waiver of Claims of Gross Negligence** The waiver of claims language excludes from the waiver claims arising out the gross negligence of the Released Party. With regard to property insurance, gross negligence or intentional misconduct of a party other than the named insured may not be a defense to coverage, so consideration should be given to making an exception to the exclusion to the extent these risks are covered by the property policy of the Releasing Party.
5. *Casualty/Total or Partial Destruction* a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within 90 days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations. …	**Background** The typical lease will assign responsibility for the maintenance of property insurance covering the building and other improvements to one party or the other. Under a long-term lease, especially when a single tenant occupies the entire premises, the lease allocates this obligation to the tenant. In multitenant situations, the lease specifies that the landlord is to maintain the property insurance. In cases where the landlord is to maintain the insurance, the lease may state that the insurance is maintained for the benefit of the landlord, or for the benefit of landlord and tenant, or may be silent on the subject of insurance and/or for whose benefit the insurance is to be maintained. **Manual's Commentary** The following is a quoted portion of the commentary in chapter 71 Leases, p. 71-2 of the TEXAS REAL ESTATE FORMS MANUAL (2 ed.) § 71.1:4 Cautions: Risk Allocation: > **Rebuilding Obligations:** The restoration obligations of the parties after a casualty are tied to the description of "Tenant's Rebuilding Obligations" contained in the Basic Terms of the lease. The tenant is expected to restore those leasehold improvements described in "Tenant's Rebuilding Obligations" in addition to replacing its personal property (including inventory, furniture, trade fixtures, and equipment). Because the tenant should carry property insurance to cover its restoration obligations, a detailed description is imperative. See clauses 71-10-8, 71-10-9, and 71-10-10. The landlord's restoration obligations are defined in terms of the portions of the premises that the tenant is not required to rebuild.

	For example, the tenant may be receiving the space in shell condition and be responsible for the initial construction of all leasehold improvements. The parties may decide that the tenant will restore all of the leasehold improvements inside the shall if the premises are destroyed. At the other extreme, the tenant may be receiving the premises with existing leasehold improvements, and the parties may decide that the landlord should restore all leasehold improvements after a casualty. Obviously, the possibilities are infinite and depend on the economic underpinnings of the transaction as well as the relative sophistication of the parties. However, the question must be asked at the outset of the transaction so that both parties are clear about the allocation of the risk for restoration and that adequate property insurance is obtained.
c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.	**Rent Abatement** Does rent abatement extend to cover the period that the Tenant is performing the Tenant's Rebuilding Obligation? Should the Tenant's Rebuilding Obligations or the Landlord's rebuilding obligation include the improvements to the Tenant's space to restore it to a condition it can open for business (carpet, interior partitioning, lighting, HVAC)?

Annotated Insurance Addendum to Lease

Form 71-34 **Insurance Addendum to Lease** [Long Form] Lease Date: [dd/mm/yy]. Landlord: _____. Tenant: _____. This insurance addendum is part of the lease. **A. Tenant agrees to—** 1. Maintain the property and/or liability insurance policies required below (mark applicable boxes) and such other insurance coverages and/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises:	**Manual's Approach** The Manual's **Insurance Addendum** together with the **Supplement to Insurance Addendum**, which follows in this article, are attachments to the lease form. They can be given to the parties' insurance consultants and insurers as a ready checklist of required coverages. The **Insurance Addendum** specifies the types of insurance to be maintained by Landlord and Tenant, but utilizes different means to identify the **geographic** coverages for Landlord and Tenant for liability insurance coverage and property insurance coverage. The Insurance Addendum identifies the portion of the Building to be covered by Tenant's property insurance as "all items included in the definition of Tenant's Rebuilding Obligations…." Landlord's property insurance is to cover "the Building exclusive of … the rebuilding requirements of all lessees." The Lease and its Insurance Addendum do not similarly state the geographic area to be covered by the Landlord and Tenant's liability insurance, but rely on the geographic coverage terms and definitions of the party's liability policy.

Type of Insurance or Endorsement	**Minimum Policy or Endorsement**	
General Liability Insurance Policies Required of Tenant		**Policy Forms.** The Insurance Addendum does not cover in detail the coverages required to be contained in the Tenant's and the Landlord's liability policies other than to provide that each is an occurrence basis policy and is to have the minimum coverage levels specified. The Insurance Addendum relies on Landlord's approval authority in **Insurance Addendum ¶ A.3** as opposed to specifying in the Insurance Addendum minimum standards to be met in the policy to be furnished by Tenant. See **Endnotes I** Policies, **II** Liability Policies and **III** Property Policies.
☐ Commercial general liability (occurrence basis) *Or* ☐ Business owner's policy	Per occurrence: $_____ General aggregate: $_____ Per occurrence: $_____ General aggregate: $_____	**ISO as the Standard** See **Endnotes I.A** and **II.C** for a discussion of ISO policies, the "standard" CGL policy. **Common Terminology Errors** See **Endnote VI.C.1** for common errors in terminology such as using antiquated terminology like ***comprehensive general liability***" and ***combined single limits***. See **Endnote I.B** Business Owner Policies.

Required Endorsements to Tenant's General Liability or Business Owner's Policy:		
☐ Designated location(s) General aggregate limit ☐ _____ [Include any other desired endorsements. See chapter 41 of this manual.]	$_____ $_____	If the liability policy covers multiple locations or projects, its limits may be exhausted by claims at the other locations or projects. If the limits have been negotiated between the parties as the minimum coverages for this transaction, the policies will need to be endorsed to make them applicable in full to this location or a separate policy purchased for this location.
Additional Liability Insurance Policies Required of Tenant:		
☐ Worker's compensation	$ 500,000	See **Endnote II.A** Workers Compensation Insurance. See **Endnote VI.C.3** Common Errors and Problems - Workers Compensation for a discussion of antiquated and current terminology.
☐ Employer's liability	$_____	See **Endnote I.B** Employer's Liability Coverage.
☐ Business automobile liability	$_____	See **Endnote III.D** Business Auto Policies. See **Endnote V.C.2** Common Errors and Problems – Business Auto Policies for a discussion of antiquated and current terminology.
☐ Excess liability *Or* ☐ Umbrella liability (occurrence basis)	$_____ $_____	
Property Insurance Policy Required of Tenant:		
☐ Causes of loss—special form *Or* ☐ Business owner's policy	100 percent of replacement cost of (a) all items included in Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises. 100 percent of replacement cost of (a) all items included in Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises	See **Endnote III.A** Landlord and Tenant Relationship. This provision coupled with the waiver of subrogation provision whereby Tenant waives claims against Landlord in addition to waiving its insurer's subrogation rights protects Landlord against claims by Tenant for damage to the Tenant's property, even if the damage arises out of the Landlord's negligence. See discussion at **Supplement to Insurance Addendum ¶¶** I.A.2.a(1) and I.B.2.a(1) Property Insurance as to whether tenant improvements and betterments are better covered under the Landlord's property insurance or the Tenant's property insurance. See **Endnote I.B** Business Owner Policies.

Required Endorsements to Tenant's Causes of Loss—[Special Form/Business Owner's] Policy:		
☐ Business income and additional expense	Sufficient limits to address reasonably anticipated business interruption losses for a period of ___ months	See **Endnote III.A.3.d(3)** Business Income And Additional Expense. Landlord may couple this requirement with a lease provision that Tenant waives claims against Landlord for business interruption and consequential losses sustained by Tenant, whether or not insured, even if such loss is caused by the negligence of Landlord, its employees, officers, directors, or agents. If the ongoing viability of Tenant may be threatened by business interruption due to fire or other perils, then Landlord may require Tenant to purchase this coverage. **ISO CP 15 03 Business Income – Landlord As Additional Insured (Rental Value) Endorsement.** Further, Landlord may require a tenant to purchase coverage for the Landlord's loss of rental income. ISO has recently promulgated an additional insured endorsement form to the tenant's property policy. This endorsement adds the person identified in the endorsement (the landlord) as an insured for loss of "rental value" and thus meets lease requirements that the tenant obtain coverage for loss of the additional insured's rental income. The ISO CP 15 03 provides that notice of insurer cancellation will be provided by the insurer to the additional insured, landlord.
☐ Boiler and machinery	$_____	See **Endnote III.E** Boiler and Machinery Coverage. Like the requirement that Tenant carry property insurance on its tenant improvements, betterments and personal property, requiring Tenant to insure its property against boiler explosion and loss due to equipment breakdown coupled with the waiver of claims provision, which is a part of the waiver of subrogation clause in the lease, protects the Landlord against claims by Tenant arising out of losses due to failure of this specialty item in the building.
☐ Flood	$_____	See **Endnote III.F** Flood Insurance.
☐ Earth movement	$_____	
☐ Ordinance or law coverage	$_____	See **Endnote III.G** Ordinance Or Law Coverage.
☐ Glass	Sufficient limits to cover plate glass	See **Endnote III.H** Glass Insurance.
☐ Signs	Sufficient limits to cover exterior signs	See **Endnote III.I** Sign Insurance.
[Include any other desired endorsements. See chapter 41 of this manual.]		**Endorsements Not Listed in Insurance Addendum.** In addition to the endorsement choices listed in the Insurance Addendum, there are other endorsement which might be appropriate, for example, an endorsement to increase the

	coverage available under the property insurance policy for debris removal. "***Debris removal***" is usually included as part of the covered expense. The ISO commercial property form limits coverage to up to $10,000 if (a) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (b) the cost of debris removal exceeds 25% of the sum of the paid loss plus deductible. An increase to these limits may be purchased by using ISO CP 04 15 Debris Removal Additional Limit of Insurance.
2. Comply with the following additional insurance requirements:	
a. The commercial general liability (or business owner's property policy) must be endorsed to name **Landlord** and Lienholder as "additional insureds"	**Persons to Be Listed as Additional Insureds on Tenant's CGL Policy** ¶ **2a** provides for "Landlord" and "Lienholder" to be named as "additional insureds." The term "***Landlord***" is given broad meaning in the Definitions section of the Lease. "Landlord" is defined as meaning "Landlord and its agents, employees, invitees, licensees, or visitors." In the case of CGL policies containing automatic insured coverage, this provision of the Lease may inadvertently extend coverage to "agents, invitees, licensees and visitors." Consideration should be given to listing in the insurance specifications specific companies that are to be scheduled as additional insureds on the Tenant's CGL policy. Also, all parties referenced or identified in the Tenant's indemnity as an Indemnified Person should also be listed as an additional insured on Tenant's CGL policy. Nobody (except the insurer) wins when a party is an Indemnified Person but is not scheduled as an additional insured. **Scheduling Additional Insureds** If it is intended that persons in addition to the named Landlord are to be listed as additional insureds, then consideration should be given to specifically naming or listing the most important of these persons in the additional insured endorsement form. E.g., see Schedule blank in **App. Form A.3** ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Persons. See discussion at Endnote **II.B.2.b(7)**. Standard additional insured endorsement forms do not extend coverage to the officers, directors and partners of the additional insured.
and must **not be endorsed to exclude** the sole negligence of Landlord or Lienholder from the definition of "insured contract."	**Manual's Indemnity by Tenant.** Tenant's indemnity of the Landlord is set out as follows in **Lease** ¶A.15: "**Tenant agrees to –** Indemnify, defend, and hold Landlord harmless from any Injury (and any resulting or related claim, action, loss, liability, or reasonable expense, including attorney's fees and other fees and court and other costs) occurring in

	any portion of the Premises. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF TENANT'S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.**" (Underlining added for emphasis) **Tenant's indemnity** in Lease ¶ A 15 covers all Injuries occurring in the **Premises** "**even if** caused **in whole or in part** by the ordinary negligence of Landlord." Thus Tenant is **indemnifying Landlord for its sole negligence**, a risk not covered by the standard additional insured endorsement and arguably not covered by the "insured contract" provisions of the Tenant's CGL policy. In order to effect this coverage, Tenant will have to have its carrier issue a manuscripted endorsement to its policy. If Tenant does not obtain such manuscripted endorsement, it will find itself in the position of indemnifying Landlord for a liability not reinsured by Tenant's CGL policy. **Standard Endorsement to "Insured Contract" Definition** In 2004 ISO revised several of its additional insured endorsement forms to limit coverage to injuries and damages ***"caused, in whole or in part***" acts or omissions of the named insured (e.g., the Tenant). Additionally, ISO issued a new CGL policy amendment form, **CG 24 26 07 04** Amendment of Insured Contract Definition , a copy of which is **Appendix Form A.10**. This amendment form amends the definition of "insured contracts" to limit assumed tort liability to injury or damage "caused, in whole or in part" by (the named insured). The CGL policy must be reviewed to determine if this amendment has been added to the policy. An argument exists as to whether this amendment excludes the sole negligence of the Landlord, as it does not expressly state that the additional insured's sole negligence is excluded from the definition of "insured contract."
b. Additional insured endorsements must **not exclude** coverage for the sole or contributory ordinary negligence of Landlord or Lienholder.	**Potentially Unavailable Coverage Specified** The general reference to the Landlord being listed as an additional insured on the Tenant's commercial general liability policy does not specify the scope of the matters to be covered by the additional insured endorsement other than to state that the additional insured endorsement form will not exclude coverage for the sole or contributory ordinary negligence of the Landlord or Lienholder. The industry standard additional insured endorsement forms issued by ISO do not expressly extend coverage to the additional insured's sole negligence. **App. Form A.3** ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or

	Organization: See discussion following form. In 2004 ISO modified several of its endorsement forms with the stated intent to expressly exclude from coverage the sole negligence of the additional insured. Many insurers additional insured forms now contain express exclusions of the additional insured's sole negligence. An issue may exist as to whether ISO's standard endorsement form issued for use by tenants to list landlords as an additional insured on a tenant's CGL policy extends to cover the landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its policy that expressly covers the Landlord's sole negligence. As a result it is possible that the additional insured endorsement furnished by Tenant will not be in compliance with this requirement. **No Geographic Limitation of Tenant's Additional Insured Endorsement Coverage Specified.** **¶ 2.b** does not specify or limit geographically the area of the Building to which Landlord's protection as additional insured is to extend. This is different from how the parties allocated liabilities by the indemnities. In the Lease's indemnity provisions the parties have carved up responsibility for liability based on geographic areas (Tenant is responsible for all Injuries occurring in the Premises; Landlord is responsible for all Injuries occurring in the Common Areas). This anomaly gives rise to a variance in coverage between a party's indemnity and its required insurance coverage. For example, if an Injury occurs in the Common Areas, Landlord is to indemnify Tenant. However, Landlord has coverage for such liability to the extent it is a protected for that liability pursuant to the additional insured endorsement on Tenant's liability policy. Attached as **App. Form A.4** is the industry standard ISO CG 20 11 Additional Insured CGL Endorsement designating Landlord as an additional insured on Tenant's CGL policy. The standard form utilizes the term "***premises***" to define the geographic area giving rise to coverage. But as explained in the commentary following that form in the Appendix such designation does not limit the Landlord's coverage to Injuries occurring "in" the Premises as such term is defined in the Lease. Coverage is for liabilities "***arising out of***" the premises leased to the Tenant. The definition of the term "premises" is not defined in the Tenant's CGL policy. Courts have construed the insurance coverage broadly against the insurer and extended coverage beyond merely "in" the premises. **Importance of Examining the Additional Insured Endorsement Form** **- Exclusion of Additional Insured's Negligence** See **Endnote II.B.2.b(5)** discussing an additional insured endorsement form that expressly excluded coverage of the negligence of the additional insured.

	- Exclusion If Additional Insured Has Insurance See **Endnote II.B.2.b(4)** discussing an additional insured endorsement form that excluded coverage of an additional insured if it otherwise had CGL insurance. **- Other Insurance Clauses** See **Endnote II.B.2.b(6)** discussing "***other insurance***" clauses in standard CGL policies. The standard CGL policy provides that it is "***excess***" over "any other **primary** insurance available to you (the insured) covering liability for damages arising out of the premises or operations … for which you have been added as an additional insured by attachment of an endorsement." (Emphasis added). The additional insured's "other insurance" (its own policy) thus declares itself to be excess over the coverage available to its insured through an additional insured endorsement. However, there are two situations where the additional insured's expectations as to the primacy of its additional insured coverage can be thwarted. (1) If the additional insured's own policy does not contain this wording, then both the named insured's policy and the additional insured's policy will contribute pro rata to losses except if the insurance specifications specifically provide for the named insured's policy to be "primary and noncontributing". (2) Some additional insured endorsements provide that they provide excess coverage unless the insurance specifications require that the additional insured coverage is "primary and noncontributing." This type clause is called a ***primary-when-required provision***. The Insurance Addendum is silent as to the effect of the additional insured having "other insurance" available to it for liabilities covered by the additional insured endorsement. The **Supplement to Insurance Addendum** specifically addresses these two situations by specifying that the coverage of the additional insured will be primary and noncontributing. See **Endnote II.B.2.b(11)** Additional Insured's "Other Insurance" as to whether coupling a contractual indemnity with an additional insured requirement will override the "other insurance" provisions of the standard CGL policy. **- Excess Insurance Clauses** Some additional insured endorsements (e.g., Traveler's blanket automatic insured provisions) provide that the coverage afforded to the additional insured will be excess to coverage afforded under the additional insured's "other insurance" unless the insurance specifications in the underlying agreement between the insured and additional insured provide that the additional insured coverage is primary and noncontributing. **- Umbrella as Excess Insurance** See the recommendations at **Endnote II.B.2.b(6)** as to how to protect the additional insured against having its own CGL insurance contributing ahead of the named insured's umbrella policy.
c. Property insurance policies must contain	See **Endnote III.A.2** Contractual Risk Allocations.

waivers of subrogation of claims against Landlord and Lienholder.	
d. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.	The general reference to the Tenant providing the Landlord with a certificate of insurance does not specify the items to be covered in the certificate of insurance. See the following form, the **Supplement to Insurance Addendum**, setting out in detail information to be set out in the certificate of insurance. As discussed in **Endnote VI.A** Certificates Of Insurance, certificates of insurance are not insurance, just evidence of insurance. Although it is typical to rely on a certificate of insurance as if it were insurance, a more prudent practice is to obtain and review the underlying policy and endorsements.
3. Obtain the approval of Landlord and Lienholder with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates, and other evidence of Tenant's Insurance; the amounts of any deductibles or self-insured retentions amounts under Tenant's Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.	This provision does not identify the deadline for seeking Landlord's approval. If approval is deferred past the execution date of the lease, the parties place themselves in the position of arguing over the forms at a time when construction may have commenced on tenant improvements. The **Supplement to Insurance Addendum ¶ I.A.3.b** requires delivery of the required insurance prior to Tenant's entry on the premises. Additionally, as noted in the discussion to **¶ I.A.3.a** to the Supplement to Insurance and the referenced Endnotes, reliance on certificates of insurance is imprudent.

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term:	**Tenant Not Afforded Policy Review Authority** There is no provision in the Insurance Addendum providing Tenant with the authority to review and approve the form of Landlord's policies or specifying minimum standards to be addressed in the policies to be furnished by Landlord.

Type of Insurance	**Minimum Policy Limit**	
☐ Commercial general liability (occurrence basis)	Per occurrence: $_____ General aggregate: $_____	See **Endnotes I.A** ISO Policies and Endorsements – The Standard and **II.C** CGL for a discussion of the ISO CGL policy and endorsements, the "standard" for the insurance industry. **Common Terminology Errors** See **Endnote VI.C.1** for common errors in terminology such as using antiquated terminology like ***comprehensive general liability***" and ***combined single limits***. **Tenant Not Designated as an Additional Insured** The Insurance Addendum to Lease does not require that the Tenant be listed as an additional insured on the CGL policy obtained by the Landlord for the Project as to Injuries occurring in the Common Areas. Tenant should consider requiring that it be listed as an additional insured on the Project's CGL policy as to Tenant's liability for

		Injuries occurring in the Common Areas. Adding Tenant as an additional insured on the Landlord's CGL policy is in line with the indemnities contained in the Lease. Additionally, adding Tenant as an additional insured is in line with the Tenant's expectations that it is insured by the "Building's" insurance for which it is paying through its Pro Rata Share of Operating Expenses for injuries occurring in the Common Areas and in the Parking Garage. **App. Form A.6** CG 20 26 07 04 Additional Insured – Designated Person or Organization: a form of additional insured endorsement to Landlord's CGL policy. The ISO endorsement form can be tailored to limit Tenant's protection as an additional insured to Injuries occurring in the Common Areas. The standard ISO form issued does not make that distinction. **Proposed Manuscript Changes to the ISO Endorsements** Should Tenant indemnify Landlord for Injuries occurring in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual's approach is to allocate via indemnity 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. A "fairer" approach is to provide each party with coverage on a primary basis on the other party's CGL policy for injuries occurring in a geographic area (e.g., inside or outside the Premises; in the Common Areas and the Parking Garage) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence. In the author's opinion a fairer allocation of risk can be made based on the degree of causation in addition to where the Injury occurs. **(1) Manuscript Change to the ISO form adding Landlord as an Additional Insured on Tenant's CGL Policy** The additional insured endorsement can be modified to specify that it <u>includes</u> coverage of injuries or damage occurring <u>outside the Premises</u> only if the injury or damage is caused by the sole negligence of the Tenant. The additional insured endorsement can be modified to specify that it <u>excludes</u> coverage for injuries or damage occurring <u>inside the Premises</u>, if the injury or damage is caused: (a) <u>in whole</u> by the negligent acts or omissions or willful misconduct of the Landlord or (b) <u>in part</u> by the negligent acts or omissions of Landlord if the aggregate of the Landlord's plus its contractors' percentage share of all negligence is 51% or greater. **(2) Manuscript Change to the ISO form adding Tenant as an Additional Insured on Landlord's CGL Policy** The additional insured endorsement can be modified to specify that it <u>includes</u> coverage for injuries or damage <u>in the Common Areas or Parking Garage</u> provided the injury or damage is not

		caused by the sole negligence of the Tenant and provided the Landlord is negligent. The additional insured endorsement can be modified to exclude from coverage liabilities to the extent they arise out of Tenant's acts or omissions in the Premises, if the liability is caused by the contributory negligence of the Tenant and if the Tenant's percentage share of all negligence is 51% or greater.
☐ Causes of loss—special form property	100 percent of replacement cost of the [Shopping Center/Building] exclusive of foundation, footings, infrastructure, sitework, and the replacement requirements of all lessees	See **Endnote III** Property Insurance. See **Supplement to Insurance Addendum** ¶I.B.2 Landlord's Property Insurance.

Annotated Supplement to Insurance Addendum

Supplemental Form	Comments
Supplement to Insurance Addendum Lease Date: [dd/mm/yy]. Landlord: _____. Tenant: _____. This insurance addendum is part of the lease. To the extent there is a conflict between the provisions of this supplement and the insurance addendum, this supplement controls.	**Why Supplement the Insurance Addendum.** The Author recommends that a Supplement be added to the Insurance Addendum to address the following points: 1. Policy Form. The Supplement to the Insurance Addendum can specify minimum acceptable insurance policy forms. This provides the parties with a common expectation and agreement as to insurance coverage prior to the expenditure of significant funds in designing space or making other lease arrangements. It also will permit the parties to involve their insurance advisors prior to signing the Lease. 2. Adding Tenant as an Additional Insured on Landlord's CGL Policy. Adding Tenant as an additional insured on the Landlord's CGL policy is in line with the indemnities contained in the Lease. Additionally, adding Tenant as an additional insured is in line with the Tenant's expectations that it is insured by the Project's insurance for which it is paying through its Pro Rata Share of CAM or Operating Expenses for Injuries occurring in the Common Areas. 3. Additional Insured Form Specified with Specified Manuscripted Changes. Adding a Supplement to the Insurance Addendum to specify the additional insured endorsement form similarly adds clarity to the lease negotiation process. It will avoid misunderstanding as to the scope of the additional insured coverage. It hopefully will result in determining on the front end if there will be difficulty in producing the desired additional insurance coverage. The approach recommended by this author is that sample additional insured endorsement forms for attachment to the Tenant's CGL policy and the Landlord's CGL policy be attached as Exhibits to the Supplement. 4. Certificate of Insurance Form Attached. Similarly, specifying the content of the certificate of insurance helps avoid future failure to produce an appropriately detailed certificate. The approach recommended by this author is that a sample certificate of insurance be attached to the Supplement as an Exhibit.
I. DURING TERM AND FOR SPECIFIED PERIODS AFTER TERM **I.A. Policies to be provided by Tenant**	
I.A.1. Liability Insurance.	
a. Commercial General Liability. *"CGL"*	
(1) Coverages/Minimum Limits. In addition to the specifications set out in the insurance addendum, the following:	See **Endnote II.C** CGL.

$_____ per occurrence. $_____ general aggregate. $_____ Product-completed operations aggregate $_____ Personal and advertising injury $_____ Damage to premises rent to you.	Note that the **Supplement to Insurance Addendum** further specifies limits for the 3 additional CGL policy coverages. It is typical to specify for the product-completed operations aggregate a limit equal to double the per occurrence limit.
The policy limits may be written on a combination of primary and umbrella coverage.	Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.
(2) Form. ISO form CG 00 01 12 07 [, or a substitute providing equivalent coverage], and shall cover liability arising from premises, operations, and liability assumed under an insured contract [(including the tort liability of another assumed in a business contract)].	The ISO CGL policy form covers each of these lines of coverage. See **Endnote I.A** for a discussion of the ISO form numbering system. Note that this specification identifies the "12 07" edition of the ISO CGL policy. Dropping this reference permits the use of older editions. The bracket language permitting substitute policy forms. If the 1973 edition is used, the "equivalent coverage" language will require the attachment of a broad form endorsement. The inclusion of a list of covered risks serves as a checklist to confirm that the policy includes the required coverages upon receipt of the policy if a non-ISO form is tendered. Of particular interest from a risk management standpoint is the specification that the policy include coverage for "liability assumed under an insured contract [(including the tort liability of another assumed in a business contract)]." See **Endnote II.C.5** Indemnity Insurance for a discussion of a CGL policy's coverage of an insured's (e.g., a Landlord's, Tenant's or Contractor's) contractual indemnities.
(3) No Modification of Standard Separation of Insured Language. Separation of insured language will not be modified.	**"Cross-Liability Coverage."** The Supplement to Insurance Addendum specifies that the Landlord and Tenant's CGL policies are to be on the most current ISO CGL policy form or equivalent. The Supplement also specifies that the CGL policy is not to have its "***separation of insured***" language modified (a/k/a the "***severability of interests clause***"). Additionally, the Supplement to Insurance Addendum stipulates that if the CGL policy does not contain the standard ISO separation of insureds provision, or a substantially similar clause, the CGL policy shall be endorsed to provide cross-liability coverage. The ISO CGL policy separation of liability clause providing "**cross-liability coverage**" is found at **Endnote II.C.7** Cross-Liability Coverage. By virtue of adding one party to another party's insurance policy as an additional insured there results 2 insureds on the same policy. "Cross liability coverage" is coverage added to the Named Insured's policy to assure the insureds that adding the additional insured will not invalidate the Named Insured's coverage for any liability it may have to the additional insured. The liability of one insured to another is called "***cross-liability***." The separation of insured language establishes separate coverage for each insured under the policy, except as respects the policy limits. Separation of insured language is generally provided in non-ISO CGL policy forms and in business auto policy and umbrella liability policy forms. Since

	the separation of insured language is contained in the ISO CGL policy form, ISO does not have an endorsement form to add separation of insured language to a CGL policy. It is prudent to specify that the required liability policies provide cross-liability coverage as would be achieved under the standard ISO separation of insureds clause. If you are tendered a non-ISO CGL or other liability policy, you should examine it to confirm that it contains separation of insured language protective of the insured and the additional insured.
(4) Limits Allocated to Premises. If the CGL insurance contains a general aggregate limit, it shall apply separately to this [Premises] by an aggregate limit per premises endorsement on ISO form CG 25 04 Designated Location General Aggregate Limit, or equivalent.	On contracts for services to be provided on the Premises substitute Project for Premises.
(5) Deletion of Personal Injury Exclusion. The contractual liability exclusion with respect to personal injury will be deleted.	
(6) Defense Costs as Additional Benefit. Defense will be provided as an additional benefit and not included within the limit of liability.	Subject to the scope of liability coverage set out in the additional insured endorsement, the Named Insured's CGL policy provides the additional insured with the same rights to a defense as it provides a right to defense to the Named Insured. The various duties of an insurer to its insured are illustrated by *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103 (Tex. App.–Texarkana 1994, *no writ*) where Monsanto was awarded $71,048,070.22 for actual and treble damages, prejudgment interest and attorney's fees arising out of the insurer's obtaining a financial interest in, and control of, litigation against its insured in an attempt to defeat the insured's reimbursement rights under an environmental impairment liability policy. INS. CODE Art. 21.21 § 16(a) violation. The Supplement to Insurance Addendum provides that the additional insured's defense will be provided as an additional benefit and not included within the limit of liability. The policy limits are available to cover insured liabilities of both the Named Insured and the additional insured. Depending on the wording of the indemnity, the Indemnifying Person may have contractually agreed to provide the Indemnified Person with a defense. In this respect the Indemnify Person may be relying on its CGL policy insurer to cover this contractual undertaking. In the past there have been issues as to the scope of the defense obligations of a Named Insured's insurer to the Named Insured's indemnitee. Because of such issues, Indemnified Persons required that they also be additional insureds on the Indemnifying Person's liability policies.
(7) Waiver of Subrogation. ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to Landlord and other persons as may be designated by Landlord to Tenant.	As to the additional insureds, a subrogation waiver endorsement is "belt and suspenders" as an insurer may not subrogate against its own insured. Inclusion in the list of persons not scheduled or listed as additional insureds, will provide assurance as to them of subrogation waiver. However, there may be little risk of subrogation against officers, directors and agents of an additional insured.
(8) Additional Insureds. Landlord shall be included as an	See **Appendix Form A.4** ISO CG 20 11 01 96 Additional Insured

additional insured using an ISO CG 20 11 01 96 ISO endorsement or equivalent, and shall be included as an additional insured on Tenant's commercial umbrella, if any.	– Managers or Lessors of Premises. The CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises added to the Tenant's CGL policy listing Landlord as an additional insured will cover the Landlord as an additional insured on Tenant's CGL policy for all liability arising out of the ownership, maintenance or use of that part of the "Premises" leased to Tenant, but not for any occurrence which takes place after the Tenant ceases to be a Tenant and not for any liabilities arising out of structural alterations, new construction or demolition operations performed by or on behalf of the Landlord.
During construction of the leasehold improvements by Tenant and its contractor, Landlord shall be included as an additional insured on Tenant's commercial general liability policy using an ISO CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing Landlord, Landlord's manager and other persons as may be designated by Landlord to Tenant as additional insureds.	See **Appendix Form A.3** ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization. The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to the Tenant's CGL policy listing Landlord as an additional insured will cover Landlord for bodily injury, property damage, and personal injury caused in whole or in part by the Tenant's acts or omissions or the acts or omissions of those acting on the Tenant's behalf in the performance of Tenant's "ongoing operations" at the Shopping Center and related property, without exclusion for construction activities.
As between coverage afforded additional insureds as additional insured on Tenant's CGL policy and other insurance or self-insurance program maintained by additional insureds, the coverage afforded by Tenant's CGL policy will be primary and other insurance of additional insureds with be excess and noncontributing. Tenant's CGL policy shall not be endorsed or modified to make it excess over other insurance available to an additional insured. If Tenant's CGL policy states that it is excess or pro rata, the policy shall be endorsed to be primary with respect to the additional insureds.	The standard CGL policy states that its coverage and the coverage afforded to additional insureds is primary over other insurance available to additional insureds. This insurance specification states that the Tenant's CGL policy will be endorsed to provide that it provides primary coverage with respect to coverage afforded additional insureds in the event that it does not so provide.
(9) Insured Contracts. Coverage shall include but not be limited to liability assumed by Tenant under the Lease (including the tort liability of another assumed in a business contract).	See **¶ 12**(a) Prohibited Endorsements below.
(10) Deductible and SIR. May contain a deductible or self insured retention of no greater than $_____.	SIR is the equivalent of no insurance for the SIR amount.
(11) Notice. Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.	See **Appendix Form A.1** ISO CG 02 05 12 04 Texas Changes – Amendment of Cancellation Provisions or Coverage Change.
(12) Prohibited Endorsements. The following endorsements are not permitted:	
(a) Limiting the scope of coverage of insured contracts to exclude coverage of liability for injury or property damage caused either in whole or in part by the other party's negligence.	Some insurers limit the scope of indemnity insurance to cover bodily injury and property damage only to the extent that the insured's indemnity is a ***limited form indemnity*** (an indemnity for liabilities only to the extent they are caused in whole or in part by the negligence of the insured, but not to the extent caused by the negligence of the indemnified person, aka a comparative fault indemnification). Also, other insurers limit the scope of indemnity insurance to cover only bodily injury and property damage only to the extent

	that the insured's indemnity is an ***intermediate form indemnity*** (an indemnity for liabilities to the extent they are caused in whole or in part by the insured, and thus partly caused by the negligence of the indemnified person). To the extent the insured's indemnity is broader than the liability insured by the indemnity insurance, the insured is exposed to an uninsured risk.
(b) Any type of punitive, exemplary or multiplied damages exclusion.	
(c) Limiting the scope of coverage for liability arising from pollution, explosion, collapse, underground property damage, employment-related practices, or damage to work.	
b. Workers Compensation.	
(1) Coverages/Minimum Limit. Not less than statutory limits. **(2) Statutory Coverage.** No "alternative" forms of coverage will be permitted. **(3) Waiver of Subrogation.** WC 42 03 04A Texas Waiver of Right to Recover From Others Endorsement to include a waiver of subrogation by insurer as to the Landlord, and its agents, officers, directors, and employees and other persons as may be designated by Landlord to Tenant. **Employer Liability.** The commercial umbrella and/or employers liability limits shall not be less than $_____ each accident for bodily injury by accident $_____ each employee for bodily injury by disease.	See **Endnote II.A** Workers Compensation Insurance. Note there is no specification for listing additional insureds on the workers comp and employers liability policy. This waiver is to prevent Tenant's workers comp carrier from seeking subrogation against the Landlord. Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.
c. Business Auto Policy.	
(1) Form. ISO form TE 00 01 or equivalent. The policy limits may be written on a combination of primary and umbrella coverage.	See **Endnote II.D** Business Auto Policies. See **Endnote VI.C.2** for a discussion of antiquated and current terminology for business auto policies. Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.
(2) Scope of Coverage. Includes liability arising out of operation of any auto (including owned, hired and non-owned vehicles).	If the insured does not own an auto, the insurer may not agree to cover liability from "any auto", but limit coverage to hired and nonowned autos.
(3) Waiver of Subrogation. TE 20 46A Change in Transfer of Rights of Recovery Against Others To Us Endorsement to include	As to the additional insureds, a subrogation waiver endorsement is "belt and suspenders" as an insurer may not subrogate against its

a waiver of subrogation by insurer as to Landlord.	own insured. Inclusion in the list of persons not scheduled or listed as additional insureds, will provide assurance as to them of subrogation waiver. However, there may be little risk of subrogation against officers, directors and agents of an additional insured.
(4) Additional Insureds. TE 99 01B Additional Insured—Business Auto Coverage Form listing Landlord and other persons as may be designated by Landlord to Tenant as additional insureds.	
d. Umbrella Liability Insurance	
(1) Form/Limits. Liability insurance may be written on a combination of primary and excess limits to meet the total requirement. Policy is to be written on an occurrence coverage basis. **(2) Scope of Coverage.** Written on an umbrella basis in excess over and no less broad than the liability coverages referenced above. **(3) Coverage Period.** Inception and expiration dates will be the same as the CGL insurance. **(4) Following Form.** Coverage must "drop down" for exhausted aggregate limits under the liability coverages referenced above; and must contain "follow form" statement. **(5) Limits Allocated to Project.** Aggregate limit of insurance per location endorsement. **(6) Waiver of Subrogation.** Policy to provide that subrogation is waived as to same persons as to which subrogation is above required to be waived as to the CGL policy. **(7) Additional Insureds.** Umbrella policy shall list as additional insureds and shall cover such persons as additional insureds as they are required above to be listed as additional insureds on the CGL policy.	Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.
(8) Notice. Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.	See **Appendix Form A.2** ISO CU 24 19 12 01 Lessor – Additional Insured and Loss Payee.
[**e. Liquor Liability** **(1) Minimum Limits.** Tenant shall carry liquor liability insurance with limits no less than the following: $_____ per occurrence. $_____ general aggregate. **(2) Coverage.** Such insurance shall be provided on an occurrence-based policy and cover liability arising out of operations of Tenant at the Property. Defense shall be provided as an additional benefit and not included within the limit of liability.]	

[**f. Environmental Liability** **(1) Minimum Limits.** Tenant shall carry environmental liability insurance with a limit of no less than $_____ . **(2) Coverage.** Such insurance shall be provided on an occurrence-based policy and cover liability arising out of operations of Tenant at the Property. Defense shall be provided as an additional benefit and not included within the limit of liability. Such insurance shall include coverage for mold, fungus and related bacteria.]	
e. Other Tenant shall carry such other insurance as Landlord deems necessary or as required by Landlord's Lender.	
I.A.2. <u>Property Insurance</u>. Tenant shall provide the following property insurance:	See **Endnote III** Property Insurance.
a. Commercial Property Insurance.	
(1) Form. ISO form CP 10 30, or equivalent, covering (a) Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment and other business personal property located at the Premises.	See allocation to Landlord at **Supplement to Insurance Addendum ¶ I.B.2** below of the responsibility for insurance of Tenant's improvements and betterments under Landlord's property policy. Most Landlord-drafted/biased leases allocate this insurance responsibility to the Tenant. See **App. Form B.4** Building And Commercial Property Coverage Form ¶ A.1.b(6) specifying that a tenant's "***use interest*** as tenant in improvements and betterments" are part of the Covered Property of an ISO property insurance policy. Further, the landlord's ownership interest in tenant improvements and betterments are part of the Landlord's Covered Property. ¶A.1.a.(5). However, not all property policies are worded the same as the ISO property insurance policy. (1) A tenant's property policy may state that it covers tenant's personal property and be silent as to its use interest in tenant improvements that are owned by the landlord pursuant to a lease provision that transfers ownership of tenant alterations and improvements to the landlord. In cases of policy silence at to tenant improvements as to which tenant only has a "use interest", the insurer may deny coverage. A New York court held for the tenant under such circumstances in *Sigola Mf., Inc. v. Dairyland Ins. Co.*, 124 A.D.2d 654 (N. Y. App. Div. 1986). (2) A landlord's property policy may explicitly state that improvements and betterments are covered under the landlord's policy only if they are located within property occupied by the landlord and not within a tenant's premises. (3) Even if both landlord's and tenant's policies state that they cover tenant improvements (the landlord's ownership interest, and the tenant's use interest), the policies may provide that they do not cover except on an excess basis the property if there is "other insurance". The language in such "other insurance" provisions vary, but they typically require that in the event of a loss, any other applicable policy must respond first. The

	court in *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co,* 602 F.3d 677 (5th Cir. 2010) held that in such case both the tenant's insurer and the landlord's insurer must share the cost.
(2) Insureds. Landlord and Tenant, as their interests may appear.	See **Endnote I.C.3** Parties to the Policy. See **Endnote III.A** Property Insurance. See **App. Form B.6** CP 12 19 Additional Insured – Building Owner issued by ISO in November 2008 ISO. This endorsement is issued in cases where the Tenant is purchasing the policy and is used to designate a building owner as the Named Insured on the tenant's property policy covering the building. It is the insureds who receive the loss payment under a property policy. Thus it is unnecessary to specify that the Landlord in such case is also a *loss payee*. The ISO CP 12 19 Building Owner Additional Insured Endorsement does not provide for notice of cancellation to be given to the landlord/additional insured. Further, the cancellation provision in the ISO common policy conditions states that notice of cancellation is given only to the first named insured. Thus, the tenant's property policy provides notice of cancellation will only be given to the tenant. In *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5th Cir. – Tex. 2007) the landlord learned the hard way that it needed to follow up and obtain a corrected additional insured endorsement on the tenant's property policy. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". In addition to issuing the additional insured endorsement to the property policy, the landlord should also have obtained an endorsement to the property policy requiring notice of cancellation be given to it of policy cancellation. The standard property policy only requires notice of cancellation be sent to the first named insured. See **App. Form B.5** ISO CP 12 18 06 07 Loss Payable Provisions, Optional Clause F Building Owner Loss Payable Clause. In November 2008 ISO amended its CP 12 18 Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the CP 12 19. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner. See **App. Form B.6** ISO CP 12 19 06 07 Additional Insured - Building Owner, an endorsement to a tenant's property policy to designate its landlord as a Named Insured as to the building.
(3) Required Endorsements as to Coverage/Limits. As determined by Landlord, but may include Business Income and Extra Expense; Rental Value; Glass; Law and Ordinance; Terrorism; and Signs.	See **Endnote III.G-I** Ordinance Or Law Coverage, Glass Insurance, and Sign Insurance.

(4) Waiver of Subrogation. Waiver of subrogation by insurer as to the Landlord and other persons as may be designated by Landlord to Tenant.	See **Endnote III.A.2b** Property Insurance – Waivers Of Subrogation Or Waiver Of Recovery.
b. Boiler and Machinery Insurance. Boiler and machinery insurance covering damages to Tenant's furniture, fixtures, equipment and other business personal property located at the Premises due to boiler explosion or equipment breakdown. If this policy does not allow the insured to waive rights of recovery against others prior to loss, Tenant shall cause them to be endorsed with a waiver of subrogation.	See **Endnote III.E** Boiler and Machinery Coverage.
I.A.3. Evidence of Insurance. Insurance must be evidenced as follows:	
a. Form. Liability insurance: ACORD™ Form 25 (2010/05) *Certificates of Liability Insurance* for liability coverages. ACORD™ Form 28 (2009/12) *Evidence of Commercial Property Insurance* for property coverages. For property insurance for which the policy has not yet been issued, then Tenant is to provide an ACORD™ Form 75 (2010/04) *Insurance Binder*.	See **App. Forms C.1-4** ACORD Certificates and discussion at **Endnote VI.A** Certificates Of Insurance. Note that for the reasons discussed in the Endnote, it is not reasonable to rely on an ACORD certificate or evidence of insurance. It is recommended instead that, if possible, a copy of the insurance policies, including endorsements, be obtained and reviewed to determine compliance with the insurance specifications. If the policies have not been issued, obtain specimen copies. As to commercial property coverage, some risk managers recommend requiring that the Tenant provide an ACORD™ Form 28 (2003), as it does not contain the disclaimers now contained in the 2009/12 version. Agents will resist providing the 2003 edition but will do so if the deal is important enough.
b. Delivery Deadlines. Evidence to be delivered to Landlord prior to entry on Premises and thereafter at least 30 days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Landlord's request for an updated certificate. Additionally, Tenant shall provide Landlord within 10 days of Landlord's request with certified copies of all insurance policies.	The specifications have been expanded to require delivery to Landlord of a certificate of insurance and/or certified copies of policies within 10 days of Landlord's request.
c. Certificate Requirements. Certificates must: **(1) Insured.** State the insured's name and address. **(2) Insurer.** State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.	
(3) Additional Insured Status and Subrogation Wavier. Specify the additional insured status and waivers of subrogation as required by these specifications.	

(4) Primary Status. State the primary and non-contributing status required herein.	
(5) Deductibles and Self-Insured Retentions Stated. State the amounts of all deductibles and self-insured retentions.	
(6) Certified Copy of Endorsements and Policy Declaration Page. Be accompanied by insurer certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.	See **Appendix Forms A.1-6** ISO Additional Insured Endorsements.
(7) Notices. Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation [and material change] will be sent to the certificate holder.	The current ACORD certificate no longer contains in the notice statement, the phrases "*endeavor to*" and "*but failure to mail such notice shall impose no obligation or liability of any kind upon Company, its agents or representatives*". It now merely states that "notice will be delivered in accordance with the policy provisions. Note that the standard liability policy provides for notice of cancellation to the first named insured and does not provide for notice of cancellation to be given to the additional insureds. Thus it is imperative to obtain an endorsement to the CGL policy to provide notice of cancellation to the additional insured. Also, note that a similar issue exists as to property policies obtained by the Tenant for the benefit of the Landlord. Although the Landlord may be designated as a loss payee or additional insured on property policies purchased to cover a building (e.g., a single tenant building), the policy does not provide for notice of cancellation to provided to the Landlord. A cancellation notice endorsement is required. See **Appendix Forms A.1-2** ISO Notice Endorsements.
(8) Certificate Holder. Be addressed to the Landlord as the certificate holder and show Landlord's correct address. Separate certificate addressed to Landlord's lender.	
(9) Producer. State the producer of the certificate with correct address and phone number listed.	
(10) Authorized Representative. Be executed by a duly authorized representative of the insurers.	See **Endnote VI.A1.a.(2)** Signed By An "Authorized Representative"?
I.A.4. Policies. **a. Insurer Qualifications.** All insurance required to be maintained by Tenant must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or *Standard & Poor Insurance Solvency Review* A-, or better, and admitted [authorized] to engage in the business of insurance in the State in which the Improvements are located.	See **Endnote VI.B** Insurer Ratings. Many good insurer choices are "authorized" to do business but are not "admitted" in the state. Also, not every state requires an insurer to be licensed (aka admitted) in that state.
b. Approved Revisions and Substitutions. If the forms of	

policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Landlord will have the right to require other equivalent forms. Any policy or endorsement forms other than a form specified in this exhibit must be approved in advance by Landlord.	
5. Miscellaneous Requirements.	
a. No Waiver. Failure of Landlord to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Landlord to identify a deficiency from evidence that is provided shall not be construed as a waiver of Tenant's obligation to maintain such insurance.	
b. Limits. "Limits" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Tenant maintains greater limits, then these specifications shall not limit the amount of recovery available to Landlord.	
I.B. Policies to be provided by Landlord. Landlord is to provide the following insurance:	
I.B.1. Liability Insurance. Landlord is to provide CGL insurance as follows: **a. Coverages/Limits.** Policy on an occurrence basis. Coverage amount subject to approval by Landlord, but not less than the following amounts as of the Premises Delivery Date: $_____ per occurrence. $_____ general aggregate. $_____ product-completed operations aggregate $_____ personal and advertising injury. $_____ damage to premises rented to you. $_____ medical expense.	
b. Form. ISO form CG 00 01 12 07, [or a substitute providing equivalent coverage,] and shall cover liability arising from premises, operations, contractor's protective for contractor's liability arising out of the hire of subcontractors (independent contractors), products-completed operations, personal and advertising injury, and liability assumed under an insured contract [(including the tort liability of another assumed in a business contract)].	The ISO CGL policy form covers each of these lines of coverage. See **Endnote I.A** ISO Policies And Endorsements – The Standard for a discussion of the ISO form numbering system. Note that this specification identifies the "12 07" edition of the ISO CGL policy. Dropping this reference permits the use of older editions. The bracket language permitting substitute policy forms. If the 1973 edition is used, the "equivalent coverage" language will require the attachment of a broad form endorsement.

	The inclusion of a list of covered risks serves as a checklist to confirm that the policy includes the required coverages upon receipt of the policy if a non-ISO form is tendered. Of particular interest from a risk management standpoint is the specification that the policy include coverage for "liability assumed under an insured contract [(including the tort liability of another assumed in a business contract)]." See **Endnote II.C.5** Indemnity Insurance for a discussion by a CGL policy of an insured's (e.g., a Landlord's, Tenant's or Contractor's) contractual indemnities.
c. Waiver of Subrogation. ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to Landlord, Tenant and other persons as may be designated by Landlord.	As to the additional insureds, a subrogation waiver endorsement is "belt and suspenders" as an insurer may not subrogate against its own insured. Inclusion in the list of persons not scheduled or listed as additional insureds, will provide assurance as to them of subrogation waiver. However, there may be little risk of subrogation against officers, directors and agents of an additional insured.
d. Additional Insureds. Additional insured endorsement listing Tenant and persons as may be designated by Landlord as additional insureds.	See **Appendix Form A.6** ISO CG 20 26 07 04 Additional Insured – Designated Person or Organization and **Appendix Form A.5** ISO CG 20 18 11 85 Additional Insured - Mortgagee, Assignee, or Receiver
I.B.2. Property Insurance. Landlord shall maintain property insurance as follows:	
a. Commercial property insurance. Commercial property insurance covering the building, fixtures, equipment, and tenant improvements and betterments.	This specification allocates to the Landlord the responsibility for insurance of Tenant's improvements and betterments under Landlord's property policy. Most Landlord-drafted/biased leases allocate this insurance responsibility to the Tenant. See Staltz, *Insuring Tenant Alterations*, PROBATE & PROPERTY 45 (Jan./Feb. 2006) articulating the rationale supporting this allocation; Millea and Geyen, *Insurance Coverage For Tenant Improvements*, http://www.mondaq.com/unitedstates/article.asp?articleid=125396. Also see Nusbaum, *The "Three-Legged Stool": The Interplay Of Property Insurance, Mutual Waivers And Waivers Of Subrogation In Commercial Leases* (Feb. 3, 2011) http://www.mondaq.com/unitedstates/article.asp?articleid=121948 and Hannan, *Using Property Insurance, Mutual Waiver, and Waiver of Subrogation Clauses in Commercial Leases (with Model Clauses)*, The Practical Real Estate Lawyer (Mar. 2001), at p. 23.
(1) Form. Commercial property insurance shall at a minimum cover the perils under the ISO Causes of Loss - Special Form (formerly known as "all risk") CP 10 30, or equivalent. [ISO Causes of Loss – Broad Form, CP 10 20]. [, excluding terrorism.] [, excluding flood] [, excluding earthquake] [excluding windstorm]. and shall cover the full [90% of] estimated replacement cost of the property insured [except terrorism, flood, and earthquake]. [Add specific insurance coverage requirements as to terrorism, flood, earthquake and windstorm.]	Unlike the standard liability insurance policy, there is no standard property insurance policy form. In 1986 ISO replaced named perils and extended coverage policies with the three causes of loss policy types: basic, broad and special. This terminology has been adopted as standard terminology to describe the perils covered. Reference is made in the insurance specifications to coverage at a minimum equivalent to the coverage of special form. See **Appendix Forms B.1-4** Commercial Property Policy Forms. See **Endnote III.A.3.c(1)** Basic, Broad and Special for a listing of perils covered by the three ISO property insurance forms. See

[Boiler and machinery insurance may be written in a separate policy.] Any coinsurance requirement in the policy shall be deleted through an agreed value endorsement, the activation of an agreed value option, or other appropriate policy action.	**Endnote VI.C.4.b.** "Fire And Extended Coverage" Is Antiquated Terminology. Since 1986, the practice of specifying "***fire and extended coverage insurance***" or "***all risks coverage***" has shifted to the terminology "***basic causes of loss***", "***broad causes of loss***", and "***special causes of loss***". Many lease forms have continued to use the terminology "fire and extended coverage" insurance (e.g., TAR Commercial Property Lease), although that terminology has not been used in property policies for a number of years. The basic causes of loss policy is equivalent of the "fire and extended coverage" policy. Using "fire and extended coverage" in a lease to describe the landlord's coverage can lead to coverage issues. "Water damage from leaking appliances" is not covered under a fire and extended coverage policy (nor under the basic causes of loss policy). **Terrorism.** The property policy may have a terrorism exclusion. Replacement cost coverage for this peril may not be available or may be cost prohibitive. It may be available to the extent of an agreed dollar amount, subject to annual review. If this coverage is desired, a specific specification will need to be added to the insurance specifications. **Flood.** Causes of Loss coverage does not include flood coverage. This coverage may be included by endorsement depending on the building's location or possibly written under a separate "***difference in condition***" (DIC) policy. Flood coverage may be available to the extent of an agreed dollar amount (called a "***sublimit***") with a deductible (or a higher deductible than the policy's deductible if the policy has a deductible) as opposed to full replacement cost, subject to annual review. Also flood coverage is available through the National Flood Insurance Program, with a maximum of $500,000 on each building and $500,000 on each building's contents. If this coverage is desired, a specific specification will need to be added to the insurance specifications. **Earthquake.** Like flood, earthquake is a special line coverage added by endorsement. **Windstorm.** Windstorm is a peril covered by each of the three ISO causes of loss policy forms. However, if the property is located in an area exposed to hurricanes, the property insurance policy may be amended to exclude coverage of hurricane damage or may include sublimits and high deductibles. **Replacement Cost; Coinsurance.** See **Endnote III.A.3.c(3)** Valuation Terminology. Insurers typically require a minimum limit of 90% of replacement cost or 80% of actual cash value. Most policies include a coinsurance clause that penalizes the insured for failing to insure the property to this required amount by deducting a proportionate amount from loss recoveries. The insurer may waive the coinsurance requirement by attaching an ***agreed value endorsement*** if it is satisfied that the property is insured for at least the required amount.
(2) Insured. Landlord.	See **Appendix Form B.6** ISO CP 12 19 - Additional Insured - Building Owner.
(3) Required Endorsements as to Coverage/Limits. As	**Business Income**

determined by Landlord, but may include Business Income and Extra Expense; Rental Value; Glass; Law and Ordinance; Terrorism; Signs; Debris Removal.	If Landlord carries (and as a pass through expense Tenant pays for) loss of rents insurance then rent should abate after a loss. However, if the loss is caused by a terrorism event the loss of rent coverage may not be available. The parties should consider how this uninsured risk will be borne or shared. **Law and Ordinance** See **App. Form B.4** Building and Personal Property Coverage Form ¶A.4.e(2) and (6) Coverage- Additional Coverages – Increased Cost of Construction. Replacement cost is the cost of replacing the Building without consideration to changes in laws or ordinances. The ISO commercial property policy provides for payment of up to the lessor of $10,000 or 5% of the limit of insurance for the increased cost of construction incurred to comply with a law or ordinance in the course of repair, rebuilding or replacement of damaged parts of the covered property. Higher limits can be obtained through an ISO CP 04 05 the ordinance or law coverage endorsement. **Debris Removal** See **App. Form B.4** Building and Personal Property Coverage Form ¶A.4.a Coverage- Additional Coverages – Debris Removal. The ISP Commercial Property Policy provides coverage for debris removal as "additional coverage" and is limited to 25% of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the ISO CP 04 15 Debris Removal Additional Limit of Insurance endorsement.
(4) Waiver of Subrogation. Waiver of subrogation by insurer as to the Landlord, Tenant and other persons as may be designated by Landlord.	
b. Boiler and Machinery Insurance. Boiler and machinery insurance covering the building, fixtures, equipment, tenant improvements and betterments.	
II. DURING PERIODS OF CONSTRUCTION Landlord's contractor constructing the Building [and Tenant's contractor constructing the Tenant improvements] shall provide the following:	
II.A. Bonds.	
II.A.1. Payment Bond.	
a. Coverage. 100% of Contract Sum under the Construction Contract + 10% for extras until 31 days after Final Completion.	

b. Form. Statutory form required (AIA form not acceptable).	
c. Coverage. Shall include coverage for consequential and delay damages due to Contractor's default.	
d. Rating. Issuer must be at least *a Best's Key Rating Guide* A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list)and duly licensed and authorized to issue surety bonds in Texas.	
e. Term. Shall be in effect for the period required by the Texas Property Code.	
f. Multiple Obligees. Shall name as additional obligees such persons as designated by Landlord.	
g. Recorded. The Payment Bond and all required attachments (issuer's agent's power of attorney and memorandum of the Contract) will be recorded in the Official Public Records of the County prior to commencement of Work on site.	
II.A.2. Performance Bond.	
a. Form. (AIA form or equivalent). Shall cover Contractor's express warranty and obligations to correct defective Work arising under the Contract Documents.	
b. Rating. Issuer must be at least *a Best's Key Rating Guide* A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas.	
c. Extended Coverages. Shall cover risk of contract penalties and delay damages.	
d. Term. Shall be in effect for a period of not less than one year following Final Completion.	
e. Multiple Obligees. Shall name as additional obligees such persons as designated by Landlord.	
II.B. Builder's Risk Insurance Unless waived in writing by Landlord, Landlord's contractor constructing the Building and Tenant's Contractor constructing the Tenant improvements shall provide the following property insurance:	See **Endnote III.D** Builder's Risk Insurance. Standard commercial property insurance policies usually will not cover loss associated with buildings under construction except for additions under construction, alterations and repairs to the building or structure. See definition of Covered Property at Paragraph A.1.a(5)(a) on page 1 of **App. Form B.4**, the standard Building

	and Commercial Property Coverage Form. Also, on to a limited extent will standard commercial property insurance cover buildings under construction on newly acquired premises through an extension of coverage. See Coverage Extension at Paragraph A.1.a(5)(a) on page 1 of **App. Form B.4**, the standard Building and Commercial Property Coverage Form. See Comiskey, *Builder's Risk Requirements and Strategies*, State Bar of Texas, Construction Law Conference (2010). Many commonly expected coverages are available only through policy endorsement and are not part of the issuer's standard policy form, such as coverage for the owner's additional architect's fees arising out of an insured loss; coverage for owner supplied materials; amending the law and ordinance exclusion to cover costs of demolition of the intact portion of a building when a law, ordinance or regulation requires that the entire structure be torn down; endorsement to include full collapse coverage, including collapse resulting from design error; and verification that sublimits (e.g., sublimits for flood and earthquake coverage) are adequate or eliminated.
II.B.1. Completed Value. Non-reporting form.	
II.B.2. Amount. Initial Contract Sum, plus an amount to be acceptable to Landlord , to increase by amount of subsequent modification of Contract Sum.	
II.B.3. Replacement Costs. Coverage shall be provided in amount equal at all times to the full replacement value and costs of debris removal for any single occurrence. Shall include Contractor's overhead and profit.	
II.B.4. Covered Property. **a.** All structure(s) under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, pilings, underground pipes and wiring, excavations, grading, backfilling or filling. **b.** All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site. **c.** All property including materials and supplies on site for installation. **d.** All property including materials and supplies at other locations but intended for use at the site. **e.** All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit. **f.** Other Work at the site identified in the Lease. **g.** Other property for which an insured is liable regarding the project.	

II.B.5. Deductibles. Deductibles shall not exceed an amount acceptable to Landlord.

II.B.6. Insureds. Insureds shall include:

a. Named Insureds. Landlord, Contractor and all Loss Payees and Mortgagees as Named Insureds.

b. Additional Insureds. Tenant, and other tenants designated by Landlord to Contractor to be Additional Insureds.

c. Subcontractors. Subcontractors of all tiers in the Work as Additional Insureds, but not limited "to their interests as they may appear".

II.B.7. Form. Coverage shall be at least as broad as an unmodified ISO special causes of loss form, with collapse added as a cause of loss. Policy shall be written to cover all risks of physical loss except those specifically excluded in the policy, and all exclusions must be pre-approved by Landlord and Contractor, and shall insure at least against the perils of fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, theft, vandalism, malicious mischief, and collapse and such additional perils and coverages as indicated below.

a. Completed Value Basis. Written on a completed-value, Non-reporting form basis.

b. Insureds Other Insurance Excess and Noncontributing. Builder's Risk shall be primary to any other insurance coverage available to the named insured parties, with that other insurance being excess, secondary and non-contributing.

c. Prohibited. No protective safeguard warranty permitted.

d. Required Endorsements as to Coverage/Limits. To include

Coverage	Minimum Sublimit
Additional expenses due to delay in completion of project and contract penalties	Amount subject to approval by Landlord.
Agreed Value	Included without sublimit.
Business income/rental value	Amount subject to approval by Landlord.

See **Appendix Form B.7** Additional Expense – Soft Cost Coverage.

Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse	Included without sublimit.
Debris removal including demolition as may be made legally necessary by operation of any law, ordinance, or regulation.	Included without sublimit.
Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse	To be included.
Mechanical breakdown, including hot & cold testing	Amount subject to approval by Landlord.
Occupancy clause	To be included.
Ordinance or law	To be included without sublimit.
Replacement cost	To be included.
Soft Costs	Amount subject to approval by Landlord.
Terrorism	Amount subject to approval by Landlord.

II.B.7. Waiver of Subrogation. Waiver of subrogation by insurer as to the Contractor, Contractor's subcontractors of any tier, Landlord, Landlord's subcontractors of any tier, Landlord's consultants, the Architect, the Architect's consultants, their officers, directors and employees, and other persons as may be designated by Landlord.	See **Endnote III.D.5.a** AIA's Waiver Of Subrogation.

II.B.8. Notices. 30 days prior written notice to each insured of cancellation, non-renewal or material reduction.	
II.B.9. Termination of Coverage. The termination of coverage provision shall be endorsed to permit occupancy of the covered property being constructed . This insurance shall be maintained in effect, unless otherwise provided for the Contract Documents, until the earliest of the following dates: 1 The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated; 2 The date on which final payment, as provided for in the Contract Documents; or 3 The date on which the insurable interests in the Covered Property of all insureds other than Contractor have ceased.	
II.B.10. Tenant Finish-Out. Builder's risk policy shall specifically permit partial occupancy by tenants in connection with construction of finish-out of leased premises.	
B.11. Contractor's Equipment and Personal Property. No premium shall be chargeable to Landlord, but shall be borne by Contractor, to the extent such premium applies to coverage for any tools, apparatus, machinery, scaffolding, hoists, forms, staging, shoring and similar items commonly referred to as construction equipment, of the Contractor, or its subcontractors which may be on the site, and the capital value of which is not included in the Work.	
II.C. Boiler and Machinery Insurance Contractor shall be required to obtain and maintain boiler and machinery insurance during installation and until final acceptance by Landlord. May be included in builder's risk policy.	See **Endnote III.E** Boiler and Machinery Coverage.
II. D. Liability Insurance	
II.D.1. Commercial General Liability. *"CGL"* **a. Coverages/Minimum Limits.** In addition to the specifications set out in the insurance addendum, the following: $_____ per occurrence. $_____ general aggregate. $_____ product-completed operations	

aggregate. $_____ personal and advertising injury. $_____ medical expense limit.	
b. Form. ISO form CG 00 01 12 07, [or a substitute providing equivalent coverage], and shall cover liability arising from premises, operations, contractor's protective for contractor's liability arising out of the hire of subcontractors (independent contractors coverage), incidental design liability arising from the contractor's construction means and methods, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract).	The ISO CGL policy form covers each of these lines of coverage. See **Endnote I.A** for a discussion of the ISO form numbering system. Note that this specification identifies the "12 07" edition of the ISO CGL policy. Dropping this reference permits the use of older editions. The bracket language permitting substitute policy forms. If the 1973 edition is used, the "equivalent coverage" language will require the attachment of a broad form endorsement. The inclusion of a list of covered risks serves as a checklist to confirm that the policy includes the required coverages upon receipt of the policy if a non-ISO form is tendered.
c. Separation of Insured Language. Separation of insured language will not be modified.	**"Cross-Liability Coverage."** The Supplement to Insurance Addendum specifies that the Landlord and Tenant's CGL policies are to be on the most current ISO CGL policy form or equivalent. The Supplement also specifies that the CGL policy is not to have its "***separation of insured***" language modified (a/k/a the "***severability of interests clause***"). Additionally, the Supplement to Insurance Addendum stipulates that if the CGL policy does not contain the standard ISO separation of insureds provision, or a substantially similar clause, the CGL policy shall be endorsed to provide cross-liability coverage. The ISO CGL policy separation of liability clause providing "**cross-liability coverage**" is found at **Endnote II.C.7** Cross-Liability Coverage. By virtue of adding one party to another party's insurance policy as an additional insured there results 2 insureds on the same policy. "Cross liability coverage" is coverage added to the Named Insured's policy to assure the insureds that adding the additional insured will not invalidate the Named Insured's coverage for any liability it may have to the additional insured. The liability of one insured to another is called "***cross-liability***." The separation of insured language establishes separate coverage for each insured under the policy, except as respects the policy limits. Separation of insured language is generally provided in non-ISO CGL policy forms and in business auto policy and umbrella liability policy forms. Since the separation of insured language is contained in the ISO CGL policy form, ISO does not have an endorsement form to add separation of insured language to a CGL policy. It is prudent to specify that the required liability policies provide cross-liability coverage as would be achieved under the standard ISO separation of insureds clause. If you are tendered a non-ISO CGL or other liability policy, you should examine it to confirm that it contains separation of insured language protective of the insured and the additional insured.
d. Limits Allocated to Premises. If the CGL insurance contains a general aggregate limit, it shall apply separately to this project by an aggregate limit per premises endorsement on ISO form CG 25 23, or equivalent.	
e. Deletion of Personal Injury Exclusion. The contractual	

liability exclusion with respect to personal injury will be deleted.	
f. Defense Costs as Additional Benefit. Defense will be provided as an additional benefit and not included within the limit of liability.	
g. Waiver of Subrogation. ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to Landlord, Tenant, their officers, directors and agents, and other persons as may be designated by Landlord.	As to the additional insureds, a subrogation waiver endorsement is "belt and suspenders" as an insurer may not subrogate against its own insured. Inclusion in the list of persons not scheduled or listed as additional insureds, will provide assurance as to them of subrogation waiver. However, there may be little risk of subrogation against officers, directors and agents of an additional insured.
h. Additional Insureds. ISO form CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing Landlord, Landlord's manager, Tenant and other persons as may be designated by Landlord as additional insureds. No exclusion for the acts or omissions of the additional insured, except may exclude the sole negligence of the additional insured. As between coverage afforded additional insureds as additional insured on contractor's CGL policy and other insurance maintained by additional insureds, the coverage afforded by contractor's CGL policy will be primary and other insurance of additional insureds with be excess and noncontributing.	See **Appendix Form A.3** ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization
i. Insured Contracts. Coverage shall include but not be limited to liability assumed by contractor under the construction documents (including the tort liability of another assumed in a business contract).	
j. Deductible and SIR. May contain a deductible or self insured retention of no greater than $_____.	
k. Notice. Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.	
l. Prohibited Endorsements. The following endorsements are not permitted:	
(a) Amendment Of Insured Contract Definition, CG 24 26 or its equivalent.	See **Appendix Form A.10** ISO CG 24 26 07 04 Amendment of Insured Contract Definition. This endorsement amends the definition of "insured contract" to limit the indemnity insurance insuring indemnities for tort liability of the indemnified person to bodily injury and property damage ***caused in whole or in part, by*** the indemnifying person.
(b) Contractual Liability Limitation, CG 21 39 or its equivalent.	See **Appendix Form A.7** ISO CG 21 39 10 93 Contractual Liability Limitation. This endorsement amends the definition of an "insured contract" to eliminate from the indemnity insurance indemnities by the insured of the indemnified person's tort liability for bodily injury and property damage.

	Some insurers limit the scope of indemnity insurance to cover bodily injury and property damage only to the extent that the insured's indemnity is a ***limited form indemnity*** (an indemnity for liabilities only to the extent they are caused in whole or in part by the negligence of the insured, but not to the extent caused by the negligence of the indemnified person, aka a comparative fault indemnification). Also, other insurers limit the scope of indemnity insurance to cover only bodily injury and property damage only to the extent that the insured's indemnity is an ***intermediate form indemnity*** (an indemnity for liabilities to the extent they are caused in whole or in part by the insured, and thus partly caused by the negligence of the indemnified person). To the extent the insured's indemnity is broader than the liability insured by the indemnity insurance, the insured is exposed to an uninsured risk.
(c) Any type of punitive, exemplary or multiplied damages exclusion.	
(d) Limiting the scope of coverage for liability arising from pollution, explosion, collapse, underground property damage, employment-related practices, or damage to work.	
(e) Exclusion – Contractor's Professional Liability, CG 22 79 or its equivalent.	See **Appendix Form A.9** ISO CG 22 79 07 98 Exclusion – Contractors – Professional Liability.
(f) Exclusion – Construction Management Errors and Omissions, CG 22 34 or its equivalent.	See **Appendix Form A.8** ISO CG 22 34 07 98 Exclusion – Construction Management Errors and Omissions.
m. Post-Completion Products-Completed Operations Coverage. Products and completed operations coverage for a period of __ years after final completion of construction of the improvements.	Liabilities may "occur" after completion of coverage and occurrence based coverage for such liabilities will need to be in place for up to the statute of limitations.
n. Post-Completion CGL Coverage. Contractor to maintain same CGL coverage for a period of ____ years after final completion of construction of the improvements.	
II.D.2. <u>Workers Compensation</u>. **a. Coverages/Minimum Limit.** Not less than statutory limits. **b. Statutory Coverage.** No "alternative" forms of coverage will be permitted. **c. Waiver of Subrogation.** WC 42 03 04A Texas Waiver of Right to Recover From Others Endorsement to include a waiver of subrogation by insurer as to the Owner and other persons as may be designated by Landlord. **Employer Liability.**	See **Endnote II.A** Workers Compensation Insurance. Note there is no specification for listing additional insureds on the workers comp and employers liability policy. This waiver is to prevent Tenant's workers comp carrier from seeking subrogation against the Landlord.

The commercial umbrella and/or employers liability limits shall not be less than $_____ each accident for bodily injury by accident $_____ each employee for bodily injury by disease.	Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.
II.D.3. Business Auto Policy. **a. Form.** ISO form TE 00 01 or equivalent. The policy limits may be written on a combination of primary and umbrella coverage.	Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.
b. Scope of Coverage. Includes liability arising out of operation of any auto (including owned, hired and non-owned vehicles).	If the insured does not own an auto, the insurer may not agree to cover liability from "any auto", but limit coverage to hired and nonowned autos.
c. Waiver of Subrogation. TE 20 46A Change in Transfer of Rights of Recovery Against Others To Us Endorsement to include a waiver of subrogation by insurer as to Landlord and Landlord's lenders and property managers.	As to the additional insureds, a subrogation waiver endorsement is "belt and suspenders" as an insurer may not subrogate against its own insured. Inclusion in the list of persons not scheduled or listed as additional insureds, will provide assurance as to them of subrogation waiver. However, there may be little risk of subrogation against officers, directors and agents of an additional insured.
d. Additional Insureds. TE 99 01B Additional Insured—Business Auto Coverage Form listing Landlord, Landlord's lender and property manager and other persons as may be designated by Landlord as additional insureds.	
[e. Pollution Liability. CA 99 48 pollution liability coverage at least as broad as that provided by the ISO pollution liability – broadened coverage for covered autos endorsement, and with the Motor Carrier Act endorsement (MCS 90) attached.]	This specification is to added if there is a hazardous waste hauler.
II.D.4. Umbrella Liability Insurance. **a. Form/Limits.** Liability insurance may be written on a combination of primary and excess limits to meet the total requirement. Policy is to be written on an occurrence coverage basis. **b. Scope of Coverage.** Written on an umbrella basis in excess over and no less broad than the liability coverages referenced above. **c. Coverage Period.** Inception and expiration dates will be the same as the CGL insurance. **d. Following Form.** Coverage must "drop down" for exhausted aggregate limits under the liability coverages referenced above; and must contain "follow form" statement.	Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.

e. Limits Allocated to Project. Aggregate limit of insurance per location endorsement.	
f. Waiver of Subrogation. Policy to provide that subrogation is waived as to same persons as to which subrogation is above required to be waived as to the CGL policy.	
g. Additional Insureds. Umbrella policy shall list as additional insureds and shall cover such persons as additional insureds as they are required above to be listed as additional insureds on the contractor's CGL policy.	
h. Notice. Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.	Cf **Appendix Form A.2** ISO CU 24 19 12 01 Lessor – Additional Insured and Loss Payee.
II.D.5 Contractors Pollution Liability Insurance. **a. Coverage.** Contractor shall provide Contractors Pollution Liability ("CPL") insurance providing third party liability coverage for bodily injury, property damage, clean up expenses, and defense arising from the operations of the Contractor. Coverage provided in the policy shall apply to operations and completed operations of the Contractor without separate restrictions for either of these time frames. Mold, microbial matter, fungus and biological substances shall be specifically included within the definition of "pollutants" in the Policy. **b. Form.** This insurance shall include prior acts coverage sufficient to cover all services rendered by the Contractor and by its consultants. This coverage may be provided on a claims-made basis. **c. Limits.** Coverage shall be provided with a limit of not less than $1,000,000. **d. Endorsements.** Landlord shall be listed as an additional insured. There shall be no separate limitation for the time period of this additional insured status within the additional insured endorsement. Policy shall be endorsed to give Landlord at least 30 days advance notice of cancellation or material reduction in coverage provided by this policy. Policy shall be endorsed to waive subrogation against the Landlord.	

Supplement to Insurance Addendum

Lease

Date: [dd/mm/yy].

Landlord: _____.

Tenant: _____.

This insurance addendum is part of the lease. To the extent there is a conflict between the provisions of this supplement and the insurance addendum, this supplement controls.

I. DURING TERM AND FOR SPECIFIED PERIODS AFTER TERM

A. Policies to be provided by Tenant

1. Liability Insurance.

a. Commercial General Liability. *"CGL"*

(1) Coverages/Minimum Limits. In addition to the specifications set out in the insurance addendum, the following:

$_____ per occurrence.

$_____ general aggregate.

$_____ Product-completed operations aggregate.

$_____ Personal and advertising injury.

$_____ Damage to premises rent to you.

The policy limits may be written on a combination of primary and umbrella coverage.

(2) Form. ISO form CG 00 01 12 07 [, or a substitute providing equivalent coverage], and shall cover liability arising from premises, operations, and liability assumed under an insured contract [(including the tort liability of another assumed in a business contract)].

(3) No Modification of Standard Separation of Insured Language. Separation of insured language will not be modified.

(4) Limits Allocated to Premises. If the CGL insurance contains a general aggregate limit, it shall apply separately to this [Premises] by an aggregate limit per premises endorsement on ISO form CG 25 04 Designated Location General Aggregate Limit, or equivalent.

(5) Deletion of Personal Injury Exclusion. The contractual liability exclusion with respect to personal injury will be deleted.

(6) Defense Costs as Additional Benefit. Defense will be provided as an additional benefit and not included within the limit of liability.

(7) Waiver of Subrogation. ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to Landlord and other persons as may be designated by Landlord to Tenant.

(8) Additional Insureds. Landlord shall be included as an additional insured using an ISO CG 20 11 01 96 ISO endorsement or equivalent, and shall be included as an additional insured on Tenant's commercial umbrella, if any.

During construction of the leasehold improvements by Tenant and its contractor, Landlord shall be included as an additional insured on Tenant's commercial general liability policy using an ISO CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing Landlord, Landlord's manager and other persons as may be designated by Landlord to Tenant as additional insureds.

As between coverage afforded additional insureds as additional insured on Tenant's CGL policy and other insurance or self-insurance program maintained by additional insureds, the coverage afforded by Tenant's CGL policy will be primary and other insurance of additional insureds with be excess and noncontributing. Tenant's CGL policy shall not be endorsed or modified to make it excess over other insurance available to an additional insured. If Tenant's CGL policy states that it is excess or pro rata, the policy shall be endorsed to be with respect to the additional insureds.

(9) **Insured Contracts.** Coverage shall include but not be limited to liability assumed by Tenant under the Lease (including the tort liability of another assumed in a business contract).

(10) **Deductible and SIR.** May contain a deductible or self insured retention of no greater than $_____.

(11) **Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.

(12) **Prohibited Endorsements.** The following endorsements are not permitted:

(a) Limiting the scope of coverage of insured contracts to exclude coverage of liability for injury or property damage caused either in whole or in part by the other party's negligence.

(b) Any type of punitive, exemplary or multiplied damages exclusion.

(c) Limiting the scope of coverage for liability arising from pollution, explosion, collapse, underground property damage, employment-related practices, or damage to work.

b. Workers Compensation.

(1) **Coverages/Minimum Limit.** Not less than statutory limits.

(2) **Statutory Coverage.** No "alternative" forms of coverage will be permitted.

(3) **Waiver of Subrogation.** WC 42 03 04A Texas Waiver of Right to Recover From Others Endorsement to include a waiver of subrogation by insurer as to the Landlord, and its agents, officers, directors, and employees and other persons as may be designated by Landlord to Tenant.

Employer Liability. The commercial umbrella and/or employers liability limits shall not be less than

$_____ each accident for bodily injury by accident

$_____ each employee for bodily injury by disease.

c. Business Auto Policy.

(1) **Form.** ISO form TE 00 01 or equivalent. The policy limits may be written on a combination of primary and umbrella coverage.

(2) **Scope of Coverage.** Includes liability arising out of operation of any auto (including owned, hired and non-owned vehicles).

(3) **Waiver of Subrogation.** TE 20 46A Change in Transfer of Rights of Recovery Against Others To Us Endorsement to include a waiver of subrogation by insurer as to Landlord.

(4) **Additional Insureds.** TE 99 01B Additional Insured—Business Auto Coverage Form listing Landlord and other persons as may be designated by Landlord to Tenant as additional insureds.

d. Umbrella Liability Insurance.

(1) **Form/Limits.** Liability insurance may be written on a combination of primary and excess limits to meet the total requirement. Policy is to be written on an occurrence coverage basis.

(2) **Scope of Coverage.** Written on an umbrella basis in excess over and no less broad than the liability coverages referenced above.

(3) **Coverage Period.** Inception and expiration dates will be the same as the CGL insurance.

(4) **Following Form.** Coverage must "drop down" for exhausted aggregate limits under the liability coverages referenced above; and must contain "follow form" statement.

(5) **Limits Allocated to Project.** Aggregate limit of insurance per location endorsement.

(6) **Waiver of Subrogation.** Policy to provide that subrogation is waived as to same persons as to which subrogation is above required to be waived as to the CGL policy.

(7) **Additional Insureds.** Umbrella policy shall list as additional insureds and shall cover such persons as additional insureds as they are required above to be listed as additional insureds on the CGL policy.

(8) **Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.

[**e. Liquor Liability**

(1) **Minimum Limits.** Tenant shall carry liquor liability insurance with limits no less than the following:

$_____ per occurrence.

$_____ general aggregate.

(2) **Coverage.** Such insurance shall be provided on an occurrence-based policy and cover liability arising out of operations of Tenant at the Property. Defense shall be provided as an additional benefit and not included within the limit of liability.]

[e. **Pollution Liability.** CA 99 48 pollution liability coverage at least as broad as that provided by the ISO pollution liability – broadened coverage for covered autos endorsement, and with the Motor Carrier Act endorsement (MCS 90) attached.]

[**e. Environmental Liability**

(1) **Minimum Limits.** Tenant shall carry environmental liability insurance with a limit of no less than $_____ .

(2) **Coverage.** Such insurance shall be provided on an occurrence-based policy and cover liability arising out of operations of Tenant at the Property. Defense shall be provided as an additional benefit and not included within the limit of liability. Such insurance shall include coverage for mold, fungus and related bacteria.]

[e.] **Other.** Tenant shall carry such other insurance as Landlord deems necessary or as required by Landlord's Lender.

2. **Property Insurance.** Tenant is to provide the following property insurance:

a. Commercial Property Insurance.

(1) **Form.** ISO form CP 10 30, or equivalent, covering (a) Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment and other business personal property located at the Premises.

(2) **Insureds.** Landlord and Tenant, as their interests may appear.

(3) **Required Endorsements as to Coverage/Limits.** As determined by Landlord, but may include Business Income and Extra Expense; Rental Value; Glass; Law and Ordinance; Terrorism; and Signs.

(4) **Waiver of Subrogation.** Waiver of subrogation by insurer as to the Landlord and other persons as may be designated by Landlord to Tenant.

b. **Boiler and Machinery Insurance.** Boiler and machinery insurance covering damages to Tenant's furniture, fixtures, equipment and other business personal property located at the Premises due to boiler explosion or equipment breakdown. If this policy does not allow the insured to waive rights of recovery against others prior to loss, Tenant shall cause them to be endorsed with a waiver of subrogation.

3. **Evidence of Insurance.** Insurance must be evidenced as follows:

a. **Form.** Liability insurance: ACORD™ Form 25 (2010/05) *Certificates of Liability Insurance* for liability coverages. ACORD™ Form 28 (2009/12) *Evidence of Commercial Property Insurance* for property coverages.

b. **Delivery Deadlines.** Evidence to be delivered to Landlord prior to entry on Premises and thereafter at least 30 days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Landlord's request for an updated certificate. Additionally, Tenant shall provide Landlord within 10 days of Landlord's request with certified copies of all insurance policies.

c. **Certificate Requirements.** Certificates must:

(1) **Insured.** State the insured's name and address.

(2) **Insurer.** State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.

(3) **Additional Insured Status and Subrogation Wavier.** Specify the additional insured status and waivers of subrogation as required by these specifications.

(4) **Primary Status.** State the primary and non-contributing status required herein.

(5) **Deductibles and Self-Insured Retentions Stated.** State the amounts of all deductibles and self-insured retentions.

(6) **Certified Copy of Endorsements and Policy Declaration Page.** Be accompanied by insurer certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.

(7) **Notices.** Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation [and material change] will be sent to the certificate holder.

(8) **Certificate Holder.** Be addressed to the Landlord as the certificate holder and show Landlord's correct address. Separate certificate addressed to Landlord's lender.

(9) **Producer.** State the producer of the certificate with correct address and phone number listed.

(10) **Authorized Representative.** Be executed by a duly authorized representative of the insurers.

4. **Policies.**

a. **Insurer Qualifications.** All insurance required to be maintained by Tenant must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or *Standard & Poor Insurance Solvency Review* A-, or better, and admitted to engage in the business of insurance in the State in which the Improvements are located.

b. **Approved Revisions and Substitutions.** If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Landlord will have the right to require other equivalent forms. Any policy or endorsement forms other than a form specified in this exhibit must be approved in advance by Landlord.

5. **Miscellaneous Requirements.**

a. **No Waiver.** Failure of Landlord to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Landlord to identify a deficiency from evidence that is provided shall not be construed as a waiver of Tenant's obligation to maintain such insurance.

b. **Limits.** "Limits" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Contractor maintains greater limits, then these specifications shall not limit the amount of recovery available to Owner.

B. **Policies to be provided by Landlord.** Landlord is to provide the following insurance:

1. **Liability Insurance.** Landlord is to provide CGL insurance as follows:

a. **Coverages/Limits.** Policy on an occurrence basis. Coverage amount subject to approval by Landlord, but not less than the following amounts as of the Premises Delivery Date:

$_____ per occurrence.

$_____ general aggregate.

$_____ product-completed operations aggregate

$_____ personal and advertising injury.

$_____ damage to premises rented to you.

$_____ medical expense.

b. **Form.** ISO form CG 00 01 02 04, or a substitute providing equivalent coverage, and shall cover liability arising from premises, operations, contractor's protective for contractor's liability arising out of the hire of subcontractors (independent contractors), products-completed operations, personal and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract).

c. **Waiver of Subrogation.** ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to Landlord, Tenant and other persons as may be designated by Landlord.

d. **Additional Insureds.** Additional insured endorsement listing [Tenant and] persons as may be designated by Landlord as additional insureds.

2. **Property Insurance.** Landlord shall is to provide property insurance as follows:

a. **Commercial property insurance.** Commercial property insurance covering the building, fixtures, equipment, and tenant improvements and betterments.

(1) **Form.** Commercial property insurance shall at a minimum cover the perils under the ISO Causes of Loss - Special Form (formerly known as "all risk") CP 10 30, or equivalent. [ISO Causes of Loss – Broad Form, CP 10 20]. [, excluding terrorism.] [, excluding flood] [, excluding earthquake] [excluding windstorm].

and shall cover the full [90% of] estimated replacement cost of the property insured [except terrorism, flood, and earthquake].

[Add specific insurance coverage requirements as to terrorism, flood, earthquake and windstorm.]

[Boiler and machinery insurance may be written in a separate policy.]

Any coinsurance requirement in the policy shall be deleted through an agreed value endorsement, the activation of an agreed value option, or other appropriate policy action.

(2) **Insured.** Landlord.

(3) **Required Endorsements as to Coverage/Limits.** As determined by Landlord, but may include Business Income and Extra Expense; Rental Value; Glass; Law and Ordinance; Terrorism; Signs.

(4) **Waiver of Subrogation.** Waiver of subrogation by insurer as to the Landlord, Tenant and other persons as may be designated by Landlord.

b. **Boiler and Machinery Insurance.** Boiler and machinery insurance covering the building, fixtures, equipment, tenant improvements and betterments.

II. **During Periods of Construction**

Landlord's contractor constructing the Building [and Tenant's contractor constructing the Tenant improvements] shall provide the following:

A. **Bonds.**

1. **Payment Bond.**

a. **Coverage.** 100% of Contract Sum under the Construction Contract + 10% for extras until 31 days after Final Completion.

b. **Form.** Statutory form required (AIA form not acceptable).

c. **Coverage.** Shall include coverage for consequential and delay damages due to Contractor's default.

d. **Rating.** Issuer must be at least *a Best's Key Rating Guide* A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list)and duly licensed and authorized to issue surety bonds in Texas.

e. **Term.** Shall be in effect for the period required by the Texas Property Code.

f. **Multiple Obligees.** Shall name as additional obligees such persons as designated by Landlord.

g. **Recorded.** The Payment Bond and all required attachments (issuer's agent's power of attorney and memorandum of the Contract) will be recorded in the Official Public Records of the County prior to commencement of Work on site.

2. **Performance Bond.**

a. **Form.** (AIA form or equivalent). Shall cover Contractor's express warranty and obligations to correct defective Work arising under the Contract Documents.

b. **Rating.** Issuer must be at least *a Best's Key Rating Guide* A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list)and duly licensed and authorized to issue surety bonds in Texas.

c. **Extended Coverages.** Shall cover risk of contract penalties and delay damages.

d. **Term.** Shall be in effect for a period of not less than one year following Final Completion.

e. **Multiple Obligees.** Shall name as additional obligees such persons as designated by Landlord.

B. **Builder's Risk Insurance.** Unless waived in writing by Landlord, Landlord's contractor constructing the Building and Tenant's Contractor constructing the Tenant improvements shall provide the following property insurance:

1. **Completed Value.** Non-reporting form.

2. **Amount.** Initial Contract Sum, plus an amount to be acceptable to Landlord , to increase by amount of subsequent modification of Contract Sum.

3. **Replacement Costs.** Coverage shall be provided in amount equal at all times to the full replacement value and costs of debris removal for any single occurrence. Shall include Contractor's overhead and profit.

4. **Covered Property.**

a. All structure(s) under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, pilings, underground pipes and wiring, excavations, grading, backfilling or filling.

b. All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.

c. All property including materials and supplies on site for installation.

d. All property including materials and supplies at other locations but intended for use at the site.

e. All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.

f. Other Work at the site identified in the Lease.

g. Other property for which an insured is liable regarding the project.

5. **Deductibles.** Deductibles shall not exceed an amount acceptable to Landlord.

6. **Insureds.** Insureds shall include:

a. **Named Insureds.** Landlord, Contractor and all Loss Payees and Mortgagees as Named Insureds.

b. **Additional Insureds.** Tenant, and other tenants designated by Landlord to Contractor to be Additional Insureds.

c. **Subcontractors.** Subcontractors of all tiers in the Work as Additional Insureds, but not limited "to their interests as they may appear".

7. **Form.** Coverage shall be at least as broad as an unmodified ISO special causes of loss form, with collapse added as a cause of loss. Policy shall be written to cover all risks of physical loss except those specifically excluded in the policy, and all exclusions must be pre-approved by Landlord and Contractor, and shall insure at least against the perils of fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, theft, vandalism, malicious mischief, and collapse and such additional perils and coverages as indicated below.

a. **Completed Value Basis.** Written on a completed-value, Non-reporting form basis.

b. **Insureds Other Insurance Excess and Noncontributing.** Builder's Risk shall be primary to any other insurance coverage available to the named insured parties, with that other insurance being excess, secondary and non-contributing.

c. **Prohibited.** No protective safeguard warranty permitted.

d. **Required Endorsements as to Coverage/Limits.** To include

Coverage	Minimum Sublimit
Additional expenses due to delay in completion of project and contract penalties	Amount subject to approval by Landlord.
Agreed Value	Included without sublimit.
Business income/rental value	Amount subject to approval by Landlord.
Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse	Included without sublimit.
Debris removal including demolition as may be made legally necessary by operation of any law, ordinance, or regulation.	Included without sublimit.
Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse	To be included.
Mechanical breakdown, including hot & cold testing	Amount subject to approval by Landlord.
Occupancy clause	To be included.
Ordinance or law	To be included without sublimit.
Replacement cost	To be included.
Soft Costs	Amount subject to approval by Landlord.
Terrorism	Amount subject to approval by Landlord.

8. **Waiver of Subrogation.** Waiver of subrogation by insurer as to the Contractor, Contractor's subcontractors of any tier, Landlord, Landlord's subcontractors of any tier, Landlord's consultants, the Architect, the Architect's consultants, their officers, directors and employees, and other persons as may be designated by Landlord.

9. **Notices.** 30 days prior written notice to each insured of cancellation, non-renewal or material reduction.

10. **Termination of Coverage.** The termination of coverage provision shall be endorsed to permit occupancy of the covered property being constructed . This insurance shall be maintained in effect, unless otherwise provided for the Contract Documents, until the earliest of the following dates:

1	The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;
2	The date on which final payment, as provided for in the Contract Documents; or
3	The date on which the insurable interests in the Covered Property of all insureds other than Contractor have ceased.

11. **Tenant Finish-Out.** Builder's risk policy shall specifically permit partial occupancy by tenants in connection with construction of finish-out of leased premises.

12. **Contractor's Equipment and Personal Property.** No premium shall be chargeable to Landlord, but shall be borne by Contractor, to the extent such premium applies to coverage for any tools, apparatus, machinery, scaffolding, hoists, forms, staging, shoring and similar items commonly referred to as construction equipment, of the Contractor, or its subcontractors which may be on the site, and the capital value of which is not included in the Work.

C. **Boiler and Machinery Insurance.** Contractor shall be required to obtain and maintain boiler and machinery insurance during installation and until final acceptance by Landlord. May be included in builder's risk policy.

D. **Liability Insurance.**

1. **Commercial General Liability.** ***"CGL"***

a. **Coverages/Minimum Limits.** In addition to the specifications set out in the insurance addendum, the following:

$_____ per occurrence.

$_____ general aggregate.

$_____ product-completed operations aggregate.

$_____ personal and advertising injury.

$_____ medical expense limit.

b. **Form.** ISO form CG 00 01 02 04, or a substitute providing equivalent coverage, and shall cover liability arising from premises, operations, contractor's protective for contractor's liability arising out of the hire of subcontractors (independent contractors coverage), incidental design liability arising from the contractor's construction means and methods, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract).

c. **Separation of Insured Language.** Separation of insured language will not be modified.

d. **Limits Allocated to Premises.** If the CGL insurance contains a general aggregate limit, it shall apply separately to this project by an aggregate limit per premises endorsement on ISO form CG 25 23, or equivalent.

e. **Deletion of Personal Injury Exclusion.** The contractual liability exclusion with respect to personal injury will be deleted.

f. **Defense Costs as Additional Benefit.** Defense will be provided as an additional benefit and not included within the limit of liability.

g. **Waiver of Subrogation.** ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to Landlord, Tenant, their officers, directors and agents, and other persons as may be designated by Landlord.

h. **Additional Insureds.** ISO form CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing Landlord, Landlord's manager, Tenant and other persons as may be designated by Landlord as additional insureds. No exclusion for the acts or omissions of the additional insured, except may exclude the sole negligence of the additional insured. As between coverage afforded additional insureds as additional insured on contractor's CGL policy and other insurance maintained by additional insureds, the coverage afforded by contractor's CGL policy will be primary and other insurance of additional insureds with be excess and noncontributing.

i. **Insured Contracts.** Coverage shall include but not be limited to liability assumed by contractor under the construction documents (including the tort liability of another assumed in a business contract).

j. **Deductible and SIR.** May contain a deductible or self insured retention of no greater than $_____.

k. **Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.

l. **Prohibited Endorsements.** The following endorsements are not permitted:

(1) Amendment Of Insured Contract Definition, CG 24 26 or its equivalent.

(2) Contractual Liability Limitation, CG 21 39 or its equivalent.

(3) Any type of punitive, exemplary or multiplied damages exclusion.

(4) Limiting the scope of coverage for liability arising from pollution, explosion, collapse, underground property damage, employment-related practices, or damage to work.

(5) Exclusion – Contractor's Professional Liability, CG 22 79 or its equivalent.

(6) Exclusion – Construction Management Errors and Omissions, CG 22 34 or its equivalent.

m. **Post-Completion Products-Completed Operations Coverage.** Products and completed operations coverage for a period of __ years after final completion of construction of the improvements.

n. **Post-Completion CGL Coverage.** Contractor to maintain same CGL coverage for a period of ____ years after final completion of construction of the improvements.

2. **Workers Compensation.**

a. **Coverages/Minimum Limit.** Not less than statutory limits.

b. **Statutory Coverage.** No "alternative" forms of coverage will be permitted.

c. **Waiver of Subrogation.** WC 42 03 04A Texas Waiver of Right to Recover From Others Endorsement to include a waiver of subrogation by insurer as to the Owner and other persons as may be designated by Landlord.

Employer Liability. The commercial umbrella and/or employers liability limits shall not be less than

$_____ each accident for bodily injury by accident

$_____ each employee for bodily injury by disease.

3. Business Auto Policy.

a. Form. ISO form TE 00 01 or equivalent. The policy limits may be written on a combination of primary and umbrella coverage.

b. Scope of Coverage. Includes liability arising out of operation of any auto (including owned, hired and non-owned vehicles).

c. Waiver of Subrogation. TE 20 46A Change in Transfer of Rights of Recovery Against Others To Us Endorsement to include a waiver of subrogation by insurer as to Landlord and Landlord's lenders and property managers.

d. Additional Insureds. TE 99 01B Additional Insured—Business Auto Coverage Form listing Landlord, Landlord's lender and property manager and other persons as may be designated by Landlord as additional insureds.

4. Umbrella Liability Insurance.

a. Form/Limits. Liability insurance may be written on a combination of primary and excess limits to meet the total requirement. Policy is to be written on an occurrence coverage basis.

b. Scope of Coverage. Written on an umbrella basis in excess over and no less broad than the liability coverages referenced above.

c. Coverage Period. Inception and expiration dates will be the same as the CGL insurance.

d. Following Form. Coverage must "drop down" for exhausted aggregate limits under the liability coverages referenced above; and must contain "follow form" statement.

e. Limits Allocated to Project. Aggregate limit of insurance per location endorsement.

f. Waiver of Subrogation. Policy to provide that subrogation is waived as to same persons as to which subrogation is above required to be waived as to the CGL policy.

g. Additional Insureds. Umbrella policy shall list as additional insureds and shall cover such persons as additional insureds as they are required above to be listed as additional insureds on the contractor's CGL policy.

h. Notice. Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.

5. Contractors Pollution Liability Insurance.

a. Coverage. Contractor shall provide Contractors Pollution Liability ("CPL") insurance providing third party liability coverage for bodily injury, property damage, clean up expenses, and defense arising from the operations of the Contractor. Coverage provided in the policy shall apply to operations and completed operations of the Contractor without separate restrictions for either of these time frames. Mold, microbial matter, fungus and biological substances shall be specifically included within the definition of "pollutants" in the Policy.

b. Form. This insurance shall include prior acts coverage sufficient to cover all services rendered by the Contractor and by its consultants. This coverage may be provided on a claims-made basis.

c. Limits. Coverage shall be provided with a limit of not less than $1,000,000.

d. Endorsements. Landlord shall be listed as an additional insured. There shall be no separate limitation for the time period of this additional insured status within the additional insured endorsement. Policy shall be endorsed to give

Landlord at least 30 days advance notice of cancellation or material reduction in coverage provided by this policy. Policy shall be endorsed to waive subrogation against the Landlord.

Supplement to Risk Management Provisions

Lease

Date: dd/mm/yy

Landlord: _____

Tenant: _____

This Supplement to the Risk Management Provisions is part of the lease. To the extent there is a conflict between the provisions of this supplement and the lease, this supplement controls.

A. Additional Definitions. The following are definitions of terms used in this supplement and the lease.

1. Affiliates. "**Affiliates**" means with respect to any person or entity, each stockholder, subsidiary, officer, director, member, partner, heir, executor, personal representative, and affiliates.

2. Attorney Fees. "**Attorney Fees**" include the Indemnified Person's attorneys' fees and expenses incurred by attorneys, such as postage, courier expenses, long distance charges, travel expenses, and copying costs (whether incurred by an attorney as part of its overhead or to third party services), incurred in the defense of a Claim or Action or to collect on the indemnity of the Indemnifying Person.

3. Claim or Action. "**Claim**" or "**Action**" means any and all claims, actions, causes of action, suit or proceeding (whether in tort or contract, law or equity, or otherwise) against an Indemnified Person with respect to which an Indemnifying Person or an Indemnified Person may have liability or incur a loss.

4. Court or Other Costs. "**Court or Other Costs**" include costs of investigation and expert witnesses; filing fees.

5. Indemnified Persons. "**Indemnified Persons**" means (a) in the case of the indemnity by Tenant the following persons: Landlord and its Affiliates, agents, its management company, Lienholder, employees, invitees, licensees, or visitors and (b) in the case of the indemnity by Landlord the following persons: Tenant and its Affiliates, agents, employees, invitees, licensees, or visitors.

6. Indemnifying Person. "**Indemnifying Person**" means (a) in the case of the indemnity by Tenant the following persons: Tenant and its successors and assigns and (b) in the case of the indemnity by Landlord the following persons: Landlord and its successors and assigns.

7. Injury. "**Injury**" includes (a) harm to or death of an employee of either an Indemnifying Person or an Indemnified Person; and (b) bodily injury.

8. Loss, Liability or Expense. "**Loss**," "**Liability**" or "**Expense**" includes losses, liabilities, damages (including actual, consequential and punitive), expenses (including consultant and expert fees), charges, assessments, fines, penalties, liens, judgments, settlements, and Litigation Expenses (as herein defined).

9. Litigation Expenses. "**Litigation Expenses**" include Attorney's Fees and Court or Other Costs.

10. Occurrence. "**Occurrence**" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Occurrences include accidents that happen after the end of the Term of the lease but are caused by acts or omissions during the Term of the lease.

B. INDEMNITY.

1. INDEMNITY BY TENANT. ¶A.18 Clause (D) of the lease is amended to add the words underlined below:

> **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR TENANT BUT WILL NOT**

APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.

2. **INDEMNITY BY LANDLORD.** ¶C.6 Clause (D) of the lease is amended to add the words underlined below:

THE INDEMNITY CONTAINED IN THIS PARAGRAPH (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT OR LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.

3. **ENVIRONMENTAL LAW COMPLIANCE; INDEMNITY.** Notwithstanding anything in the lease to the contrary, there is hereby excepted from the mutual indemnities provided by ¶¶A.18 and C.6, indemnification for Environmental Liabilities. Indemnification for Environmental Liabilities is separately addressed in the Environmental Liability and Indemnification Addendum to this lease.

C. Management of Claims.

1. **Notice of Action or Claim.** The Indemnified Person must promptly notify the Indemnifying Person in writing of a Claim or Action and deliver to the Indemnifying Person a copy of the claim, process, and all legal pleadings with respect to the Claim or Action. Receipt of this notice is a condition precedent to the Indemnifying Person's liability to the Indemnified Person with respect to the Injury.

2. **Indemnifying Person's Assumption of the Defense.**

a. **Notice of Assumption.** If an Indemnifying Person wishes to assume the defense of the Claim or Action, it shall do so by sending notice of the assumption to the Indemnified Persons. The Indemnifying Person's assumption of the defense acknowledges its obligation to indemnify.

b. **Selection of Counsel.** Promptly after sending the notice, the Indemnifying Person shall choose and employ independent legal counsel of reputable standing. After sending the notice, the Indemnifying Person is entitled to contest, pay, settle or compromise the Claim or Action as it determines, subject to the provisions of ¶C.7 of this supplement.

3. **Indemnifying Person's Declining Defense.** An Indemnifying Person may refuse to provide a defense of the Claim or Action, if it reasonably believes that the Claim or Action, for which a defense is sought, is not required to be defended pursuant to the terms of this lease, and a refusal to defend under such circumstances shall not be a breach of this lease. However, if the Indemnified Person shall be required by a final judgment to pay any amount in respect of any obligation or liability against which the Indemnifying Person is required to indemnify under this lease, the Indemnifying Person shall promptly reimburse the Indemnified Person in an amount equal to the amount of such payment. Further, if such refusal, or any failure, to provide a defense against an Claim or Action is not to have been reasonably justified, then the Indemnifying Person shall be obligated to pay all of the out-of-pocket expenses incurred by the Indemnified Person in defending the Claim or Action or Action, including, but not limited to the value of the time, including travel time, that all of the employees, agents and representatives of the Indemnified Person dedicated to, or expended in furtherance of, the defense of the Claim or Action. The Indemnifying Person, who fails to provide a defense required by this lease to be provided, without any further action required by any Indemnified Person, hereby intentionally relinquishes and waives any and all rights of every nature to dispute, defend against or contest, in any manner (including but not limited to the waiver of every defense of every nature) the claim of the Indemnified Person, regarding the amount of, reasonableness of, necessity for or the Indemnifying Person's obligation to pay, the costs, fees and expenses, and other damages incurred by the Indemnified Person in defending the Claim or Action for which a defense by this lease was refused by the Indemnifying Person.

4. **Indemnified Person's Right to Undertake the Defense.** Despite the provisions of ¶C.2 above, an Indemnified Person is entitled (a) to participate in the defense of an Claim or Action and (b) to defend an Claim or Action if

(1) the Indemnifying Person fails or refuses to defend the Claim or Action on or before the ___ day after the Indemnifying Person has given written notice to the Indemnifying Person of the Claim or Action;

(2) in response to a petition by the Indemnified Person, a court of competent jurisdiction rules that the Indemnifying Person failed or is failing to vigorously prosecute or defend such Claim or Action;

(3) such Claim or Action may result in liabilities which would not be fully indemnified hereunder;

(4) representation of the Indemnifying Person and the Indemnified Person by the same counsel would, in the opinion of that counsel, constitute a conflict of interest; or

(5) the Claim or Action may result in a criminal proceeding against the Indemnified Person.

5. Providing and Assisting with the Defense.

a. Qualification of Counsel. The Indemnifying Person shall provide a defense with qualified counsel that is selected by the Indemnifying Person, and such counsel shall be deemed to have been approved by the Indemnified Person, without further action by the Indemnified Person, unless the Indemnified Person establishes (a) a substantive and material conflict of interest with such counsel; or (b) a fair and substantial cause or reason to withhold such approval, such as the incompetence or significant inexperience of such counsel.

b. Cooperation. The Indemnified Person shall cooperate in the defense and shall make reasonably available all records, witnesses, evidence and other tangible items, in the possession, custody or control of the Indemnified Person, deemed relevant by the Indemnifying Person. The Indemnified Person shall also take all such other action, and sign such documents, as the Indemnifying Person shall deem to be reasonably necessary to defend such Claims or Actions in a timely manner.

6. Litigation Expenses.

a. Expenses Before and After Assumption of the Defense. The Indemnifying Person shall pay for the Litigation Expenses incurred by the Indemnified Person to and including the date the Indemnifying Person assumes the defense of the Claim or Action. Upon the Indemnifying Person's assumption of the defense of the Claim or Action, the Indemnifying Person's obligation ceases for any Litigation Expenses the Indemnified Person subsequently incurs in connection with the defense of the Claim or Action. Despite the previous sentence, the Indemnifying Person is liable for the Litigation Expenses of the Indemnified Person, if (a) the Indemnified Person has employed counsel in accordance with the provisions of ¶C.4; or (b) the Indemnifying Person has authorized in writing the employment of counsel and stated in that authorization the dollar amount of Litigation Expenses for which the Indemnifying Person is obligated.

b. Allocation of Expenses if Defense Involves Additional Matters. Counsel for the defense of the Indemnified Person provided by the Indemnifying Person shall regularly estimate in good faith the portion of all costs, fees and expenses of the defense directly related to the defense of the Claim or Action and to exclude therefrom any costs, fees and expenses due to matters other than the defense of the Claim or Action. Defense counsel shall provide the Indemnified Person and the Indemnifying Person a report setting out this allocation with each billing made by counsel.

7. Compromise and Settlement.

a. General Rule. If an Indemnifying Person assumes the defense of an Claim or Action, it may not affect any compromise or settlement of the Claim or Action without the written consent of the Indemnified Person affected by the compromise or settlement, and the Indemnified Person has no liability with respect to any compromise or settlement any Claim or Action effected without its consent [*add: but such consent shall not be unreasonably withheld*].

b. Exceptions. Despite the provisions of ¶C.7a, an Indemnifying Person may effect a compromise or settlement of an Claim or Action without obtaining the consent of the effected Indemnified Person if the following conditions are met:

(1) There is no finding or admission of any violation of law or any violation of the rights of any person and no effect on any other Claim that may be made against the Indemnified Person;

(2) The sole relief provided is monetary damages that are paid in full by the Indemnifying Persons; and

(3) The compromise or settlement includes, as an unconditional term, the claimant's or the plaintiff's release of the Indemnified Person, in form and substance satisfactory to the Indemnified Person, from all liability in respect of the Claim or Action.

D. **Payment.** The Indemnifying Person shall pay and cause to be discharged any judgment it is obligated to pay pursuant to its indemnity of the Indemnified Persons within 21 days of the judgment becoming a final and unappealable judgment.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.1

Appendix Forms

TEXAS CHANGES – AMENDMENT OF CANCELLATION PROVISIONS OR COVERAGE CHANGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCT WITHDRAWAL COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART

In the event of cancellation or material change that reduces or restricts the insurance afforded by this Coverage Part, we agree to mail prior written notice of cancellation or material change to:

SCHEDULE

1.	**Name:**
2.	**Address:**
3.	**Number of days advance notice:**
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.2

LESSOR – ADDITIONAL INSURED AND LOSS PAYEE

This endorsement modifies insurance provided under the following:

COMMERCIAL LIABILITY UMBRELLA COVERAGE PART

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Endorsement Effective:	Countersigned By:
Named Insured:	(Authorized Representative)

SCHEDULE

Insurance Company Policy Number Effective Date
Expiration Date
Named Insured Address
Additional Insured (Lessor) Address
Designation or Description of "Leased Autos"

Coverage	**Limit Of Insurance**
Liability	$ Each "Occurrence"

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

Subject to such coverage provided in the "underlying insurance", the following cancellation provisions apply:

1. If we cancel the policy, we will mail notice to the lessor in accordance with the Cancellation Common Policy Condition.

2. If you cancel the policy, we will mail notice to the lessor.

3. Cancellation ends this agreement.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.3

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION[1]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	**Location(s) Of Covered Operations**
[*insert name of additional insureds*: (a)_____, and its successors and assigns, and its directors and employees (the owner/landlord), (b) _____ (the landlord's management company), (c) _____ (the landlord's lender), (d), _____, and its successors and assigns, and its members and employees, and (e) ("tenant's lender".] **[1]**	[*insert building address*.]
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" ***caused*** **[2]**, ***in whole or in part, by***:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after: **[3]**

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project. **[4]**

FOOTNOTES TO CG 20 10 07 04 ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

1. Naming Landlord and Tenant as Additional Insureds on Tenant's Contractor's CGL Policy. This endorsement has been completed as an endorsement to a tenant's contractor's CGL insurance to list as additional insureds the persons in the Schedule: the landlord, its management company and lender, and the tenant and its lender.

2. Coverage for Injuries Caused by Named Insured-Contractor's Acts or Omissions. This endorsement provides coverage to the additional insured (*e.g*., landlord and tenant) on the contractor's CGL policy for "liability" "***caused, in whole or in part, by***" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those of its subcontractors, *etc.*). (This form is also used to provide additional insured coverage for a contractor on a subcontractor's CGL policy).

The "caused in whole or in part" language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties. The 2004 revision to this additional insured endorsement was in part a response to holdings, such as *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App. – Austin [3rd Dist.] 1999, no writ), *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. [1st Dist.] 1999, writ denied) and *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) holding that the "arising out of" language was ambiguous and should be broadly interpreted as providing coverage for liabilities arising out of the concurrent and even the sole negligence of the additional insured.

Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent and the additional insured was the solely negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent?

The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named insured's employee is barred by the workers' comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer.

3. Exclusions. Liabilities ***occurring after*** completion of the work are not covered. Coverage for liabilities arising after completion of the contractor's operations but attributable to the contractor's acts or omissions prior to completion may be added by requiring both this endorsement and a CG 20 37 Additional Insured-Owners, Lessees or Contractors–Completed Operations endorsement.

4. Crafting an Additional Insured Endorsement. A good contract drafting practice is to attach to the parties insurance specifications an example of the ISO additional insured endorsement referenced in the insurance

specifications. An even better drafting practice is to attach the ISO form with all information inserted. This practice may assure the issuance of the required endorsement.

Notification Requirement. The parties insurance specifications in addition to specifying that the additional insured endorsement be a specific ISO form might also provide that the ISO form is to be manuscripted to include within it advance notification to the additional insured of cancellation of the named insured's policy due to nonpayment of premium or due to other events. Additionally, it could specify advance notification of non-renewal or material changes to the policy. See **Appendix Form A.1** ISO CG 02 05 12 04 Texas Changes – Amendment of Cancellation Provisions or Coverage Change for notification endorsement to a CGL policy. The following is sample notification language to be added on the face of the additional endorsement form.

> In the event of cancellation or material change that reduces or restricts the insurance afforded to the additional insured, we agree to mail prior written notice of cancellation or material change to the additional insureds listed in the Schedule to the following address, or such other address for the additional insured of which we have been notified by the additional insured, at least ___ days before the effective date of the cancellation or material change, and in the case of material change the notification shall provide to the additional insured a copy of the material changes:
>
> Additional insured's name and address: _____.

The additional insured should also require in its insurance specifications that the named insured's insurer recognize that the coverage afforded by the additional insured endorsement to the additional insured is primary and noncontributory, meaning that any other insurance of the additional insured shall be deemed to be excess to the coverage afforded by additional insured endorsement.

> Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the additional insured named above, whether primary, excess, or contingent, and even though such other insurance provides that it is primary insurance; and we will not seek contribution from any other insurance of the additional insured.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.4

ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Designation of Premises [1] (Part Leased to You):

[*insert suite no., street address and other descriptive information as to what is the "**premises**"* and add the following: and the appurtenant use of the "Common Areas" as defined in the Lease between _____ as Tenant and _____, as Landlord].

2. Name of Person or Organization (Additional Insured): [2]

[*insert name of additional insureds*: (a) _____, and its successors and assigns (the owner/landlord), and its directors and employees, (b) _____, (property manager), and (c) _____ (owner's lender)].

3. Additional Premium:

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section **II**) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability ***arising out of*** [3] the ***ownership, maintenance or use*** [4] of ***that part of the premises*** [5] leased to you and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to [6]:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.

2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.[7]

FOOTNOTES TO CG 20 11 01 96 ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES

1. Adding Landlord as Additional Insured to Tenant's CGL Policy.

This endorsement is used most commonly when a landlord is to be listed as an additional insured on the tenant's liability insurance policy.

2. What Persons in Addition to Landlord to be Additional Insureds?

If it is intended that persons in addition to the named Landlord are to be listed as additional insureds, then each of these persons by category and the most important of these persons by name be identified and listed in the Schedule provided in the additional insured endorsement form to identify the additional insureds.

3. "Arising Out Of" Effects Broad Coverage.

Coverage is broad as it covers the additional insured's liability for Injuries "***arising out of***" its "ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)" as opposed to using language employed in some of the other current ISO endorsement forms that were amended in 2004 to change from "arising out" to "caused by."

4. "Out of Ownership, Maintenance or Use" of Premises.

Coverage also is broad as it covers the additional insured's liability for Injuries arising out of its "ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)." This language is broad. It applies clearly to the landlord's vicarious liability for acts of the tenant (i.e., the "***use***" of the premises). The language is also expansive and general enough to apply directly to the landlord's own negligence. It covers liability arising out of the "***ownership***" and "***maintenance***" of the premises, areas in which the landlord could be held liable regardless of any involvement of the tenant. The ISO industry standard additional insured endorsement form above does not expressly extend coverage to the additional insured's sole negligence. It also does not expressly exclude coverage of a landlord's sole negligence. In 2004 ISO modified several of its endorsement forms (but not this one) to expressly exclude from coverage the sole negligence of the additional insured. An issue may exist as to whether the above ISO endorsement form extends to cover a landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its CGL policy that expressly covers a landlord's sole negligence.

5. Arising Out of the "Premises".

This endorsement provides a blank line for the description of the "Premises." Care must be exercised in completing this blank. This endorsement has a major potential coverage issue. It extends coverage to the additional insured landlord for liability for bodily injury and property damage "***arising out of***" ownership, maintenance or use of "***that part of the premises leased***" to the Tenant. A coverage issue may occur if the bodily injury or property damage occurs outside of the "premises" as such term is defined in the lease (for example, in the common areas maintained by the landlord or in the alley behind the project).

The most common factually litigated scenario regarding these endorsements involves injuries occurring "***outside***" the "***part***" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is affected if the schedule designates more or less than the "part of the premises" leased to the named insured. Some courts have found that the reference to "premises" is not a geographic limitation of the additional insured's coverage. Such courts have construed the endorsement's use of "arising out of" the premises as meaning that the injury or damage does not have to actually occur in the premises. However, some courts have placed a literal meaning on the "premises" and have required the injury to occur in the premises leased to a tenant.

Cases Finding No Coverage.

For example, in *General Accident, Fire and Life Assurance Corp.* v. *Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the additional insured endorsement did not cover a claim brought by the named insured's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant named insured's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the covered location where the injury must occur, and

do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility.

See Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc., 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N. Y. App. Div. Lexis 13316 (2003) a case involving an injury that occurred to a HVAC repairman who was injured while walking on the roof of a landlord's multi-tenant retail center to get to a HVAC unit that the tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement form was the above ISO CG 20 11 Additional Insured – Managers and Lessors of Premises. The court found that the additional insured endorsement did not insure the landlord for the injury as the injury neither occurred in the retail space leased to tenant or on the roof directly above the space.

Northbrook Ins. Co. v. American Stats Ins. Co., 495 N.W.2d 450 (Minn. 1993)-additional insured endorsement held not to cover injuries occurring in alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center) and the additional insured endorsement described the "premises" as the 3,200 square feet of space occupied by the named insured tenant. The court stated:

> The additional insured endorsement under which (the landlord) was added as an insured specified it provided coverage, only with respect to liability arising out of the ownership, maintenance or use of the insured premises, i.e., the bakery. By its terms, the endorsement provides coverage for (the landlord's) negligence *in the bakery*. Coverage is not provided for the rest of the shopping center.

The court also reasoned that since the lease provided for the landlord to the alley the parties did not intend to transfer to the tenant's insurer the risk of liabilities occurring in the alley.

A similar conclusion was recently reached in *Minges Creek* v. *Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006). This case arose out of injury to a customer of a card shop who slipped in the icy parking lot of the mall in which the shop was located. The customer sued both the card shop and the mall. The lease provided that the shop was required to maintain liability insurance "with respect to the leased premises and the business operated by the Tenant" and to "name landlord (i.e., the mall owner), any other parties in interest designated by Landlord, and Tenant as insured." The additional insured endorsement to Tenant's CGL policy provided coverage to the additional insured landlord "with respect to liability arising out of Premises owned or used by you (the tenant). The court held that the landlord was not insured against the liability by tenant's additional insured endorsement. The court viewed the lease and the additional insurance endorsement as "inextricably intertwined" and stated that they "should be interpreted in context with each other." The court concluded that the card shop was required by its lease to provide insured status for the mall only with respect to the "leased premises"–the limited square footage set out in the lease, 6,796 square feet of interior space as shown in the mall's site plan attached to the lease. The court found that although the parking lot was provided for the "use" of the card shop and other tenants, it was not part of the "premises" used by the card shop. The court found that the context of the lease agreement "requires that the definition of premises in the policy be coextensive with the card shop's obligation to name (the mall owner) as an additional insured."

Also see *USF&G* v. *Drazic*, 877 S.W.2d 140 (Mo. 1994)-additional insured not covered for injuries to named insured tenant's employee who slipped and was injured on an icy parking lot.

See also cases construing the scope of indemnities as to injuries arising out of the use of the "premises" as not extending to injuries not occurring in the premises (but note courts follow a strict construction rule limiting private parties contracts not employed in construing insurance contracts): Rensselaer *Polytechnic Inst.* v. *Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991). The court was not persuaded that a duty to indemnify existed by the argument that, although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co.* v. *Admon Realty, Inc.*, 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)–finding no duty to indemnity where the cause of the damage occurred outside the leased premises.

Cases Finding Coverage.

An earlier New York case, *J. P. Realty Trust* v. *Public Serv.*, 476 N.Y.S.2d 325 (1984), found coverage for the additional insured for an injury occurring to the named insured's employee injured while using a freight elevator. The additional insured endorsement designated landlord's entire building as "that part leased to the insured;" however, the lease designated only two floors of the building as leased to the tenant as the "premises." The lease provided tenant use of the freight elevator. This court looked to the intent of the parties and construed the additional insured endorsement broadly in favor of coverage. Similarly, the court in *Harrah's Atlantic Inc.* v. *Harleysville Ins. Co.*, 288 N. J. Super. 152, 671 A.2d 1122 (1996) found coverage for the additional insured landlord for an injury occurring outside the premises leased to tenant (employee of named insured tenant injured crossing street separating landlord's parking garage and landlord's building which housed tenant's retail space). The court noted

> However, the requirement that there be a causal link or connection between the accident and the leased premises does not mean that there must be any degree of physical proximity between the leased premises and the scene of the accident. The two concepts are quite different. Thus, we would expect the outcome in the *Franklin* case to have been the same had the tenant's business guest fell on the building's exterior steps even if they were some distance from the luncheonette. This is so because the negotiating for such an endorsement in a lease the landlord is simply attempting to ensure against the risk of liability generated by the business about to be conducted by the tenant, and place the cost of insuring that risk on the tenant.

Franklin Mut. Ins. v. *Security Indem. Ins.*, 275 N. J. Super. 335, 340, 646 A.2d 443, *cert denied* 139 N. J. 185, 652 A.2d 173 (1994). *Also see ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 637 N.Y.S.2d 117 (N.Y. 1st Dept. 1996)–court required the insurer of the tenant of a garage to defend the owner of the garage in a personal injury suit even though the accident occurred on the sidewalk in front of the tenant's property. The additional insured endorsement was issued on an inapplicable form as it provided additional insured coverage as to injuries arising out of premises "leased to" the named insured. There were no leased premises as the named insured was a garage operator. The court noted that named insured's CGL policy provided coverage to the named insured for garage operations including

> the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations ...[; and] all operations necessary or incidental to a garage business.

The court reasoned that "without traversing the sidewalk for access to and from the garage, there could be no use at all of the garage as a parking facility." *Id.* at 176. In *University of California Press* v. *G. A. Insurance Co. of New York*, 1995 U.S. Dist. Lexis 21442, 1995 WL 591307 (E.D.N.Y. 1995), the property damage and actual injury occurred within the leased premises. Books stored within the leased premises were damaged by leaking water from a sprinkler system malfunction one floor above the leased premises. The court found the language of the insurance agreement to be ambiguous and unclear as to whether the term "arising out of" referred to where the breach took place, where the accident occurred or where the damage occurred. Unable to reconcile that ambiguity, the court followed a basic principle of contract law and construed the ambiguity against the insurer as the policy's drafter. Thus, because the damage occurred within the leased premises, the court found in favor of coverage. The court in *Hormel Foods Corp.* v. *Northbrook Property & Casualty Insurance Co.*, 938 F.Supp. 555 (D. Minn. 1996), *aff'd*, No. 97–1197, 1997 U.S. App. Lexis 34146 (8th Cir. 1997) upheld coverage for an additional insured landlord which leased a hog-processing facility to the employer (Quality Pork Products, "QPP") of a person who was killed using a machine designed and manufactured by Hormel, installed on the premises, and leased to QPP by Hormel. The Northbrook insurance policy additional insured endorsement covered losses "arising out of the ownership, maintenance or use, of the leased premises." The court held that the machine was so intertwined with the facility's operations as to make injuries flowing from it attributable to the "ownership, maintenance, or use" of the facility. The machine was bolted to the floor walls and was "unambiguously part of the premises." How far some courts will extend additional insured coverage is illustrated by *SFH, Inc.* v. *Millard Refrigerated Services, Inc.*, 339 F.3d 738 (8th Cir. 2003). The warehouse lease required the lessee to carry CGL insurance and the lessor and its manager as additional insureds. Coverage was affected through a blanket additional insured endorsement covering all additional insureds required by named insured's contracts to be covered. The additional insured language was identical to the ISO CG 20 11 coverage as to "liability arising out of the ownership, maintenance or use of that part of the premises leased to you." The lessee's property was destroyed by a fire at the warehouse. It was determined that the one of the manager's employees had disabled the sprinkler system. The court found in favor of coverage, stating

> Construing the "arising out of" language broadly, we conclude that [the warehouse manager's] liability arose out of its maintenance of the leased premises. the fire started within the portion of the warehouse leased by [the lessee] and injured [the lessee's] property located in the leased premises. [The lessee's] loss was caused, or significantly increased, by the conduct of the [manager's] employee who shut off the water to the building's sprinkler system.

6. Exclusions.

This endorsement contains two significant carve outs. The first is for liabilities for Injuries that "*take place after (the tenant) ceases to be a tenant in that premises*." This carve out excludes coverage for liabilities for Injuries that technically occur after cessation of the tenancy but relate to acts or omissions during the tenancy. Coverage for liabilities for Injuries arising after expiration of the tenancy but attributable to the tenant's acts or omissions prior to completion may be added by requiring both this endorsement and the CG 29 37 endorsement. The second carve out is for alterations, new construction or demolition operations "*by or on behalf of the (additional insured–e.g., the landlord)*." This carve out excludes protection for liabilities for Injuries associated with construction activities. If the tenant will be engaged in any construction activities (e.g., tenant improvements), then another endorsement form should be used.

7. Crafting an Additional Insured Endorsement.

A good contract drafting practice is to attach to the parties insurance specifications an example of the ISO additional insured endorsement referenced in the insurance specifications. An even better drafting practice is to attach the ISO form with all information inserted. This practice may assure the issuance of the required endorsement.

Notification Requirement. The parties insurance specifications in addition to specifying that the additional insured endorsement be a specific ISO form might also provide that the ISO form is to be manuscripted to include within it advance notification to the additional insured of cancellation of the named insured's policy due to nonpayment of premium or due to other events. Additionally, it could specify advance notification of non-renewal or material changes to the policy. See **Appendix Form A.1** ISO CG 02 05 12 04 Texas Changes – Amendment of Cancellation Provisions or Coverage Change for notification endorsement to a CGL policy. The following is sample notification language for the notification to be added on the face of the additional endorsement form.

> In the event of cancellation or material change that reduces or restricts the insurance afforded to the additional insured, we agree to mail prior written notice of cancellation or material change to the additional insureds listed in the Schedule to the following address, or such other address for the additional insured of which we have been notified by the additional insured, at least ___ days before the effective date of the cancellation or material change, and in the case of material change the notification shall provide to the additional insured a copy of the material changes:
>
> Additional insured's name and address: _____ .

The additional insured should also require in its insurance specifications that the named insured's insurer recognize that the coverage afforded by the additional insured endorsement to the additional insured is primary and noncontributory, meaning that any other insurance of the additional insured shall be deemed to be excess to the coverage afforded by additional insured endorsement.

> Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the additional insured named above, whether primary, excess, or contingent, and even though such other insurance provides that it is primary insurance; and we will not seek contribution from any other insurance of the additional insured.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.5

ADDITIONAL INSURED – MORTGAGEE, ASSIGNEE, OR RECEIVER

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

Designation of Premises:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule but only with respect to their liability as mortgagee, assignee, or receiver and arising out of the ownership, maintenance, or use of the premises by you and shown in the Schedule.
2. This insurance does not apply to structural alterations, new construction and demolition operations performed by or for that person or organization.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.6

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION[1]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)
[*insert name of additional insureds*: (a) _____ (the primary additional insured), and its successors and assigns, and its members and employees and (b) _____ (the designated primary additional insured's lender.)]
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" ***caused***, [2] ***in whole or in part, by*** your acts or omissions or the acts or omissions of those acting on your behalf:

A. In the performance of your ongoing operations; or

B. In connection with your ***premises*** owned by or rented to you. [3]

FOOTNOTES TO CG 20 26 07 04 ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION

1. "Catch All" Designated Person Additional Endorsement Form - Designating Tenant as an Additional Insured on Landlord's CGL Policy.

This endorsement may be used when no other ISO form exists for the purpose or when the parties designate this form as the form to be used. This form is suitable for use to designate a tenant as an additional insured on Landlord's CGL policy. In a landlord-tenant context, it may be used to provide additional insured coverage to an owner on a tenant's CGL policy and *vice versa* to provide additional insured coverage to a tenant on a landlord's CGL policy. In cases where the landlord is to be included as an additional insured on the tenant's CGL policy and the tenant is to be included on a landlord's CGL policy, the insurance specifications and the additional insured endorsements must be drafted to allocate on a geographic basis the areas where the landlord's insurance is to afford primary and noncontributory coverage to the landlord and the tenant (for example, the common areas) and the areas where the tenant's insurance is to afford primary and noncontributory coverage to the landlord and the tenant (for example, inside the suite or demised premises leased to the tenant, exclusive of common areas).

2. No Express Exclusions - Except Limited to Injuries "Caused by" Named Insured.

This endorsement is the broadest of the ISO Additional Insured Endorsements. This endorsement provides additional insured coverage for liability bodily injury, property damage and personal and advertising injury caused, in whole or in part, by the named insured's (in this case the Landlord) acts or omissions "in connection with your premises owned by ... you." This endorsement form does not contain any carve outs from coverage like other ISO additional insured endorsement forms. However, by its express coverage terms it eliminates certain coverages. For example, the injury must be caused at least in part by the named insured. This eliminates coverage for the additional insured's sole negligence. The injury must occur in connection with premises owned by the named insured. The term "***premises***" is not defined, but likely will be given a broad meaning by courts. In the context of a lease, courts will likely interpret this endorsement listing the tenant as an additional insured on the landlord's CGL policy as covering more than merely the "Premises" leased to the tenant, but also the common areas.

3. Crafting an Additional Insured Endorsement.

A good contract drafting practice is to attach to the parties' insurance specifications an example of the ISO additional insured endorsement referenced in the insurance specifications. An even better drafting practice is to attach the ISO form with all information inserted. This practice may assure the issuance of the required endorsement.

Notification Requirement. The parties insurance specifications in addition to specifying that the additional insured endorsement be a specific ISO form might also provide that the ISO form is to be manuscripted to include within it advance notification to the additional insured of cancellation of the named insured's policy due to nonpayment of premium or due to other events. Additionally, it could specify advance notification of non-renewal or material changes to the policy. The following is sample notification language for the notification to be added on the face of the additional endorsement form.

> In the event of cancellation or material change that reduces or restricts the insurance afforded to the additional insured, we agree to mail prior written notice of cancellation or material change to the additional insureds listed in the Schedule to the following address, or such other address for the additional insured of which we have been notified by the additional insured, at least ___ days before the effective date of the cancellation or material change, and in the case of material change the notification shall provide to the additional insured a copy of the material changes:
>
> Additional insured's name and address: _____ .

The additional insured should also require in its insurance specifications that the named insured's insurer recognize that the coverage afforded by the additional insured endorsement to the additional insured is primary and noncontributory, meaning that any other insurance of the additional insured shall be deemed to be excess to the coverage afforded by additional insured endorsement.

> Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the additional insured named above, whether primary, excess, or contingent, and even though such other insurance provides that it is primary insurance; and we will not seek contribution from any other insurance of the additional insured.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.7

CONTRACTUAL LIABILITY LIMITATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The definition of "insured contract" in the DEFINITIONS Section is replaced by the following:

"Insured contract" means:

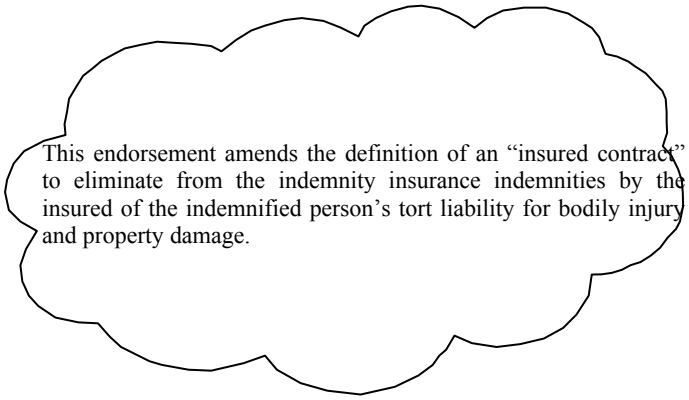
a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement.



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.8

EXCLUSION – CONSTRUCTION MANAGEMENT ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph **2., Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph **2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:**

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

1. The preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications by any architect, engineer or surveyor performing services on a project on which you serve as construction manager; or

2. Inspection, supervision, quality control, architectural or engineering activities done by or for you on a project on which you serve as construction manager.

This exclusion does not apply to "bodily injury" or "property damage" due to construction or demolition work done by you, your "employees" or your subcontractors.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.9

EXCLUSION – CONTRACTORS – PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph **2., Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph **2., Exclusions** of **Section I – Coverage B – Personal And Advertising Injury Liability:**

1. This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:

a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and

b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.

2. Subject to Paragraph **3.** below, professional services include:

a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and

b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.

3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

A.10

AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph **9.** of the **Definitions** Section is replaced by the following:

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is ***caused, in whole or in part, by*** you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph **f.** does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities

This endorsement amends the definition of "insured contract" to limit the indemnity insurance insuring indemnities for tort liability of the indemnified person to bodily injury and property damage *caused in whole or in part, by* the indemnifying person.

B.1

COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS PAGE

POLICY NO. EFFECTIVE DATE ___mm/dd/yy_____ ☐ "X" If Supplemental Declarations is Attached

NAMED INSURED

DESCRIPTION OF PREMISES

Prem. No. __ Bldg. No. __ Location, Construction And Occupancy

COVERAGES PROVIDED Insurance At The Described Premises Applies Only For Coverages For Which A Limit Of Insurance Is Shown

Prem. No.	Bldg. No.	Coverage	Limit Of Insurance	Covered Causes Of Loss	Coinsurance*	Rates

*If Extra Expense Coverage, Limits On Loss Payment

OPTIONAL COVERAGES Applicable Only When Entries Are Made In The Schedule Below

Prem. No.	Bldg. No.	Agreed Value Expiration Date	Cov.	Amount Building	Replacement Cost (X) Pers. Prop.	Including "Stock"

Inflation Guard (%) Bldg.	Pers. Prop.	*Monthly Limit Of Indemnity (Fraction)	Maximum Period Of Indemnity (X)	*Extended Period Of Indemnity (Days)

*Applies to Business Income Only

MORTGAGEHOLDERS

Prem. No. __ Bldg. No. ___ Mortgageholder Name And Mailing Address _____

DEDUCTIBLE

$500. Exceptions: _____

FORMS APPLICABLE

To All Coverages:

To Specific Premises/Coverages:

Prem. No. ____ Bldg. No. ____ Coverages ___ Form Number ___

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.

2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or

b. 30 days before the effective date of cancellation if we cancel for any other reason.

3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.

5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declaration is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination of Your Books and Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections and Surveys

1. We have the right to:

a. Make inspections and surveys at this time;

b. Give you reports on the conditions we find; and

c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

a. Are safe or healthful; or

b. Comply with laws, regulations, codes and standards.

3. Paragraphs **1.** and **2.** of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

4. Paragraph **2.** of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and

2. Will be the payee for any return premiums we pay.

F. Transfer of Your Rights and Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

COMMERCIAL PROPERTY CONDITIONS

This Coverage Part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in Commercial Property Coverage Forms.

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

This coverage part is void in any case of fraud by you as it relates to this coverage part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

1. This coverage part;

2. The covered property

3. Your interest in the covered property; or

4. A claim under this coverage part.

B. CONTROL OF PROPERTY

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

The breach of any condition of this coverage part at any one or more locations will not affect coverage at any location where, at the time of loss or damage, the breach of condition does not exist.

C. INSURANCE UNDER TWO OR MORE COVERAGES

If two or more of this policy's coverages apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this coverage part unless:

1. There has been full compliance with all of the terms of this coverage part; and

2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

E. LIBERALIZATION

If we adopt any revision that would broaden the coverage under this coverage part without additional premium within 45 days prior to or during the policy period, the broadened coverage will immediately apply to this coverage part.

F. NO BENEFIT TO BAILEE

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

G. OTHER INSURANCE

1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this coverage part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable limit of insurance under this coverage part bears to the limits of insurance of all insurance covering on the same basis.

2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable limit of insurance.

H. POLICY PERIOD, COVERAGE TERRITORY

Under this coverage part:

1. We cover loss or damage commencing:

a. During the policy period shown in the declarations; and

b. Within the coverage territory.

2. The coverage territory is:

a. The United States of America (including its territories and possessions);

b. Puerto Rico; and

c. Canada.

I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this coverage part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your covered property or covered income.

2. After a loss to your covered property or covered income only if, at time of loss, that party is one of the following:

a. Someone insured by this insurance;

b. A business firm:

(1) Owned or controlled by you; or

(2) That owns or controls you; or

c. Your tenant.

This will not restrict your insurance.

B.4

BUILDING AND PERSONAL PROPERTY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **H.,** Definitions.

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the type of property described in this section, **A.1.**, and limited in **A.2.**, Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.

a. Building, meaning the building or structure described in the Declarations, including:

(1) Completed additions;

(2) Fixtures, including outdoor fixtures;

(3) Permanently installed:

(a) Machinery and

(b) Equipment;

(4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:

(a) Fire-extinguishing equipment;

(b) Outdoor furniture;

(c) Floor coverings; and

(d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;

(5) If not covered by other insurance:

(a) Additions under construction, alterations and repairs to the building or structure;

(b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

b. Your Business Personal Property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property – Separation Of Coverage form:

(1) Furniture and fixtures;

(2) Machinery and equipment;

(3) "Stock";

(4) All other personal property owned by you and used in your business;

(5) Labor, materials or services furnished or arranged by you on personal property of others;

(6) Your use interest as tenant in improvements and betterments. Improvements and betterments are

fixtures, alterations, installations or additions:

(a) Made a part of the building or structure you occupy but do not own; and

(b) You acquired or made at your expense but cannot legally remove;

(7) Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property Of Others.

c. Personal Property Of Others that is:

(1) In your care, custody or control; and

(2) Located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

2. Property Not Covered

Covered Property does not include:

a. Accounts, bills, currency, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities;

b. Animals, unless owned by others and boarded by you, or if owned by you, only as "stock" while inside of buildings;

c. Automobiles held for sale;

d. Bridges, roadways, walks, patios or other paved surfaces;

e. Contraband, or property in the course of illegal transportation or trade;

f. The cost of excavations, grading, backfilling or filling;

g. Foundations of buildings, structures, machinery or boilers if their foundations are below:

(1) The lowest basement floor; or

(2) The surface of the ground, if there is no basement;

h. Land (including land on which the property is located), water, growing crops or lawns;

i. Personal property while airborne or waterborne;

j. Bulkheads, pilings, piers, wharves or docks;

k. Property that is covered under another coverage form of this or any other policy in which it is more specifically described, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;

l. Retaining walls that are not part of a building;

m. Underground pipes, flues or drains;

n. Electronic data, except as provided under the Additional Coverage, Electronic Data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph, **n.,** does not apply to your "stock" of prepackaged software;

o. The cost to replace or restore the information on valuable papers and records, including those which exist as electronic data. Valuable papers and records include but are not limited to proprietary information, books of account, deeds, manuscripts, abstracts, drawings and card index systems. Refer to the Coverage Extension for Valuable Papers And Records (Other Than Electronic Data) for limited coverage for valuable papers and records other than those which exist as electronic data;

p. Vehicles or self-propelled machines (including aircraft or watercraft) that:

(1) Are licensed for use on public roads; or

(2) Are operated principally away from the described premises.

This paragraph does not apply to:

(a) Vehicles or self-propelled machines or autos you manufacture, process or warehouse;

(b) Vehicles or self-propelled machines, other than autos, you hold for sale;

(c) Rowboats or canoes out of water at the described premises; or

(d) Trailers, but only to the extent provided for in the Coverage Extension for Non-owned Detached Trailers;

q. The following property while outside of buildings:

(1) Grain, hay, straw or other crops;

(2) Fences, radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, trees, shrubs or plants (other than "stock" of trees, shrubs or plants), all except as provided in the Coverage Extensions.

3. Covered Causes Of Loss

See applicable Causes Of Loss Form as shown in the Declarations.

4. Additional Coverages

a. Debris Removal

(1) Subject to Paragraphs **(3)** and **(4),** we will pay your expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

(2) Debris Removal does not apply to costs to:

(a) Extract "pollutants" from land or water; or

(b) Remove, restore or replace polluted land or water.

(3) Subject to the exceptions in Paragraph **(4),** the following provisions apply:

(a) The most we will pay for the total of direct physical loss or damage plus debris removal expense is the Limit of Insurance applicable to the Covered Property that has sustained loss or damage.

(b) Subject to **(a)** above, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

(4) We will pay up to an additional $10,000 for debris removal expense, for each location, in any one occurrence of physical loss or damage to Covered Property, if one or both of the following circumstances apply:

(a) The total of the actual debris removal expense plus the amount we pay for direct physical loss or damage exceeds the Limit of Insurance on the Covered Property that has sustained loss or damage.

(b) The actual debris removal expense exceeds 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

Therefore, if **(4)(a)** and/or **(4)(b)** apply, our total payment for direct physical loss or damage and debris removal expense may reach but will never exceed the Limit of Insurance on the Covered Property that has sustained loss or damage, plus $10,000.

(5) Examples

The following examples assume that there is no Coinsurance penalty.

EXAMPLE #1

Limit of Insurance:	$ 90,000
Amount of Deductible:	$ 500
Amount of Loss:	$ 50,000
Amount of Loss Payable:	$ 49,500
	($50,000 – $500)
Debris Removal Expense:	$ 10,000
Debris Removal Expense Payable:	$ 10,000
($10,000 is 20% of $50,000.)	

The debris removal expense is less than 25% of the sum of the loss payable plus the deductible. The sum of the loss payable and the debris removal expense ($49,500 + $10,000 = $59,500) is less than the Limit of Insurance. Therefore the full amount of debris removal expense is payable in accordance with the terms of Paragraph **(3).**

EXAMPLE #2

Limit of Insurance:	$ 90,000
Amount of Deductible:	$ 500
Amount of Loss:	$ 80,000
Amount of Loss Payable:	$ 79,500
	($80,000 – $500)
Debris Removal Expense:	$ 30,000
Debris Removal Expense Payable	
Basic Amount:	$ 10,500
Additional Amount:	$ 10,000

The basic amount payable for debris removal expense under the terms of Paragraph **(3)** is calculated as follows: $80,000 ($79,500 + $500) x .25 = $20,000; capped at $10,500. The cap applies because the sum of the loss payable ($79,500) and the basic amount payable for debris removal expense ($10,500) cannot exceed the Limit of Insurance ($90,000).

The additional amount payable for debris removal expense is provided in accordance with the terms of Paragraph **(4),** because the debris removal expense ($30,000) exceeds 25% of the loss payable plus the deductible ($30,000 is 37.5% of $80,000), and because the sum of the loss payable and debris removal expense ($79,500 + $30,000 = $109,500) would exceed the Limit of Insurance ($90,000). The additional amount of covered debris removal expense is $10,000, the maximum payable under Paragraph **(4)**. Thus the total payable for debris removal expense in this example is $20,500; $9,500 of the debris removal expense is not covered.

b. Preservation Of Property

If it is necessary to move Covered Property from the described premises to preserve it from loss or damage by a Covered Cause of Loss, we will pay for any direct physical loss or damage to that property:

(1) While it is being moved or while temporarily stored at another location; and

(2) Only if the loss or damage occurs within 30 days after the property is first moved.

c. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to $1,000, unless a higher limit is shown in the Declarations, for your liability for fire department service charges:

(1) Assumed by contract or agreement prior to loss; or

(2) Required by local ordinance.

No Deductible applies to this Additional Coverage.

d. Pollutant Clean-up And Removal

We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

The most we will pay under this Additional Coverage for each described premises is $10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

e. Increased Cost Of Construction

(1) This Additional Coverage applies only to buildings to which the Replacement Cost Optional Coverage applies.

(2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property, subject to the limitations stated in **e.(3)** through **e.(9)** of this Additional Coverage.

(3) The ordinance or law referred to in **e.(2)** of this Additional Coverage is an ordinance or law that regulates the construction or repair of buildings or establishes zoning or land use requirements at the described premises, and is in force at the time of loss.

(4) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:

(a) You were required to comply with before the loss, even when the building was undamaged; and

(b) You failed to comply with.

(5) Under this Additional Coverage, we will not pay for:

(a) The enforcement of any ordinance or law which requires demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or

(b) Any costs associated with the enforcement of an ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants", "fungus", wet or dry rot or bacteria.

(6) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is $10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which

applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lesser of: $10,000 or 5% times the value of the damaged building as of the time of loss times the applicable Coinsurance percentage.

The amount payable under this Additional Coverage is additional insurance.

(7) With respect to this Additional Coverage:

(a) We will not pay for the Increased Cost of Construction:

(i) Until the property is actually repaired or replaced, at the same or another premises; and

(ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.

(b) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of **e.(6)** of this Additional Coverage, is the increased cost of construction at the same premises.

(c) If the ordinance or law requires relocation to another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of **e.(6)** of this Additional Coverage, is the increased cost of construction at the new premises.

(b) If the Causes Of Loss – Broad Form applies, coverage under this Additional Coverage, Electronic Data, includes

(8) This Additional Coverage is not subject to the terms of the Ordinance Or Law Exclusion, to the extent that such Exclusion would conflict with the provisions of this Additional Coverage.

(9) The costs addressed in the Loss Payment and Valuation Conditions, and the Replacement Cost Optional Coverage, in this Coverage Form, do not include the increased cost attributable to enforcement of an ordinance or law. The amount payable under this Additional Coverage, as stated in **e.(6)** of this Additional Coverage, is not subject to such limitation.

f. Electronic Data

(1) Under this Additional Coverage, electronic data has the meaning described under Property Not Covered, Electronic Data.

(2) Subject to the provisions of this Additional Coverage, we will pay for the cost to replace or restore electronic data which has been destroyed or corrupted by a Covered Cause of Loss. To the extent that electronic data is not replaced or restored, the loss will be valued at the cost of replacement of the media on which the electronic data was stored, with blank media of substantially identical type.

(3) The Covered Causes of Loss applicable to Your Business Personal Property apply to this Additional Coverage, Electronic Data, subject to the following:

(a) If the Causes Of Loss – Special Form applies, coverage under this Additional Coverage, Electronic Data, is limited to the "specified causes of loss" as defined in that form, and Collapse as set forth in that form.

Collapse as set forth in that form.

(c) If the Causes Of Loss Form is endorsed to add a Covered Cause of Loss, the additional

Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Electronic Data.

(d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for loss or damage caused by or resulting from manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, modify, maintain, repair or replace that system.

(4) The most we will pay under this Additional Coverage, Electronic Data, is $2,500 for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

5. Coverage Extensions

Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

If a Coinsurance percentage of 80% or more, or a Value Reporting period symbol, is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

a. Newly Acquired Or Constructed Property

(1) Buildings

If this policy covers Building, you may extend that insurance to apply to:

(a) Your new buildings while being built on the described premises; and

(b) Buildings you acquire at locations, other than the described premises, intended for:

(i) Similar use as the building described in the Declarations; or

(ii) Use as a warehouse.

The most we will pay for loss or damage under this Extension is $250,000 at each building.

(2) Your Business Personal Property

(a) If this policy covers Your Business Personal Property, you may extend that insurance to apply to:

(i) Business personal property, including such property that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions;

(ii) Business personal property, including such property that you newly acquire, located at your newly constructed or acquired buildings at the location described in the Declarations; or

(iii) Business personal property that you newly acquire, located at the described premises.

The most we will pay for loss or damage under this Extension is $100,000 at each building.

(b) This Extension does not apply to:

(i) Personal property of others that is temporarily in your possession in the course of installing or performing work on such property; or

(ii) Personal property of others that is temporarily in your possession in the course of your manufacturing or wholesaling activities.

(3) Period Of Coverage

With respect to insurance on or at each newly acquired or constructed property, coverage will end when any of the following first occurs:

(a) This policy expires;

(b) 30 days expire after you acquire the property or begin construction of that part of the building that would qualify as covered property; or

(c) You report values to us.

We will charge you additional premium for values reported from the date you acquire the property or begin construction of that part of the building that would qualify as covered property.

b. Personal Effects And Property Of Others

You may extend the insurance that applies to Your Business Personal Property to apply to:

(1) Personal effects owned by you, your officers, your partners or members, your managers or your employees. This Extension does not apply to loss or damage by theft.

(2) Personal property of others in your care, custody or control.

The most we will pay for loss or damage under this Extension is $2,500 at each described premises. Our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

c. Valuable Papers And Records (Other Than Electronic Data)

(1) You may extend the insurance that applies to Your Business Personal Property to apply to the cost to replace or restore the lost information on valuable papers and records for which duplicates do not exist. But this Extension does not apply to valuable papers and records which exist as electronic data. Electronic data has the meaning described under Property Not Covered, Electronic Data.

(2) If the Causes Of Loss – Special Form applies, coverage under this Extension is limited to the "specified causes of loss" as defined in that form, and Collapse as set forth in that form.

(3) If the Causes Of Loss – Broad Form applies, coverage under this Extension includes Collapse as set forth in that form.

(4) Under this Extension, the most we will pay to replace or restore the lost information is $2,500 at each described premises, unless a higher limit is shown in the Declarations. Such amount is additional insurance. We will also pay for the cost of blank material for reproducing the records (whether or not duplicates exist), and (when there is a duplicate) for the cost of labor to transcribe or copy the records. The costs of blank material and labor are subject to the applicable Limit of Insurance on Your Business Personal Property and therefore coverage of such costs is not additional insurance.

d. Property Off-premises

(1) You may extend the insurance provided by this Coverage Form to apply to your Covered Property while it is away from the described premises, if it is:

(a) Temporarily at a location you do not own, lease or operate;

(b) In storage at a location you lease, provided the lease was executed after the beginning of the current policy term; or

(c) At any fair, trade show or exhibition.

(2) This Extension does not apply to property:

(a) In or on a vehicle; or

(b) In the care, custody or control of your salespersons, unless the property is in such care, custody or control at a fair, trade show or exhibition.

(3) The most we will pay for loss or damage under this Extension is $10,000.

e. Outdoor Property

You may extend the insurance provided by this Coverage Form to apply to your outdoor fences, radio and television antennas (including satellite dishes), trees, shrubs and plants (other than "stock" of trees, shrubs or plants), including debris removal expense, caused by or resulting from any of the following causes of loss if they are Covered Causes of Loss:

(1) Fire;

(2) Lightning;

(3) Explosion;

(4) Riot or Civil Commotion; or

(5) Aircraft.

The most we will pay for loss or damage under this Extension is $1,000, but not more than $250 for any one tree, shrub or plant. These limits apply to any one occurrence, regardless of the types or number of items lost or damaged in that occurrence.

f. Non-owned Detached Trailers

(1) You may extend the insurance that applies to Your Business Personal Property to apply to loss or damage to trailers that you do not own, provided that:

(a) The trailer is used in your business;

(b) The trailer is in your care, custody or control at the premises described in the Declarations; and

(c) You have a contractual responsibility to pay for loss or damage to the trailer.

(2) We will not pay for any loss or damage that occurs:

(a) While the trailer is attached to any motor vehicle or motorized conveyance, whether or not the motor vehicle or motorized conveyance is in motion;

(b) During hitching or unhitching operations, or when a trailer becomes accidentally unhitched from a motor vehicle or motorized conveyance.

(3) The most we will pay for loss or damage under this Extension is $5,000, unless a higher limit is shown in the Declarations.

(4) This insurance is excess over the amount due (whether you can collect on it or not) from any other insurance covering such property.

Each of these Extensions is additional insurance unless otherwise indicated. The Additional Condition, Coinsurance, does not apply to these Extensions.

B. Exclusions And Limitations

See applicable Causes Of Loss Form as shown in the Declarations.

C. Limits Of Insurance

The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

The most we will pay for loss or damage to outdoor signs, whether or not the sign is attached to a building, is $2,500 per sign in any one occurrence.

The amounts of insurance stated in the following Additional Coverages apply in accordance with the terms of such coverages and are separate from the Limit(s) of Insurance shown in the Declarations for any other coverage:

1. Fire Department Service Charge;

2. Pollutant Clean-up And Removal;

3. Increased Cost Of Construction; and

4. Electronic Data.

Payments under the Preservation Of Property Additional Coverage will not increase the applicable Limit of Insurance.

D. Deductible

In any one occurrence of loss or damage (hereinafter referred to as loss), we will first reduce the amount of loss if required by the Coinsurance Condition or the Agreed Value Optional Coverage. If the adjusted amount of loss is less than or equal to the Deductible, we will not pay for that loss. If the adjusted amount of loss exceeds the Deductible, we will then subtract the Deductible from the adjusted amount of loss, and will pay the resulting amount or the Limit of Insurance, whichever is less.

When the occurrence involves loss to more than one item of Covered Property and separate Limits of Insurance apply, the losses will not be combined in determining application of the Deductible. But the Deductible will be applied only once per occurrence.

EXAMPLE #1

(This example assumes there is no Coinsurance penalty.)

Deductible:	$ 250
Limit of Insurance – Building #1:	$ 60,000
Limit of Insurance – Building #2:	$ 80,000
Loss to Building #1:	$ 60,100
Loss to Building #2:	$ 90,000

The amount of loss to Building #1 ($60,100) is less than the sum ($60,250) of the Limit of Insurance applicable to Building #1 plus the Deductible.

The Deductible will be subtracted from the amount of loss in calculating the loss payable for Building #1:

$ 60,100
– 250
$ 59,850 Loss Payable – Building #1

The Deductible applies once per occurrence and therefore is not subtracted in determining the amount of loss payable for Building #2. Loss payable for Building #2 is the Limit of Insurance of $80,000.

Total amount of loss payable:

$59,850 + $80,000 = $139,850

EXAMPLE #2

(This example, too, assumes there is no Coinsurance penalty.)

The Deductible and Limits of Insurance are the same as those in Example #1.

Loss to Building #1:	$ 70,000
(Exceeds Limit of Insurance plus Deductible)	
Loss to Building #2:	$ 90,000
(Exceeds Limit of Insurance plus Deductible)	
Loss Payable – Building #1:	$ 60,000
(Limit of Insurance)	
Loss Payable – Building #2:	$ 80,000

(Limit of Insurance)
Total amount of loss ~~payable~~: ~~$ 140,000~~

E. Loss Conditions

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

3. Duties In The Event Of Loss Or Damage

a. You must see that the following are done in the event of loss or damage to Covered Property:

(1) Notify the police if a law may have been broken.

(2) Give us prompt notice of the loss or damage. Include a description of the property involved.

(3) As soon as possible, give us a description of how, when and where the loss or damage occurred.

(4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.

(5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.

(6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

(7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

(8) Cooperate with us in the investigation or settlement of the claim.

b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

4. Loss Payment

a. In the event of loss or damage covered by this Coverage Form, at our option, we will either:

(1) Pay the value of lost or damaged property;

(2) Pay the cost of repairing or replacing the lost or damaged property, subject to **b.** below;

(3) Take all or any part of the property at an agreed or appraised value; or

(4) Repair, rebuild or replace the property with other property of like kind and quality, subject to **b.** below.

We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

b. The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

c. We will give notice of our intentions within 30 days after we receive the sworn proof of loss.

d. We will not pay you more than your financial interest in the Covered Property.

e. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.

f. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.

g. We will pay for covered loss or damage within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and:

(1) We have reached agreement with you on the amount of loss; or

(2) An appraisal award has been made.

h. A party wall is a wall that separates and is common to adjoining buildings that are owned by different parties. In settling covered losses involving a party wall, we will pay a proportion of the loss to the party wall based on your interest in the wall in proportion to the interest of the owner of the adjoining building. However, if you elect to repair or replace your building and the owner of the adjoining building elects not to repair or replace that building, we will pay you the full value of the loss to the party wall, subject to all applicable policy provisions including Limits of Insurance, the Valuation and Coinsurance Conditions and all other provisions of this Loss Payment Condition. Our payment under the provisions of this paragraph does not alter any right of subrogation we may have against any entity, including the owner or insurer of the adjoining building, and does not alter the terms of the Transfer Of Rights Of Recovery Against Others To Us Condition in this policy.

5. Recovered Property

If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, the property will be returned to you. You must then return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

6. Vacancy

a. Description Of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in **(1)(a)** and **(1)(b)** below:

(a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

(i) Rented to a lessee or sub-lessee and used by the lessee or sublessee to conduct its customary operations; and/or

(ii) Used by the building owner to conduct customary operations.

(2) Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism;

(b) Sprinkler leakage, unless you have protected the system against freezing;

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to Covered Causes of Loss other than those listed in **b.(1)(a)** through **b.(1)(f)** above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

7. Valuation

We will determine the value of Covered Property in the event of loss or damage as follows:

a. At actual cash value as of the time of loss or damage, except as provided in **b., c., d.** and **e.** below.

b. If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is $2,500 or less, we will pay the cost of building repairs or replacement.

The cost of building repairs or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

However, the following property will be valued at the actual cash value even when attached to the building:

(1) Awnings or floor coverings;

(3) Outdoor equipment or furniture.

c. "Stock" you have sold but not delivered at the selling price less discounts and expenses you otherwise would have had.

d. Glass at the cost of replacement with safety-glazing material if required by law.

e. Tenants' Improvements and Betterments at:

(1) Actual cash value of the lost or damaged property if you make repairs promptly.

(2) A proportion of your original cost if you do not make repairs promptly. We will determine the proportionate value as follows:

(a) Multiply the original cost by the number of days from the loss or damage to the expiration of the lease; and

(b) Divide the amount determined in **(a)** above by the number of days from the installation of improvements to the expiration of the lease.

If your lease contains a renewal option, the expiration of the renewal option period will replace the expiration of the lease in this procedure.

(3) Nothing if others pay for repairs or replacement.

F. Additional Conditions

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

1. Coinsurance

If a Coinsurance percentage is shown in the Declarations, the following condition applies.

a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property.

Instead, we will determine the most we will pay using the following steps:

(1) Multiply the value of Covered Property at the time of loss by the Coinsurance percentage;

(2) Divide the Limit of Insurance of the property by the figure determined in Step **(1);**

(3) Multiply the total amount of loss, before the application of any deductible, by the figure determined in Step **(2);** and

(4) Subtract the deductible from the figure determined in Step **(3).**

We will pay the amount determined in Step **(4)** or the limit of insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

EXAMPLE #1 (UNDERINSURANCE)

When:	The value of the property is:	$ 250,000
	The Coinsurance percentage for it is:	80%
	The Limit of Insurance for it is:	$ 100,000
	The Deductible is:	$ 250
	The amount of loss is:	$ 40,000

Step **(1):** $250,000 x 80% = $200,000
(the minimum amount of insurance to meet your Coinsurance requirements)

Step **(2):** $100,000 ÷ $200,000 = .50

Step **(3):** $40,000 x .50 = $20,000

Step **(4):** $20,000 – $250 = $19,750

We will pay no more than $19,750. The remaining $20,250 is not covered.

EXAMPLE #2 (ADEQUATE INSURANCE)

When:	The value of the property is:	$ 250,000
	The Coinsurance percentage for it is:	80%
	The Limit of Insurance for it is:	$ 200,000
	The Deductible is:	$ 250
	The amount of loss is:	$ 40,000

The minimum amount of insurance to meet your Coinsurance requirement is $200,000 ($250,000 x 80%). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than $39,750 ($40,000 amount of loss minus the deductible of $250).

b. If one Limit of Insurance applies to two or more separate items, this condition will apply to the total of all property to which the limit applies.

EXAMPLE #3

When: The value of the property is:	
Building at Location #1:	$ 75,000
Building at Location #2:	$ 100,000
Personal Property at Location #2:	$ 75,000
	$ 250,000
The Coinsurance percentage for it is:	90%
The Limit of Insurance for Buildings and Personal Property at Locations #1 and #2 is:	$ 180,000
The Deductible is:	$ 1,000
The amount of loss is:	
Building at Location #2:	$ 30,000
Personal Property at Location #2:	$ 20,000
	$ 50,000

Step **(1):** $250,000 x 90% = $225,000
(the minimum amount of insurance to meet your Coinsurance requirements and to avoid the penalty shown below)
Step **(2):** $180,000 ÷ $225,000 = .80
Step **(3):** $50,000 x .80 = $40,000
Step **(4):** $40,000 – $1,000 = $39,000

We will pay no more than $39,000. The remaining $11,000 is not covered.

2. Mortgageholders

a. The term mortgageholder includes trustee.

b. We will pay for covered loss of or damage to buildings or structures to each mortgageholder shown in the Declarations in their order of precedence, as interests may appear.

c. The mortgageholder has the right to receive loss payment even if the mortgageholder has started foreclosure or similar action on the building or structure.

d. If we deny your claim because of your acts or because you have failed to comply with the terms of this Coverage Part, the mortgageholder will still have the right to receive loss payment if the mortgageholder:

(1) Pays any premium due under this Coverage Part at our request if you have failed to do so;

(2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and

(3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder.

All of the terms of this Coverage Part will then apply directly to the mortgageholder.

e. If we pay the mortgageholder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

(1) The mortgageholder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and

(2) The mortgageholder's right to recover the full amount of the mortgageholder's claim will not be impaired.

At our option, we may pay to the mortgageholder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

f. If we cancel this policy, we will give written notice to the mortgageholder at least:

(1) 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or

(2) 30 days before the effective date of cancellation if we cancel for any other reason.

g. If we elect not to renew this policy, we will give written notice to the mortgageholder at least 10 days before the expiration date of this policy.

G. Optional Coverages

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

1. Agreed Value

a. The Additional Condition, Coinsurance, does not apply to Covered Property to which this Optional Coverage applies. We will pay no more for loss of or damage to that property than the proportion that the Limit of Insurance under this Coverage Part for the property bears to the Agreed Value shown for it in the Declarations.

b. If the expiration date for this Optional Coverage shown in the Declarations is not extended, the Additional Condition, Coinsurance, is reinstated and this Optional Coverage expires.

c. The terms of this Optional Coverage apply only to loss or damage that occurs:

(1) On or after the effective date of this Optional Coverage; and

(2) Before the Agreed Value expiration date shown in the Declarations or the policy expiration date, whichever occurs first.

2. Inflation Guard

a. The Limit of Insurance for property to which this Optional Coverage applied will automatically increase by the annual percentage shown in the Declarations.

b. The amount of increase will be:

(1) The Limit of Insurance that applied on the most recent of the policy inception date, the policy anniversary date, or any other policy change amending the Limit of Insurance, times

(2) The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), times

(3) The number of days since the beginning of the current policy year or the effective date of the most recent policy change amending the Limit of Insurance, divided by 365.

EXAMPLE

If:	The applicable Limit of Insurance is:	$ 100,000
	The annual percentage increase is:	8%
	The number of days since the beginning of the policy year (or last policy change) is:	146
	The amount of increase is: $100,000 x .08 x 146 ÷ 365 =	$ 3,200

3. Replacement Cost

a. Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Valuation Loss Condition of this Coverage Form.

b. This Optional Coverage does not apply to:

(1) Personal property of others;

(2) Contents of a residence;

(3) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-a-brac; or

(4) "Stock", unless the Including "Stock" option is shown in the Declarations.

Under the terms of this Replacement Cost Optional Coverage, tenants' improvements and betterments are not considered to be the personal property of others.

c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.

d. We will not pay on a replacement cost basis for any loss or damage:

(1) Until the lost or damaged property is actually repaired or replaced; and

(2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

With respect to tenants' improvements and betterments, the following also apply:

(3) If the conditions in **d.(1)** and **d.(2)** above are not met, the value of tenants' improvements and betterments will be determined as a proportion of your original cost, as set forth in the Valuation Loss Condition of this Coverage Form; and

(4) We will not pay for loss or damage to tenants' improvements and betterments if others pay for repairs or replacement.

e. We will not pay more for loss or damage on a replacement cost basis than the least of **(1), (2)** or **(3),** subject to **f.** below:

(1) The Limit of Insurance applicable to the lost or damaged property;

(2) The cost to replace the lost or damaged property with other property:

(a) Of comparable material and quality; and

(b) Used for the same purpose; or

(3) The amount actually spent that is necessary to repair or replace the lost or damaged property.

If a building is rebuilt at a new premises, the cost described in **e.(2)** above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

f. The cost of repair or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

4. Extension Of Replacement Cost To Personal Property Of Others

a. If the Replacement Cost Optional Coverage is shown as applicable in the Declarations, then this Extension may also be shown as applicable. If the Declarations show this Extension as applicable, then Paragraph **3.b.(1)** of the Replacement Cost Optional Coverage is deleted and all other provisions of the Replacement Cost Optional Coverage apply to replacement cost on personal property of others.

b. With respect to replacement cost on the personal property of others, the following limitation applies:

If an item(s) of personal property of others is subject to a written contract which governs your liability for loss or damage to that item(s), then valuation of that item(s) will be based on the amount for which you are liable under such contract, but not to exceed the lesser of the replacement cost of the property or the applicable Limit of Insurance.

H. Definitions

1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

2. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

3. "Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

B.5

LOSS PAYABLE PROVISIONS

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
BUILDERS' RISK COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Premises Number:		**Building Number:**		**Applicable Clause (Enter C., D., E., or F.):**	
Description Of Property: **Loss Payee Name:** **Loss Payee Address:**					
Premises Number:		**Building Number:**		**Applicable Clause (Enter C., D., E., or F.):**	
Description Of Property: **Loss Payee Name:** **Loss Payee Address:**					
Premises Number:		**Building Number:**		**Applicable Clause (Enter C., D., E., or F.):**	
Description Of Property: **Loss Payee Name:** **Loss Payee Address:**					
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.					

A. When this endorsement is attached to the Standard Property Policy **CP 00 99,** the term Coverage Part in this endorsement is replaced by the term Policy.

B. Nothing in this endorsement increases the applicable Limit of Insurance. We will not pay any Loss Payee more than their financial interest in the Covered Property, and we will not pay more than the applicable Limit of Insurance on the Covered Property.

The following is added to the **Loss Payment** Loss Condition, as indicated in the Declarations or in the Schedule:

C. Loss Payable Clause

For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:

1. Adjust losses with you; and

2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

D. Lender's Loss Payable Clause

1. The Loss Payee shown in the Schedule or in the Declarations is a creditor, including a mortgageholder or trustee, whose interest in Covered Property is established by such written instruments as:

a. Warehouse receipts;

b. A contract for deed;

c. Bills of lading;

d. Financing statements; or

e. Mortgages, deeds of trust, or security agreements.

2. For Covered Property in which both you and a Loss Payee have an insurable interest:

a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear.

b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.

c. If we deny your claim because of your acts or because you have failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:

(1) Pays any premium due under this Coverage Part at our request if you have failed to do so;

(2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and

(3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee.

All of the terms of this Coverage Part will then apply directly to the Loss Payee.

d. If we pay the Loss Payee for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

(1) The Loss Payee's rights will be transferred to us to the extent of the amount we pay; and

(2) The Loss Payee's rights to recover the full amount of the Loss Payee's claim will not be impaired.

At our option, we may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, you will pay your remaining debt to us.

3. If we cancel this policy, we will give written notice to the Loss Payee at least:

a. 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or

b. 30 days before the effective date of cancellation if we cancel for any other reason.

4. If we elect not to renew this policy, we will give written notice to the Loss Payee at least 10 days before the expiration date of this policy.

E. Contract Of Sale Clause

1. The Loss Payee shown in the Schedule or in the Declarations is a person or organization you have entered a contract with for the sale of Covered Property.
2. For Covered Property in which both you and the Loss Payee have an insurable interest we will:
   a. Adjust losses with you; and
   b. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.
3. The following is added to the **Other Insurance** Condition:

   For Covered Property that is the subject of a contract of sale, the word "you" includes the Loss Payee.

F. Building Owner Loss Payable Clause

1. The Loss Payee shown in the Schedule or in the Declarations is the owner of the described building, in which you are a tenant.
2. We will adjust losses to the described building with the Loss Payee. Any loss payment made to the Loss Payee will satisfy your claims against us for the owner's property.
3. We will adjust losses to tenants' improvements and betterments with you, unless the lease provides otherwise.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

B.6

ADDITIONAL INSURED – BUILDING OWNER

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

SCHEDULE

Premises Number:		**Building Number:**	
Building Description: **Building Owner Name:** **Building Owner Address:**			
Premises Number:		**Building Number:**	
Building Description: **Building Owner Name:** **Building Owner Address:**			
Premises Number:		**Building Number:**	
Building Description: **Building Owner Name:** **Building Owner Address:**			
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

The building owner identified in this endorsement is a Named Insured, but only with respect to the coverage provided under this Coverage Part or Policy for direct physical loss or damage to the building(s) described in the Schedule.

B.7

ADDITIONAL EXPENSE – SOFT COST COVERAGE

This endorsement modifies insurance under the following:

BUILDERS' RISK COVERAGE FORM

A. The following is added to Additional Coverages:

1. We cover your additional expenses as indicated below which result from a delay in the completion of the project beyond the date it would have been completed had no loss occurred. The delay must be due to direct physical loss to Covered Property and be caused by or result from a Covered Cause of Loss. We will pay covered expenses when they are incurred.

   a. Coverage and Limits of Insurance
   Coverage under this endorsement applies only to those items indicated by an "x" in the box below:

   ☒ **Rents and Rental Value Coverage.** We will pay the actual "loss" of net rental income which results from delay beyond the projected completion date. But we will not pay more than the reduction in rental income less charges and expenses which do not necessarily continue.

   ☒ **Additional Advertising and Promotional Expenses.** We will pay the necessary additional advertising and promotional expenses which you incur you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional Insurance Expense.** We will pay the necessary additional insurance expense for extending or renewing coverage which you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional Interest Expense.** We will pay the cost of necessary additional interest on money you borrow to finance construction or repair which you incur you incur as a result of a delay in the completion date of the Project. This expense may arise from obligations to the interim financier or from cancellation of the permanent financing arrangements, including loan closing costs and remarketing of bonds.

   ☒ **Additional Leasing/Commission Expenses.** We will pay the necessary additional costs of renegotiating and pre-leasing of the Project, including costs of additional commissions incurred upon renegotiating leases that result from the renegotiation of leases which you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional Legal and Accounting Fees.** We will pay the necessary additional legal and accounting fees you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional License, Building Inspection and Permit Fees.** We will pay the necessary additional license, building inspection and permit fees which you incur as a result of a delay in the completion date of the Project.
   ☒ **Additional Real Estate Taxes/Ground Rents or Other Assessments.** We will pay the necessary additional real estate taxes, ground rents or other assessments which you incur you incur as a result of a delay in the completion date of the Project.

☒ **Additional Professional Fees.** We will pay the necessary additional architectural, engineering, and other professional fees which you incur you incur as a result of a delay in the completion date of the Project.

☒ **Additional Project Administration Expense/General Overhead.** We will pay the necessary additional project administration expenses which you incur you incur as a result of a delay in the completion date of the Project.

The most we will pay for "loss" for all coverages provided by this endorsement is $_____ in any one occurrence.

CERTIFICATE OF PROPERTY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

If this certificate is being prepared for a party who has an insurable interest in the property, do not use this form. Use ACORD 27 or ACORD 28.

PRODUCER	CONTACT NAME:
	PHONE (A/C, No, Ext): / FAX (A/C, No):
	E-MAIL ADDRESS:
	PRODUCER CUSTOMER ID:

INSURED	INSURER(S) AFFORDING COVERAGE	NAIC #
	INSURER A :	
	INSURER B :	
	INSURER C :	
	INSURER D :	
	INSURER E :	
	INSURER F :	

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

LOCATION OF PREMISES / DESCRIPTION OF PROPERTY (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YYYY)	POLICY EXPIRATION DATE (MM/DD/YYYY)	COVERED PROPERTY	LIMITS
	☐ PROPERTY CAUSES OF LOSS: ☐ BASIC ☐ BROAD ☐ SPECIAL DEDUCTIBLE: BUILDING / CONTENTS ☐ EARTHQUAKE ☐ WIND ☐ FLOOD				☐ BUILDING ☐ PERSONAL PROPERTY ☐ BUSINESS INCOME ☐ EXTRA EXPENSE ☐ RENTAL VALUE ☐ BLANKET BUILDING ☐ BLANKET PERS PROP ☐ BLANKET BLDG & PP	$ $ $ $ $ $ $ $
	☐ INLAND MARINE CAUSES OF LOSS ☐ NAMED PERILS	TYPE OF POLICY POLICY NUMBER				$ $ $ $
	☐ CRIME TYPE OF POLICY					$ $ $
	☐ BOILER & MACHINERY / EQUIPMENT BREAKDOWN					$ $
						$ $

SPECIAL CONDITIONS / OTHER COVERAGES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

CERTIFICATE HOLDER

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

SPECIMEN

ACORD 24 (2009/09)

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER	CONTACT NAME:	
	PHONE (A/C, No, Ext):	FAX (A/C, No):
	E-MAIL ADDRESS:	
	INSURER(S) AFFORDING COVERAGE	NAIC #
INSURED	INSURER A :	
	INSURER B :	
	INSURER C :	
	INSURER D :	
	INSURER E :	
	INSURER F :	

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
	GENERAL LIABILITY						EACH OCCURRENCE	$
	☐ COMMERCIAL GENERAL LIABILITY						DAMAGE TO RENTED PREMISES (Ea occurrence)	$
	☐ CLAIMS-MADE ☐ OCCUR						MED EXP (Any one person)	$
							PERSONAL & ADV INJURY	$
							GENERAL AGGREGATE	$
	GEN'L AGGREGATE LIMIT APPLIES PER:						PRODUCTS - COMP/OP AGG	$
	☐ POLICY ☐ PRO-JECT ☐ LOC							$
	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident)	$
	☐ ANY AUTO						BODILY INJURY (Per person)	$
	☐ ALL OWNED AUTOS ☐ SCHEDULED AUTOS						BODILY INJURY (Per accident)	$
	☐ HIRED AUTOS ☐ NON-OWNED AUTOS						PROPERTY DAMAGE (Per accident)	$
								$
	☐ **UMBRELLA LIAB** ☐ OCCUR						EACH OCCURRENCE	$
	☐ **EXCESS LIAB** ☐ CLAIMS-MADE						AGGREGATE	$
	☐ DED ☐ RETENTION $							$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y / N						☐ WC STATU-TORY LIMITS ☐ OTH-ER	
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? ☐ (Mandatory in NH)	N / A					E.L. EACH ACCIDENT	$
	If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. DISEASE - EA EMPLOYEE	$
							E.L. DISEASE - POLICY LIMIT	$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

CERTIFICATE HOLDER	CANCELLATION
	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.
	AUTHORIZED REPRESENTATIVE

ACORD EVIDENCE OF COMMERCIAL PROPERTY INSURANCE

DATE (MM/DD/YYYY)

THIS EVIDENCE OF COMMERCIAL PROPERTY INSURANCE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE ADDITIONAL INTEREST NAMED BELOW. THIS EVIDENCE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS EVIDENCE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE ADDITIONAL INTEREST.

PRODUCER NAME, CONTACT PERSON AND ADDRESS	PHONE (A/C, No, Ext):	COMPANY NAME AND ADDRESS	NAIC NO:
FAX (A/C, No):	E-MAIL ADDRESS:	IF MULTIPLE COMPANIES, COMPLETE SEPARATE FORM FOR EACH	
CODE:	SUB CODE:	POLICY TYPE	
AGENCY CUSTOMER ID #:			
NAMED INSURED AND ADDRESS		LOAN NUMBER	POLICY NUMBER
		EFFECTIVE DATE / EXPIRATION DATE	☐ CONTINUED UNTIL TERMINATED IF CHECKED
ADDITIONAL NAMED INSURED(S)		THIS REPLACES PRIOR EVIDENCE DATED:	

PROPERTY INFORMATION (Use REMARKS on page 2, if more space is required) ☐ BUILDING OR ☐ BUSINESS PERSONAL PROPERTY

LOCATION/DESCRIPTION

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS EVIDENCE OF PROPERTY INSURANCE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

COVERAGE INFORMATION PERILS INSURED: ☐ BASIC ☐ BROAD ☐ SPECIAL

	YES	NO	N/A	
COMMERCIAL PROPERTY COVERAGE AMOUNT OF INSURANCE: $				DED:
☐ BUSINESS INCOME ☐ RENTAL VALUE				If YES, LIMIT: Actual Loss Sustained; # of months:
BLANKET COVERAGE				If YES, indicate value(s) reported on property identified above: $
TERRORISM COVERAGE				Attach Disclosure Notice / DEC
IS THERE A TERRORISM-SPECIFIC EXCLUSION?				
IS DOMESTIC TERRORISM EXCLUDED?				
LIMITED FUNGUS COVERAGE				If YES, LIMIT: DED:
FUNGUS EXCLUSION (If "YES", specify organization's form used)				
REPLACEMENT COST				
AGREED VALUE				
COINSURANCE				If YES, %
EQUIPMENT BREAKDOWN (If Applicable)				If YES, LIMIT: DED:
ORDINANCE OR LAW - Coverage for loss to undamaged portion of bldg				
- Demolition Costs				If YES, LIMIT: DED:
- Incr. Cost of Construction				If YES, LIMIT: DED:
EARTH MOVEMENT (If Applicable)				If YES, LIMIT: DED:
FLOOD (If Applicable)				If YES, LIMIT: DED:
WIND / HAIL (If Subject to Different Provisions)				If YES, LIMIT: DED:
PERMISSION TO WAIVE SUBROGATION IN FAVOR OF MORTGAGE HOLDER PRIOR TO LOSS				

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

ADDITIONAL INTEREST

☐	MORTGAGEE	☐	CONTRACT OF SALE
☐	LENDERS LOSS PAYABLE		

NAME AND ADDRESS

LENDER SERVICING AGENT NAME AND ADDRESS

AUTHORIZED REPRESENTATIVE

EVIDENCE OF COMMERCIAL PROPERTY INSURANCE REMARKS - Including Special Conditions (Use only if more space is required)

SPECIMEN

ACORD®

INSURANCE BINDER

DATE (MM/DD/YYYY)

THIS BINDER IS A TEMPORARY INSURANCE CONTRACT, SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS FORM.

AGENCY	COMPANY	BINDER #

EFFECTIVE DATE	TIME	EXPIRATION DATE	TIME
	☐ AM ☐ PM		☐ 12:01 AM ☐ NOON

PHONE (A/C, No, Ext): FAX (A/C, No):

CODE: SUB CODE:

AGENCY CUSTOMER ID:

☐ THIS BINDER IS ISSUED TO EXTEND COVERAGE IN THE ABOVE NAMED COMPANY PER EXPIRING POLICY #:

INSURED

DESCRIPTION OF OPERATIONS/VEHICLES/PROPERTY (Including Location)

COVERAGES

TYPE OF INSURANCE	COVERAGE/FORMS	LIMITS: DEDUCTIBLE	COINS %	AMOUNT
PROPERTY — CAUSES OF LOSS: ☐ BASIC ☐ BROAD ☐ SPEC				
GENERAL LIABILITY — ☐ COMMERCIAL GENERAL LIABILITY; ☐ CLAIMS MADE ☐ OCCUR; RETRO DATE FOR CLAIMS MADE:		EACH OCCURRENCE		$
		DAMAGE TO RENTED PREMISES		$
		MED EXP (Any one person)		$
		PERSONAL & ADV INJURY		$
		GENERAL AGGREGATE		$
		PRODUCTS - COMP/OP AGG		$
VEHICLE LIABILITY — ☐ ANY AUTO; ☐ ALL OWNED AUTOS; ☐ SCHEDULED AUTOS; ☐ HIRED AUTOS; ☐ NON-OWNED AUTOS		COMBINED SINGLE LIMIT		$
		BODILY INJURY (Per person)		$
		BODILY INJURY (Per accident)		$
		PROPERTY DAMAGE		$
		MEDICAL PAYMENTS		$
		PERSONAL INJURY PROT		$
		UNINSURED MOTORIST		$
				$
VEHICLE PHYSICAL DAMAGE — DED — ☐ COLLISION: ☐ OTHER THAN COL:	☐ ALL VEHICLES ☐ SCHEDULED VEHICLES	☐ ACTUAL CASH VALUE ☐ STATED AMOUNT		$
GARAGE LIABILITY — ☐ ANY AUTO		AUTO ONLY - EA ACCIDENT		$
		OTHER THAN AUTO ONLY: EACH ACCIDENT		$
		OTHER THAN AUTO ONLY: AGGREGATE		$
EXCESS LIABILITY — ☐ UMBRELLA FORM; ☐ OTHER THAN UMBRELLA FORM	RETRO DATE FOR CLAIMS MADE:	EACH OCCURRENCE		$
		AGGREGATE		$
		SELF-INSURED RETENTION		$
WORKER'S COMPENSATION AND EMPLOYER'S LIABILITY		☐ WC STATUTORY LIMITS		
		E.L. EACH ACCIDENT		$
		E.L. DISEASE - EA EMPLOYEE		$
		E.L. DISEASE - POLICY LIMIT		$
SPECIAL CONDITIONS / OTHER COVERAGES		FEES		$
		TAXES		$
		ESTIMATED TOTAL PREMIUM		$

NAME & ADDRESS

	☐ MORTGAGEE ☐ LOSS PAYEE	☐ ADDITIONAL INSURED
	LOAN #	
	AUTHORIZED REPRESENTATIVE	

AGENCY CUSTOMER ID: _____

CONDITIONS

This Company binds the kind(s) of insurance stipulated on the reverse side. The Insurance is subject to the terms, conditions and limitations of the policy(ies) in current use by the Company.

This binder may be cancelled by the Insured by surrender of this binder or by written notice to the Company stating when cancellation will be effective. This binder may be cancelled by the Company by notice to the Insured in accordance with the policy conditions. This binder is cancelled when replaced by a policy. If this binder is not replaced by a policy, the Company is entitled to charge a premium for the binder according to the Rules and Rates in use by the Company.

Applicable in California

When this form is used to provide insurance in the amount of one million dollars ($1,000,000) or more, the title of the form is changed from "Insurance Binder" to "Cover Note".

Applicable in Colorado

With respect to binders issued to renters of residential premises, home owners, condo unit owners and mobile home owners, the insurer has thirty (30) business days, commencing from the effective date of coverage, to evaluate the issuance of the insurance policy.

Applicable in Delaware

The mortgagee or Obligee of any mortgage or other instrument given for the purpose of creating a lien on real property shall accept as evidence of insurance a written binder issued by an authorized insurer or its agent if the binder includes or is accompanied by: the name and address of the borrower; the name and address of the lender as loss payee; a description of the insured real property; a provision that the binder may not be canceled within the term of the binder unless the lender and the insured borrower receive written notice of the cancellation at least ten (10) days prior to the cancellation, except in the case of a renewal of a policy subsequent to the closing of the loan, a paid receipt of the full amount of the applicable premium, and the amount of insurance coverage.

Chapter 21 Title 25 Paragraph 2119

Applicable in Florida

Except for Auto Insurance coverage, no notice of cancellation or nonrenewal of a binder is required unless the duration of the binder exceeds 60 days. For auto insurance, the insurer must give 5 days prior notice, unless the binder is replaced by a policy or another binder in the same company.

Applicable in Maryland

The insurer has 45 business days, commencing from the effective date of coverage to confirm eligibility for coverage under the insurance policy.

Applicable in Michigan

The policy may be cancelled at any time at the request of the insured.

Applicable in Nevada

Any person who refuses to accept a binder which provides coverage of less than $1,000,000.00 when proof is required: (A) Shall be fined not more than $500.00, and (B) is liable to the party presenting the binder as proof of insurance for actual damages sustained therefrom.

Applicable in the Virgin Islands

This binder is effective for only ninety (90) days. Within thirty (30) days of receipt of this binder, you should request an insurance policy or certificate (if applicable) from your agent and/or insurance company.

ENDNOTES

I. POLICIES

A. ISO Policies And Endorsements – The Standard

There are many forms of "liability policy", addressing different types of risks, e.g., automobile liability, workers injury liability. Subject to specified exclusions, commercial general liability (called in this article "CGL") policies indemnify the insured from liability for "Bodily Injury", "Property Damage", and "Personal and Advertising Injury", as those terms are defined in the CGL policy. The Insurance Services Office, Inc., a trade organization of over 3,000 insurance companies, is commonly known as "ISO". ISO's forms are considered the standard form for most insurance forms and its liability policy and property policy and the endorsements thereto are referred to herein as the "***standard form***".

Number designations for ISO's standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1985 *endorsement* forms for use in connection with its commercial general liability policy. ***Endorsement*** is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement's promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction. Each ISO designation is composed of four elements. The following is an example for the endorsement form appearing in the Appendix as Form CG 20 26 07 04 Additional Insured–Designated Person or Organization:

CG	20	26	07 04
The "CG" prefix in the endorsement's designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as "GL" in connection with its *comprehensive* general liability forms.	The first set of numbers identifies the "group" to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number "20" refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group–in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled "Additional Insured–Designated Person or Organization."	The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "07 04" or July 2004. November 1985 is the initial date of all ISO forms for the "CG" system. The *coverage* forms have been revised a number of times since then and currently bear an edition date of 07 98. Many of the *endorsement* forms were revised at the same time as the coverage forms and also bear a 07 98 edition date.

The following is the ISO CGL Form Categories grouped by function:

Category Name	Category Number
Coverage Forms and Amendatory Endorsements	0
State Amendatory Endorsements	01 and 26
Termination and Suspension Endorsements	2
Deductible Endorsements	3
Additional Coverage Endorsements	4
Additional Insured Endorsements	**20**
Exclusion Endorsements	21
Special Provisions for Certain Types of Risks Endorsements	22
Coverage Amendment Endorsements	24
Amendment of Limits Endorsements	25
Claims-Made Only Endorsements	27
Miscellaneous Coverage Forms Endorsements	28 and 29
Underground Storage Tank Endorsements	30
Miscellaneous Endorsements	99

The following is a listing of all of the ISO Additional Insured Endorsements-Category 20.

Additional Insured–Club Members	CG 20 02
Additional Insured–Concessionaires Trading Under Your Name	CG 20 03
Additional Insured–Condominium Unit Owners	CG 20 04
Additional Insured–Controlling Interest	CG 20 05
Additional Insured–Engineers, Architects or Surveyors	CG 20 07
Additional Insured–Users of Golfmobiles	CG 20 08
Additional Insured–Owners/Lessees/Contractors (A)	CG 20 09
Additional Insured–Owners/Lessees/Contractors (B)	CG 20 10
Additional Insured–Managers or Lessors of Premises	CG 20 11

Additional Insured–State or Political Subdivisions–Permits	CG 20 12
Additional Insured–State or Political Subdivisions–Permits Relating to Premises	CG 20 13
Additional Insured–Users of Teams, Draft or Saddle Animals	CG 20 14
Additional Insured–Vendors	CG 20 15
Additional Insured–Townhouse Associations	CG 20 17
Additional Insured–Mortgagee, Assignee or Receiver	CG 20 18
Additional Insured–Charitable Institutions	CG 20 20
Additional Insured–Volunteers	CG 20 21
Additional Insured–Church Members, Officers and Volunteer Workers	CG 20 22
Additional Insured–Executors, Administrators, Trustees/Beneficiaries	CG 20 23
Additional Insured–Owners or Other Interests from Whom Land Has Been Leased	CG 20 24
Additional Insured–Elective or Appointive Executive Officers of Public Corporations	CG 20 25
Additional Insured–Designated Person or Organization	**CG 20 26**
Additional Insured–Co-owner of Premises	CG 20 27
Additional Insured–Lessor of Leased Equipment	CG 20 28
Additional Insured–Grantor of Franchise	CG 20 29
Additional Insured–Oil/Gas Operations–Non-Operator, Working Interests	CG 20 30
Additional Insured–Engineers, Architects or Surveyors Not Engaged by the Named Insured	CG 20 32
Additional Insured–Owners, Lessees or Contractors–Automatic Status When Required in Construction Agreement with You	CG 20 33
Additional Insured–Lessor of Leased Equipment–Automatic Status When Required in Lease Agreement with You	CG 20 34
Additional Insured–Grantor of Licenses–Automatic Status When Required by Licensor	CG 20 35
Additional Insured–Grantor of Licenses	CG 20 36
Additional Insured–Owners, Lessees or Contractors–Completed Operations	CG 20 37

B. Building Owner Policies

A Business owner's policy is a package policy (covering commercial liability and commercial property insurance) and is a less costly alternative to separate commercial liability insurance and commercial property insurance policies. It is generally available to smaller non-manufacturing business. Large businesses that do not qualify for a business owner's policy purchase "**commercial package policies**" which combine into a single policy commercial property insurance, commercial liability insurance and lines such as employee dishonesty, crime and fidelity coverage, ordinance or law coverage, boiler and machinery insurance, liquor liability and hired and non-owned auto liability insurance.

C. Parties To The Policy

1. Insureds

Covered losses are paid under an insurance policy to or on behalf of an ***insured***.

2. Liability Policies

a. Named Insureds

The Declarations Page of a liability policy names the person or organization who is the insured and such person or organization is the ***named insured***. If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the ***first named insured***.

b. Automatic Insureds

Additionally, the liability policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy on which an organization is the named insured, may provide that the organization's employees are automatically covered and are ***automatic insureds***. The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; partners and joint venturers in a named insured partnership or joint venture; members and managers of a named insured limited liability company; officers, directors, and stockholders of a named insured corporation or other named insured organization; trustees of a named insured trust; employees and volunteer workers of the named insured business; the named insured's real estate manager; any person having proper temporary custody of a deceased named insured's property; the deceased named insured's legal representative; and newly acquired or formed organizations.

c. Additional Insureds

Under a CGL policy many types of persons or organizations may be added by endorsement as an ***additional insured***, upon approval of the insurer. Many liability insurers issue ***blanket endorsements*** specifying certain parties that are ***automatic additional insureds*** under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. A review of the standard additional insured endorsements contained in the **Appendix** will reveal that limitations and exclusions for coverage may be contained in an additional insured endorsement. A common error in insurance specifications is to specify that a party is to be added to the named insured's policy as an ***additional named insured***.

3. Property Policies

a. Insured

In a property policy, the insured is the party identified on the Declarations Page as having an ***insurable interest*** in the covered property and to whom loss payments will be paid if the property is damaged or destroyed.

b. Additional Insured

Third parties may be designated by endorsement to the property policy as an ***additional insured*** to protect their ***additional interests***.

c. Mortgageholder

Similarly, the standard commercial property policy contains the standard mortgage clause providing that loss payments will be made to the insured and the ***mortgageholder*** as their interests may appear.

II. LIABILITY POLICIES

A. Workers Compensation Insurance

Worker's compensation insurance is a statutory program that imposes strict liability on employers for injuries to employees occurring while the employees are acting in the scope of employment but limits the maximum recovery against the employer to a schedule of maximum recoveries. If an employer does not participate in the program, the employer is denied the common-law defenses of assumed risk, negligence of fellow employees, and contributory negligence. Tex. Labor Code Ann. § 406.033(a). If the employer is not a subscriber to the worker's compensation insurance system, there is no statutory limit on recovery by the injured employee against the employer.

See **Endnote VI.C.3** Common Errors And Problems – Workers Compensation for a discussion of antiquated and current terminology.

1. <u>Workers Comp Buffer</u>

Although an indemnifying person's (tenant's, contractor's or subcontractor's) workers' compensation insurance will not eliminate the potential liability of an indemnified person (*e.g.*, the landlord, owner or contractor), it may provide a buffer against potential claims and make it less likely that an indemnified person will be sued by an injured employee of the indemnifying person. Because workers compensation statutes limit the recovery by an injured employee from the employer, an indemnification provision is appropriate so as to ensure that the employer remains ultimately liable for damages in excess of the statutory workers compensation limits.

2. <u>Do Not Specify As An Additional Insured on Workers Comp Policy</u>

It is not generally appropriate (except in borrowed servant, dual employment or leased employee situations) for one party to a contract to require the other party to name the other party as an additional insured on its workers compensation and employers liability policy. This would result in the other party being covered for injuries to its employees under the insured's worker's compensation policy. The concern raised by the risk of third-party actions by an injured employee of an insured employer against a related party (*e.g.,* suit by an injured employee of a contractor against the premises owner, or suit by an injured employee of a subcontractor against the contractor, or suit by an injured employee of a tenant against the landlord) can be addressed by indemnification by the employer and designation of the indemnified person as an additional insured on the employer's CGL liability policy.

3. <u>Waiver Of Subrogation Endorsement To The Workers Comp Policy</u>

The right of a workers' compensation insurer to subrogate against a third party who may have caused an employee injury is recognized by statute. TEX. LABOR CODE § 417.001. In most states, workers compensation insurance is written on the 1992 edition of the Workers Compensation and Employers Liability Insurance Policy form (WC 00 00 01 A) developed by the National Council on Compensation Insurance ("NCCI"). This form is *silent* with respect to a pre- loss waiver by employer. Therefore, a waiver of subrogation executed prior to a loss should prevent the insurer from subrogating against the third party, even without an endorsement to the policy. In order to avoid the workers compensation carrier suing the indemnified person to obtain contribution and reimbursement for amounts paid by the carrier to the employee, the parties should obtain a waiver of subrogation endorsement in favor of the indemnified persons.

4. <u>Texas WC 42 03 04 A Waiver Of Our Right to Recover From Others</u>

This form is approved for use in Texas. It is an endorsement whereby the workers' compensation carrier waives its rights of subrogation. It requires that the contract between the contractor (employer) and the owner contain a provision requiring the waiver to be obtained.

B. Employer's Liability Coverage

Employer's liability insurance provides additional coverages to the employer not contained in the state-specified form of worker's compensation insurance.

C. CGL

1. <u>Standard Policy Coverage</u>

Commercial general liability policies typically and the ISO general liability policy form, which is the industry standard, is divided into Sections, Coverages, Exclusions, Definitions and Endorsements. The ISO CG policy is set up in the following parts:

Declarations.
Section I - Coverages
- Coverage A. Bodily Injury and Property Damage Liability. (Note "Bodily Injury" and "Personal Injury" are different terms)
  1. Insuring Agreement
  2. Exclusions
- Coverage B. Personal and Advertising Injury Liability
  1. Insuring Agreement
  2. Exclusions
- Coverage C. Medical Payments
  1. Insuring Agreement
  2. Exclusions
- Supplementary Payments - Coverages A and B

Section II - Who Is An Insured
Section III - Limits of Insurance
Section IV - Commercial General Liability Conditions
Section V - Definitions
Endorsements

The ISO commercial general liability policy categorizes liabilities into three categories: Coverage A for "Bodily Injury" and "Property Damage", Coverage B for "Personal and Advertising Injury Liability" and Coverage C for "Medical Payments." ISO defines each of these terms in the policy as follows:

"**Bodily Injury**" is "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

"**Property Damage**" is "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured."

"**Personal and Advertising Injury**" is injury, including consequential bodily injury, arising out of one or more of the following offenses: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organizations good, products or services; oral or written publication, in any manner, of material that violates a person's right of privacy; the use of another's advertising idea in the insured's advertisement; infringing upon another's copyright, trade dress or slogan in the insured's advertisement.

"**Medical Payments**" is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured's operations.

2. <u>Occurrence Basis</u>

Occurrence basis liability policies cover injuries or damages caused by an "occurrence" that takes place within the "coverage territory," but only if the injuries or damages "occur" during the policy period, regardless of when the claim is actually made. ISO defines and "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "**Claims-made**" liability policies cover claims actually made while the policies are in effect, regardless of when the injuries occurred. Typically, claims-made policies exclude coverage for occurrences prior to the policy's inception date. Some issuers of claims-made policies will amend their policy for an additional premium to cover "full prior acts." Coverage under a claims-made policy ends when the policy expires, unless renewed with retroactive coverage or with a coverage extension known as "extended reporting period" or "tail" coverage.

3. General Aggregate

"General Aggregate Limit" is the maximum amount the insurer is required to pay during the policy period for Coverage A damages ("**Bodily Injury**" and "**Property Damage Liability**"), except bodily injury or property damage included within products-completed operations hazard, Coverage B damages ("**Personal and Advertising Injury Liability**"), and Coverage C expenses ("**Medical Payments**"). The General Aggregate Limit operates independently of the Products-Completed Operations Aggregate Limit. "**Products-Completed Operations Limit**" is the maximum amount the insurer is required to pay during the policy period for "products-completed operations" hazard. The products-completed operations hazard includes bodily injury and property damage occurring away from premises owned or rented by the named insured and arising out of the named insured's products or work, excluding products in the possession of the named insured, work not yet completed or abandoned, or products in transit.

4. Designated Location

If the liability policy covers multiple locations or projects, its limits may be exhausted by claims at the other locations or projects. If the limits have been negotiated between the parties as the minimum coverages for this transaction, the policies will need to be endorsed to make them applicable in full to this location or a separate policy purchased for this location.

5. Indemnity Insurance

a. An Exception To A Exclusion From Coverage

"Contractual liability" coverage (referred to by this author as "***indemnity insurance***" is contained in the CGL policy as an exception to an exclusion from coverage. The exclusion provides:

> This ***insurance does not apply to***:
>
> b. **Contractual Liability**
>
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This ***exclusion does not apply*** to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "***Insured Contract***", provided the "Bodily Injury" or "property Damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
>
> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

An "***Insured Contract***" is defined in the standard CGL policy as:

> Paragraph **9.** Of the **Definitions** Section is replaced by the following:
>
> **a.** A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
>
> **b.** A sidetrack agreement;
>
> **c.** Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
>
> **d.** An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
>
> **e.** An elevator maintenance agreement;
>
> **f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

See **App. Form A.10** CG 24 26 07 04 Amendment of Insured Contract Definition, which when added to the standard CGL policy amends definition "**f**" to add the following qualifier at the end of the first clause:

> , provided the "bodily injury" or "property damage" is ***caused, in whole or in part, by*** you or by those acting on your behalf.

Also see **App. Form A.7** Contractual Liability Limitation, which when added to the standard CGL policy by endorsement deletes "**f**" altogether from the definition of an insured contract.

b. Coverage For Named Insured As Indemnifying Party

(1) Indemnified Party Not The Insured

Indemnity insurance does not make the indemnified person an insured under the policy. *Alex Robertson Co. v. Imperial Casualty & Indemnity Co*., 8 Cal. App. 4th 338, 10 Cal. Rptr.2d 165 (1992); *Jefferson v. Sinclair Ref.g Co*., 10 N.Y.2d 422, 223 N.Y.S2d 863, 179 N.E.2d 706 (1961); *Davis Constructors & Engineers, Inc. v. Hartford Accident & Indemnity Co*., 308 F. Supp. 792 (M.D. Ala. 1968); and *Hartford Ins. Group v. Royal - Globe Co*., 21 Ariz. App. 224, 517 P.2d 1117 (1974). Instead it expands coverage for the named insured. *See e.g., Gibson & Associates, Inc. v. Home Ins. Co*., 966 F.Supp. 468, 475-77 (N. D. Tex. 1997).

(2) Named Insured Not Insured For All Contractually Assumed Liabilities

CGL policies will place conditions precedent that must be satisfied by an indemnified person prior to providing it defense under the indemnifying person's CGL policy. For example, the ISO CGL standard policy form provides

> If we defend an insured against a "suit" and an indemnitee of the insured is also named as a part to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the indemnitee has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract".

(a) Indemnifying Party And Indemnified Party Must Be Defendants In Same Suit

The insured contract provisions of ISO's CG 00 01 requires as a condition to providing the indemnified person a defense under the contractually assumed liability coverage that the indemnified person and the named insured - indemnifying person are parties to the same suit. An example of a common suit in which this is not the case is suit by an injured employee of the indemnifying party against the indemnified party.

(b) Policy Limits And Exclusion Still Apply

Indemnity insurance does not expand the scope of the liability policy beyond the coverage provided, nor does it extend the limits of liability. Coverage is limited by the policy's other exclusions (*e.g*., pollution liability, insured's breach of contract, and breach of product warranty). Indemnity insurance does not insure the performance of the business aspects of the contract. *Musgrove v. Southland Corp*., 898 F.2d 1041 (5th Cir. 1990). The court held

> Contractual liability has a definite meaning. It is coverage of the insured's contractual assumption of the liability of another party. It typically is in the form of an indemnity agreement.... The assumption by contract of the liability of another is distinct conceptually from the breach of one's contract with another.... Liability on the part of the insured for the former is triggered by contractual performance; for the latter liability is triggered by contractual breach....CITGO (the owner) concedes that LCE (the contractor) made no indemnification agreement applicable to the loss herein; rather, it complains of LCE's breach of contract. LCE's contractual liability insurance is thus not applicable. LCE did not insure its commitment to secure insurance coverage for CITGO. *Id*. at 1044.

Under the 1996 and later editions of the standard ISO form CGL policy, the cost to defend an indemnified person under the indemnifying person's CGL policy will be provided within the limit of the proceeds available under the policy as opposed to being on top of the limits as a supplementary payment, unless the indemnified person complies with a lengthy list of conditions precedent.

(c) Limited By Scope Of Indemnity

An issue exists as to whether contractual liability coverage under a protecting party's CGL insurance extends to a protected party's negligence if the "insured contract" indemnity is expressly limited to the protecting party's negligence or expressly excludes the protected party's negligence. *Office Structures, Inc., v. Home Ins. Co*., 503 A.2d 193 (Del. 1985); *but see United National Ins. Co. v. Dunbar & Sullivan Dredging Co*., 953 F.2d 334 (7th Cir. 1992).

(d) Special Exclusions

Contractually assumed liability coverage under the standard policy covers "bodily injury" and "property damage" but does not cover "personal injury or advertising injury" liability, unless such coverage is endorsed as additional coverage on to the insured's CGL policy. "Personal and Advertising Injury" is defined in Coverage B to standard CGL policies as "injury, including consequential bodily injury, arising out of one or more of the following offenses:

> (i) false arrest, detention or imprisonment; (ii) malicious prosecution; (iii) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (iv) oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's good, products or services; (v) oral or written publication of material

that violates a person's right of privacy; (vi) the use of another's advertising idea in your "advertisement'; or (vii) infringing upon another's copyright, trade dress or slogan in your "advertisement."

For example, guard service contracts typically contain a provision requiring the owner to indemnify the guard service from liability for the types of liabilities that are embraced by the term "*Personal Injury*" (libel, slander, defamation of character, false arrest, wrongful eviction, and evasion of privacy). In such case unless the owner has its CGL policy endorsed to cover this indemnity, the owner is uninsured for this contractually assumed liability. Alternatively, the owner could require that it be listed as an additional insured on the guard service's CGL policy.

(e) No Coverage For Indemnified Person's Sole Negligence

Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for the indemnified person's sole negligence. ISO issued in 2004 an endorsement, CG 24 26 06 04, which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnified person. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence.

6. <u>Additional Insured Coverage</u>

a. Negligence

(1) Additional Insured's Vicarious Liability For Named Insured's Negligence

Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured's acts or omission. An additional insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors*; and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429. It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy. *See* the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist*., 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured's vicarious liability for the named insured's negligence, or even to cases where the named insured is concurrently negligent with the additional insured.

(2) Additional Insured's Own Negligence

Additional insured status typically affords the additional insured protection against vicarious liability arising out of the named insured's acts but depending on the insurance covenant or the policy language may cover the additional insured's own negligence. As such, it supplements the protection afforded by the indemnity provisions. Richmond, *The Additional Problems of Additional Insureds,* 33 TORT & INS. L. J. 945 (1998); Richmond and Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds,* 44 DRAKE L. REV. 781 (1996); Sigmier and Reilly, *Coverage for Independent Negligence of Additional Insureds*, FOR THE DEFENSE (Ap. 1995); Beck, *Ethical Issues in Joint Representation Under Subcontract Requirements for Defense and Additional Insured Status*, THE CONSTRUCTION LAWYER 25 (Jan. 1995). For example, listing the owner on the contractor's CGL Policy, or the contractor on its subcontractor's CGL Policy, will afford the owner liability protection. However, whether a covenant to list a person as an additional insured on the insured's liability policy or additional insured status provides coverage for the additional insured's negligence could well depend upon language of the insurance covenant and the insurance policy. When such language is silent or ambiguous, courts may look to the indemnity language and other language in the contract and custom and practice to determine the intention of the parties. Also, the language of the insurance policy, additional insured endorsement and certificate of insurance will be examined to determine the scope of the insurance coverage.

b. Interpretation Of Additional Insurance Covenants

(1) Express Negligence Test Not Applicable To Insurance Covenant

In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), *cert. den'd*, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed. 2d 45 (1993), the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring Getty to be listed as an additional insured on NL Industries' liability policies in a case where the indemnity provision excluded indemnity for Getty's negligence but the insurance provision did not expressly state that the insurance was to cover injuries due to Getty's negligence. The court reviewed the following provision:

> Seller (NL Industries - the chemical supplier) agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser (Getty - the chemical buyer):
>
> ...
> Workmen's Compensation $500,000
> Statutory Employer's Liability
>
> General Liability: $500,000
> Bodily Injury
> ...
> Automobile Liability: $500,000
> Bodily Injury
> ...
> All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co- owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co owners, joint venturers, agents, employees and insurance carriers.
>
> Seller shall indemnify, defend and hold harmless Purchaser, its co owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations or other damages resulting from injury to any person ... arising out of or incident to the performance of the terms of this Order by Seller ... Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.

The court was being requested by Getty to reverse the holding of the trial court and the court of appeals in a subsequent suit brought by Getty against NL Industries for its failure to name Getty as an "additional insured" on NL Industries' insurance policies and against NL Industries' insurers. The court held that the express negligence doctrine would **not be extended** to contractual provisions, other than indemnity agreements, and therefore was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies. The court stated "We express no opinion regarding whether Getty is an additional insured under NL's insurance policies with INA or Youell, or the extent of such coverage, if it exists." *Id.* 806.

(2) Liabilities Arising Out of Named Insured's Acts or Omissions

ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization was revised effective July, 2004 to limit coverage of the additional insured to liability for bodily injury, property damage and advertising injury

> ***caused, in whole or in part, by***:
>
> 1. Your (the named insured's) acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;

> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

Prior to the 2004 revision, the CG 20 10 provided the additional insured coverage for bodily injury, property damage and advertising injury

> ***arising out of*** your ongoing operations performed for that insured. (Italics added for emphasis by authors.)

The 2004 revision to this additional insured endorsement was in part a response to holdings, such as *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App. – Austin [3rd Dist.] 1999, no writ), *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. [1st Dist.] 1999, writ denied) and *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000), discussed in the next section, holding that the "arising out of" language was ambiguous and should be broadly interpreted as providing coverage for liabilities arising out of the concurrent and even the sole negligence of the additional insured. The 2004 revision requires that there be a causal connection between the acts or omissions of the named insured and the liability. Note, however, that the revised language does not specifically address whether covered liability can arise out of the sole negligence or contributory negligence of the additional insured. It only mentions the partial or sole involvement of the named insured.

(3) Liabilities Arising Out Of Named Insured's "Operations" Or "Work"

In *Admiral Ins. Co. v. Trident NGL, Inc*., 988 S.W.2d 451 (Tex.App. [1st Dist.] 1999, *writ den'd*). considered the breadth of "***arising out of***" in the context of an ISO CG 20 10-type additional insured endorsement covering liabilities "***arising out of the operations***" of the named insured. In *Admiral*, K-D Oilfield Services a company hired to service an oil and gas facility named the facility's owner, Trident NGL, as an additional insured for liability arising out of the service company's "operations." While one of the service company's (the named insured's) employees was unloading tools on the premises of the additional insured, the additional insured's compressor exploded. The servicing company's injured employee sued the facility's owner, Trident NGL, and the owner sought a declaration that it was covered as an additional insured. The parties agreed that the named insured contractor (K-D Oilfield Services) was free from fault and did nothing to cause the explosion. The court of appeals followed the majority view of other jurisdictions construing similar endorsements:

> [F]or liability to "arise out of operations" of a named insured it is not necessary for the named insured's acts to have "caused" the accident; rather it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured.... We hold that, because the accident in this case occurred to a KD employee while the employee was on the premises for the purpose of performing preventive maintenance on the compressor that exploded, the alleged liability for the employee's injuries "arose out of KD's operations," and, therefore, was covered by the "additional insured" provision. *Admiral* at 455.

Later the Third Court of Appeals followed the rationale of *Admiral* in *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App.- Austin [3rd Dist.] 1999, *no writ*) and held that an additional insured's negligence is covered by an additional insured endorsement covering liabilities "***arising out of (the named insured's) work***." The endorsement form was the "11 85 " version of the ISO CG 20 10 additional insured endorsement. The insurance company argued that "*arising out of*" means only those liabilities coming *directly* from the negligence of the protecting party (in this case, Crouch, the contractor), and coverage could not arise in a case where only the protected party (in this case, McCarthy, the additional insured owner) was negligent. The court of appeals, however, found that coverage occurs where there is a "causal connection" between the liability and the named insured's work, even though only the additional insured is negligent. The *McCarthy* court described the coverage trigger as follows:

> As he was walking down this incline to go to the equipment trailer, Wilson "fell on the muddy, slippery surface." These allegations show that walking down the incline to get tools to perform its job was an integral part of Crouch's work for McCarthy. Thus, the accident occurred while Wilson was on the construction site for the purpose

> of carrying out Crouch's contract with McCarthy. There was more than a mere locational relationship between the injury and Wilson's presence on the site. Wilson's injury occurred while he was carrying out a necessary part of his job for Crouch. Therefore, there is a causal connection between Wilson's injury and Crouch's performance of its work for McCarthy and the liability "arose out of" Crouch's work for McCarthy." ... The insurance companies offer a competing interpretation for the phrase "arising out of" that they claim is equally reasonable and thus creates an ambiguity. Their interpretation would limit the interpretation of "arising out of" to mean coming directly from; *i.e*., for liability to arise out of Crouch's work for McCarthy, the liability must stem *directly* from Crouch's negligence and cannot extend to negligence caused solely by McCarthy. Post - *Lindsey*, however, such a restrictive interpretation no longer appears reasonable in Texas and cannot be used to create ambiguity. However, were we to consider the phrase "arising out of" ambiguous, we would apply the familiar rules that construe the policy against the insurer and reach the same result. *Id*. at 730. [Reference to *Lindsey* is to *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999) which broadly construed the term "arising out of" to mean a causal connection in construing coverage under an auto liability insurance policy as covering accidental discharge of a shot gun in pickup.]

In 2001 the Dallas Court of Appeals in *Highland Park v. Trinity Universal Ins. Co*., 36 S.W.3d 916 (Ct. App. [5th Dist.] Dallas, 2001, *no writ*) also was called upon to construe an "*arising out of 'your work*'" additional insured endorsement. Based on *McCarthy* and *Admiral*, the court found that the additional insured endorsement covered the additional insured's, Highland Park's, negligence because the injury to the named insured's employee arose out of the named insured's work on the additional insured's premises, even though Highland Park was solely negligent.

In 2000 the Fifth Circuit in two cases involving Midcontinent Casualty Co. and different panels followed *Admiral* as opposed to *Granite Construction*. The first panel of the Fifth Circuit in *Midcontinent Casualty Co. v. Chevron Pipe Line*, 205 F.3d 222 (5th Cir. 2000) construed an ISO CG 20 10 11 85 "*arising out of your work*" additional insured endorsement as covering injuries to a named insured's employee negligently caused by the additional insured. The court appears to have been willing to make a distinction between protection afforded to an additional insured on the basis of whether the injury arose out of the "operations" or the "work" of the protecting party. The court found that

> The Midcontinent endorsement and those in *Granite Construction* and *Admiral* are not identical. Midcontinent uses "liability arising out of 'your (Power Machinery, Inc.'s) work'", defined by the policy as the named insured's [PMI's] work or operations, while the *Granite Construction* and *Admiral* endorsements, respectively, used "liability arising out of operations performed ... by or on behalf of the named insured", ... and "liability arising out of the named insured's operations" *Admiral*, 988 S.W.2d at 454 (emphasis added). On the other hand, the pertinent language in the two additional insured endorsements at issue in *McCarthy* is identical to that in Mid-continent's. *See McCarthy*, 7 S.W.3d at 727 n. 4. .... To the extent that there is a conflict in the approach taken by *Granite* and *Admiral* in interpreting the endorsement, *e.g*., fault based versus activity based, we agree with CPL(Chevron Pipe Line) that our affirming the coverage-for-CPL-ruling does not require us to resolve such conflict. We are persuaded that, in the light of *Granite Construction's* focus on the word "*operations*" in the endorsement, which it considered in conjunction with the parties' division of operations in its services contract, there is *no* need here to reach the same non-coverage holding. First, the word "operations" does *not* appear in the Midcontinent endorsement; rather, it uses "your work", which, per its policy definition as *work or operations*, may indicate that broader coverage was intended; second, the underlying services contract does *not* divide responsibilities between CPL and PMI *vis-à-vis* PMI's work; and finally, based on the finding in the Fant action that PMI controlled Fant's work at CPL, his injury, at least in part, "arose out of" PMI's work for CPL.

The second panel in *Midcontinent Casualty Co. v. Swift Energy Co*., 206 F.3d 487 (5th Cir. 2000) struggled with the issue of whether an injury arising out of operations performed by a subcontractor for its contractor were covered by an additional insured endorsement to the subcontractor's CGL policy covering injuries arising out of operations for the additional insured premises owner. The additional insured endorsement to Air Equipment's policy provided that it covered

> any person or organization for whom the named insured (Air Equipment) has agreed by written 'insured contract' to designate as an additional insured ... but only with respect to liability "arising out of your ongoing operations for that insured."

Given the absence of language in the policy excluding from its coverage liabilities arising solely from the additional insured's negligence or excluding operations performed for another contractor while on the additional insured's premises, the court held that the policy would be broadly construed in favor of coverage for the additional insured. The court reasoned that a subcontractor's operations for its contractor are operations for the owner as well. Each of these Fifth Circuit cases involved pre-2004 versions of the ISO CG 20 10 additional insured endorsement form. The court found in each case that the employment relationship between the named insured and the injured plaintiff suing the additional insured satisfied the condition for coverage.

(4) Contractual Exclusion If Additional Insured Has Insurance

The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E .D. Tex. 1994) also illustrates the risk inherent in not reading the insurance policy of the party obligated to name the prospective additional insured as an additional insured. The court found that a fact issue existed defeating a summary judgment motion as to whether the proposed additional insured had accepted the defendant's insurance policy which contained an additional insured provision that included the plaintiff, but which provision was worded so as to exclude coverage in cases where the proposed additional insured was already insured (a so-called "***Escape Clause***").

> Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

The party providing the insurance provided insurance naming the proposed additional insured as an additional insured and therefore did not violate the covenant to name the plaintiff as an additional insured, but the additional insured provision contained as Escape Clause. Timely review and objection may need to occur to defeat this waiver argument!

(5) Contractual Exclusion Of Additional Insured's Negligence

The holding in *BP Chemicals, Inc. v. First State Ins. Co.,* 226 F.3d 420 (6th Cir. 2000) in which the 6th Circuit applied Texas law emphasizes why it is important to obtain and read a copy of the Additional Insured Endorsement and not to rely either upon a statement in the Certificate of Insurance that "'x' is an additional insured for liabilities arising out of the work 'y'" or upon a general statement in the contract that "x" is to be listed as an additional insured on "y's" commercial general liability policy. The court in this case held that the additional insured endorsement meant exactly what it said "the negligence of the additional insured is excluded" and that the certificate of insurance stating that "x" was an additional insured and the contractual provision in the contract between "x" and "y" that be listed as an additional insured did not clearly provide for coverage of the additional insured's negligence. The following are the provisions in the contract, the certificate of insurance and the endorsement.

> Contract. Contractor [Bath] shall have a comprehensive general liability policy in the amount of at least $1,000,000 with an Additional Insured Endorsement naming Owner [BP Chemical] as an additional insured.
>
> Contractor hereby indemnifies and agrees to defend and save Owner and its affiliated Corporations, their agents, servants and employees harmless from any and all losses, expenses, demands and claims that may be claimed or for which suit is brought for any actual or alleged bodily injury or death occurring to any person whatsoever, in any manner arising out of or in connection with, or resulting in whole or in part out of the acts of omissions of Contractor, or any subcontractors employed by or under the direct control of the Contractor, and their respective officers, agents and employees in the performance of the Work in accordance with this Agreement, and agrees to pay all damages, costs and expenses, including attorneys' fees, arising in connection therewith. Such obligation shall not apply when the liability arises solely from the negligence of Owner, its employees or agents. Such obligation shall also be limited,

in a case involving or alleging joint negligence between Contractor and Owner, its employees or agents, to Contractor's actual percentage of comparative negligence, if any, found by the trier of fact in a cause of action brought against Contractor arising out of the performance of the Work or alleged negligence in accordance with this Agreement. This indemnity obligation of Contractor shall not be applicable to the extent that Owner is provided coverage as an additional insured under Contractor's insurance policies as specified in Exhibit A to this Contract, or to the extent that the right of indemnity is prohibited or limited by the laws of the state in which the Work is located.

Certificate of Insurance. Owner is an additional insured thereunder as respects liability arising out of or from the Work performed by Contractor for Owner.

Endorsement. It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities arising out of their operations performed by or for the named insured, but excluding any negligent acts committed by such additional insureds.

But see the holding of the Texas Supreme Court in *ATOFINA Petrochemicals, Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005) in which the court noted that a similarly worded endorsement, if so interpreted, would be illusory.

(6) Additional Insured's "Other Insurance"

The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under someone else's policy rather than having to rely upon on one's own policy. Additional insured Indemnified persons must verify that any "other insurance" coverage to which they have access will not interfere with payment by the indemnifying person's policy on a primary and non-contributory basis. This is the interplay of the indemnifying person's CGL policy with the additional insured's own CGL policy. Assuming both the Indemnifying person's CGL policy and the additional insured/Indemnified person's policies are standard from policies, then both will declare themselves to be primary insurance unless some modification is effected to eliminate this dual coverage. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange,* 444 S.W.2d 583 (Tex. 1969); *Texas Employers Ins. v. Underwriting Members,* 836 F.Supp. 398, 404 (S. D. Tex. 1993).

Note that endorsing the indemnifying person's policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. The standard ISO form policy also provides for ***proration*** when other insurance is available to the additional insured. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange,* 444 S.W.2d 583 (Tex. 1969). Without more, in such cases the additional insured's desire to have the named insured's policy respond prior to the additional insured's own policy is thwarted.

The following are common means employed to avoid the protected party's own policy contributing to the loss covered to the extent of the additional insurance coverage afforded on the protecting party's policy:

(1) Endorse the protected party's policy to be primary. The above stated approach of endorsing the protecting party's CGL policy to state that it is primary with respect to other insurance maintained by the additional insured (as noted above most standard CGL policies state they are primary).

(2) Endorse the protected party's policy to be primary and noncontributory. In addition to requiring that the protecting party's insurance be endorsed to state that it is primary, also requiring that the protecting party's policy be endorsed to state that it is "noncontributory" (an example of this approach is to endorse the protecting party's policy with an endorsement reading "Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the insured named above.") The meaning of the word "noncontributory" in this insurance context is not intuitive. "Noncontributory" does not mean that the coverage afforded by protecting party's CGL policy will not contribute to cover the additional insured's liability, but it means that the protecting party's CGL carrier will not seek contribution from any other "applicable" insurance (e.g., the additional insured's own CGL policy). What is being said is that the protecting party's CGL coverage is primary but contributory–it will respond on a primary basis to pay a covered claim, but will seek contribution from any other insurance

structured to respond on a similar primary basis. Unfortunately, the phrase "primary and noncontributory" does not have an established legal meaning in many jurisdictions. Reliance on this approach opens the protected party to litigation with the protect party's carrier as to what was meant by this endorsement. A protecting party's carrier may balk at endorsing its named insured's policy to be "primary and noncontributory" due to concerns not that it is waiving contribution from the protected party's CGL policy but that it might be inadvertently be eliminating contribution by other carriers that have issued additional insurance coverage to additional insured on the protecting party's policy (for example, a general contractor with additional insured status under multiple subcontractors' policies or a building owner that is an additional insured under each of its tenants' policies).

(3) Endorse the protected party's policy to be excess. The third approach is for the protected party (the additional insured) to have its own carrier endorse the protected party's CGL policy to state that coverage under the protected party's policy is excess to coverage available to the protected party as an additional insured on another person's policy.

In April 1997 ISO revised its "other insurance" clause in its standard CGL policy form to do just that. ISO add in Paragraph 4b(2) an exception to the declared primary coverage in Paragraph 4a for additional insurance coverage of the named insured. Thus, ISO revised its standard policy to provide that in a case where the protected party has both its own CGL policy and is an additional insured on the protecting party's CGL policy, then the protected party's CGL insurance states that its coverage is excess to the coverage available to through being covered under the additional insured endorsement on the protecting party's insurance.

4. Other Insurance

b. Excess Insurance

This insurance is excess over: ...

(2) Any other *primary* insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured *by attachment of an endorsement*.

Note, however, the 1997 language does not apply where additional insured status is not obtained by an endorsement to the protecting party's CGL policy. This provision is not triggered if the additional insured is automatically an additional insured on another insured's CGL policy. In such cases, it is still necessary to endorse the additional insured's own policy to make it excess over a protecting party's policy in order to avoid both policies being primary and co-contributing. This should be an easy sell to the protected party's carrier as the result is to make its policy excess coverage.

Also remember the protected party's policy may not contain the 1997 language. If this is the case then the protected party's policy should be endorsed to make it excess over all other coverage available to the protected party in order to achieve the elimination of overlapping coverage and contribution.

The following are traps to be avoided by the party seeking protection:

(1) Do not assume that the protecting party's insurance contains standard wording. It might not contain the standard wording that the policy affords primary coverage over other insurance available to the additional insured. In such case reliance on the 1997 ISO language or other endorsement to the additional insured's own policy to state that it is excess over other coverage available to the additional insured may be misplaced. Some policies maintained by protecting party's provide that its coverage of the additional insured is not primary but on an excess basis. In such case, endorsing the protecting party's policy to provide that it is excess coverage creates a case where both policies declare them to be excess.

Also, if the protected party's own insurance does not provide (*e.g.*, the pre-1997 ISO policies) for an exception to its contributing with all other policies available to the protected party, nonstandard language in the protecting party's to the effect that it provides excess coverage to an additional insured in cases

where the additional insured has available insurance will result in the protected party's insurance being primary and the protecting party's coverage of the protected party as an additional insured being excess. If this is the situation, then the protecting party should insist on the protecting party's policy being endorsed to provide that it affords primary and noncontributory coverage with respect to the additional insured's own policy coverage.

(2) Do not assume that the protecting party's additional insured endorsement does not have a provision in it stating that the additional insured's coverage is on excess or contributory basis. Even though the protecting party's policy may have standard language to the effect that coverage for insureds is primary and noncontributory for other insurance coverage available to the insured, the additional insured endorsement may have overriding language.

The protected party should require in the contract with the protected party that the additional insured coverage to be provided to the protected party will be on a primary, noncontributory basis. Failure of the protecting party to provide such coverage will be a breach of this insurance covenant. Note, some CGL policies provide that they automatically provide primary coverage when required by the contract between the parties (a "***primary-when-required***" provision). For example the following is a "primary-when-required" provision contained in some CGL policies:

> The insurance provided to the additional insured is excess over any other insurance naming the additional insured as an insured, whether primary, excess, contingent, or on any other basis; unless you have agreed in a written contract that such coverage will apply on a primary basis.

(3) Do not forget that umbrella insurance is not primary insurance and that to avoid the protected party's insurance becoming contributing with umbrella coverage or becoming primary to the umbrella policy some additional action is required. In order to ensure that the protected party's own CGL policy is excess and noncontributory to the protecting party's umbrella policy, the protected party should consider (a) having its own CGL policy endorsed to provide that it is not only excess to other primary coverage available to it as an additional insured but also excess over umbrella insurance provided by the protecting party (excess over any insurance available to it as an additional insured, whether primary, excess, contingent, or on any other basis") or (b) striking from the "other insurance" provision in the protected party's CGL policy the word "primary" from the 4b(2) exception to primary coverage of the protected party's own policy, or (c) having the protecting party's umbrella insurance endorsed to state that it afford primary and noncontributory coverage to the additional insured.

(7) Persons Listed In Endorsement As Additional Insureds

A disadvantage of being an "additional insured" as opposed to a "named insured" is that additional insured status does not provide coverage for the officers, directors, and partners of the additional insured, unless specifically listed individually as additional insureds. An additional insured provision covering "employees" of the additional insured does not cover a "volunteer" assisting the additional insured. *Sturgill v. Kubosh Ins. Co. of America*, 1996 WL 665552 (Tex. App.- -Houston [1st Dist.] Nov. 14, 1996).

(8) Additional Insured's Defense Costs Covered By Named Insured's Insurance

Subject to scope of liability coverage set out in the Additional Insured Endorsement, the insured's CGL policy provides the additional insured with rights to a defense. The various duties of an insurer to its insured are illustrated by *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103 (Tex. App.— Texarkana 1994, *no writ*) where Monsanto was awarded $71,048,070.22 for actual and treble damages, prejudgment interest and attorney's fees arising out of the insurer's obtaining a financial interest in, and control of, litigation against its insured in an attempt to defeat the insured's reimbursement rights under an environmental impairment liability policy. INS. CODE Art. 21.21 § 16(a) (Vernon 1981) violation.

(9) Coverage Of Additional Insured's Risk Of Liability For "*Personal Injuries*"

The ISO CGL Policy extends "personal injury" coverage to additional insureds.

(10) Coverage Under Named Insured's Umbrella Policy

The wording of the excess liability or umbrella policy will need to be examined to determine if it covers an additional insured. Frequently, excess or umbrella policies provide automatic coverage of additional insureds as "insureds" under the primary policy.

(11) Providing Both Indemnity Insurance And Additional Insured Insurance

1st Tier Policy

In *American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co.*, 335 F.3d 429 (5th Cir. 2003), the Fifth Circuit dealt with the interplay between a protecting party's (Elite Masonry, the subcontractor's) CGL policy and a protected party's (Caddell, the general contractor's) CGL policy, where the protected party was also an additional insured on the protecting party's policy and the protecting party's CGL policy contained contractually assumed liability insurance supporting the protecting party's indemnity of the protected party's concurrent negligence. American Indemnity Lloyds (AIL), the CGL insurer of the protecting party and the insurer of the protected party by additional insured coverage of the indemnified protected party, sued Travelers, for contribution. The Fifth Circuit noted that, as AIL contended, the general rule is that where two liability policies issued by different carriers provide coverage to the same insured (Caddell), and both contain an "other" insurance clause that provides for sharing with other primary policies, the two insurers share the loss, and if one paid it and the other did not, the paying insurer may recover contribution form the non-paying insurer. AIL issued a CGL policy to Elite containing a blanket additional insured endorsement. Caddell was the named insured on a CGL policy issued by Travelers. Both the Travelers and AIL policies contained the ISO CG 0001 coverage form, pre-1998 version, which provided for sharing with other primary policies. AIL settled the suit brought by an injured employee of Elite that sued Caddell. AIL sought contribution from Travelers as both policies insured Caddell and both policies provided for sharing with other primary policies.

However, the court held there is an exception to this general rule where the insurer seeking contribution also insures the obligation of its named insured to indemnify the additional insured for the loss. *Id*. at 435-36, *citing Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002). *Also see* 15 COUCH ON INSURANCE (3rd Ed. 1999; Russ & Segalla) § 219.1 at 219-7 stating

> [a]n indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an "other insurance" clause in its policy.

To allow AIL to obtain contribution from Travelers would only result in Travelers, as Caddell's subrogee, asserting Caddell's right to be indemnified by Elite Masonry, and AIL. *Id*. at 433 citing in Footnote 4: *Rushing v. Int. Aviation Underwriters*, 604 S.W.2d 239, 243-44 (Tex. Civ. App.–Dallas 1980, *writ ref. n.r.e.*); *General Star Indem. Co. v. Vesta Fire Ins. Co*., 173 F.3d 946, 949-50 (5th Cir. 1999); and *Sharp v. Johnson Bros. Co*., 917 F.2d 885, 890 (5th Cir. 1990).

Texas courts have not yet been faced with determining whether an indemnity provision acts as an agreement establishing priorities between a protecting and protected parties' CGL insurance. It has been held in other jurisdictions that a protecting party's indemnity has the effect of making the additional insurance coverage primary without rights of contribution from the additional insured's other insurance. *Rossmoor Sanitation Inc. v. Pylon Inc*., 119 Cal. Rptr. 449, 13 Cal.3d 622, 532 P.2d 97 (Cal. 1975), *J. Walters Const. Inc. v. Gilman Paper Co*., 620 So.2d 219 (Fla. App. 1993), and *Aetna Ins. Co. v. Fidelity & Cas. Co. of New York*, 483 F.2d 471 (5th Cir. 1973) discussed in *American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co*., 335 F.3d 429, 438 (5th Cir. 2003).

Umbrella Policy

One court has found that the combination of indemnity, contractually assumed liability insurance and additional insurance coverage in an excess liability policy is an exception to the "other insurance" provision in the excess policy preventing contribution from the additional insured's other available primary insurance, even though the excess policy provided it was excess to unscheduled insurance of the additional insured. *Wal-Mart Stores Inc. v. RLI Ins. Co*., 292 F.3d 583, 588 (8th Cir. 2002).

7. Cross-Liability Coverage

The ISO CGL policy contains the following separation of liability clause providing "**cross-liability coverage**":

> **SEPARATION OF INSUREDS CONDITIONS**
>
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned to the first Named Insured in this Coverage Part, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each insured against whom claim is made or "suit" is brought.
>
> ISO, 2003©

D. Business Auto Policies

See Endnote **VI.C.2** for a discussion of antiquated and current terminology for business auto policies.

1. BAP Insurance

Business Auto Policies ("BAP") contain blanket additional insured provisions. This form is approved for use in Texas. This form can be used either to confirm the existence of a general "*any person*" additional insured provision in the BAP or specifically to designate persons to be additional insureds. This endorsement also contains a requirement that the insurer notify the additional insured in advance of insurance cancellation.

2. Waiver Of Subrogation

This form is approved for use in Texas. This form is an endorsement to the BAP waiving the insurer's subrogation rights. This form does not require the designation of the parties as to whom the insurer's rights are waived. Note that this form requires that the contract between the contractor and the owner contain a waiver of subrogation provision in order for the insurer to have waived its rights of subrogation. If the contract does not contain a contractual waiver of the insurer's right of subrogation, this form does not waive the insurer's right of subrogation.

III. PROPERTY INSURANCE

A. Landlord And Tenant Relationship

1. Tenant's General Duty of Care of the Premises

At common law, neither the landlord nor the tenant is obligated to repair the premises after casualty damages unless it caused the damage; the lease continues in effect, and the rent is not reduced or abated. In order to use the premises, the tenant is put to the burden of restoring the premises to useful condition.

Absent a tenant's fault in causing damage to the premises or provision in the lease, the tenant's common law obligation is not to commit waste. The tenant is liable to the landlord if the tenant negligently destroys the premises (*e.g.*, negligently caused fire) absent a provision in the lease to the contrary. *Nagorny v. Gray*, 261 S.W.2d 741 (Tex. Civ. App.—Galveston 1953, *no writ*).

If the lease does not obligate the landlord or the tenant to restore the premises after a casualty loss, and the loss is not caused by the negligence of either party, then landlord bears the risk of the decline in value of the property if either it or the tenant do not restore the property.

As opposed to leaving the rebuilding obligation to the common law rules, the parties will address this topic in the lease. The lease may provide that the tenant is obligated to return the premises at the expiration of the lease term and make no exception for casualty losses; the lease may allocate the responsibility of rebuilding to landlord or to tenant, or parts to landlord and parts to tenant; and the lease will address the funding of the rebuilding obligation by requiring one or the other of the parties to maintain property insurance, including setting out the specifications of the property insurance.

2. Contractual Risk Allocations

a. Covenant Requiring Party To Insure Its Own Property Not Equivalent to Waiver Of Recovery Or Waiver Of Subrogation

Upon payment by the landlord's insurer for the insured property loss, the landlord's insurer is subrogated to the landlord's claim and can sue the tenant to recoup the insurance proceeds. In *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956), the Texas Supreme Court held that where the lease merely provided that the landlord agreed to carry fire and extended coverage insurance on the building, part of which was occupied by the landlord, there was no duty on the landlord to procure insurance for the benefit of the tenant, and the insurers were not precluded from obtaining a subrogated cause of action from payment of damages on account of fire caused by tenant's negligence. The court rejected the tenant's contention that the intent of the parties for including a covenant of the landlord to insure its own building (presumably the cost was built into the rent) was to exculpate the tenant for its own negligence.

See **App. Form B.3** Commercial Property Conditions ¶ I. Transfer of Rights of Recovery Against Others To Us – The ISO property policy for leased premises allows the parties to waive the insurer's rights in advance by a waiver of claims in the lease. The ISO property policy also allows the landlord to waive the insurer's subrogation right even after a loss.

Most leases, including the leases in the Texas Real Estate Forms Manual, contain a provision addressing the rights between the parties in the event that the property is damaged by the negligence of the other party.

The lease, such as the leases in the Texas Real Estate Forms Manual, may provide that the party whose property is damaged waives claims against the other negligent party and that the damaged party will look to the property insurance for recovery. Further the lease may provide that the right of subrogation of the insurer is waived or that the party obtaining the insurance will also obtain an endorsement to the property policy whereby the insurer waives its rights of subrogation to recovery its insurance proceeds against the negligent party.

In circumstances where the lease does not contain a waiver of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, ***equitable subrogation***. A majority of courts follow the rule that a lessor's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an ***implied coinsured***. Some of these courts have concluded that the landlord's agreement to procure property insurance covering the building implies an obligation by the landlord to insure the building for the benefit of both the landlord and the tenant. Others of these courts have reasoned that the tenant has indirectly paid for the insurance, either through rent or through expense pass through. The better practice to address this risk in the lease. See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11. INSURANCE LAW, Keeton and Widiss, §4.4(b). *Metal Works, Inc. v. North Star Reinsurance Corp. v. Continental Ins. Co.*, 624 N.E.2d 647 (1993); *Cook Paint & Varnish Co.*, 418 F.Supp 56 (N.D. Tex. 1976); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. 1975).

Texas follows the minority rule. *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956See FRIEDMAN ON LEASES (5th ed. 2011), § 9.12 No Implication of Co-Insured Status Unless Explicitly and Unambiguously Stated Otherwise in the Lease. The minority jurisdiction rule is based on the common-law presumption that a tenant is liable for the tenant's own negligence and the equitable principle of subrogation.

Since there is no recognized standard property policy form, like the ISO liability form, it is prudent to examine the property policy in connection with drafting the lease and to condition the lease, if necessary, on obtaining a subrogation waiver from the insurer.

b. Waivers Of Subrogation Or Waiver Of Recovery

(1) Waivers Of Subrogation Or Waiver Of Recovery?

Waiver of recovery is the landlord or tenant waiving its rights or recovery for the acts of the other. Waiver of subrogation is the landlord or tenant or both waiving the right of its insurer to be subrogated to the landlord's or tenant's claim. While a waiver of recovery also is a waiver of subrogation (because the

insurer has no rights left to which to be subrogated), a waiver of subrogation alone is not a waiver of recovery.

(2) Covenant Requiring Tenant To Pay For Insurance And Name Landlord As An Insured Equivalent To Waiver of Recovery By Landlord Against Tenant

In *Publix Theatres Corp. v. Powell*, 71 S.W.2d 237 (Tex. Comm. App. 1934), the lessee agreed in the lease to carry the fire insurance on the leased building, at the lessee's expense, naming the landlord as the insured. The insurer paid, but the landlord still sued the tenant for the loss. The court declared that to permit the lessor to keep the insurance money and also to collect from the lessee would be a double recovery.

In *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142 (Tex. App.— Houston [1st Dist.] 1991, *writ denied*), the court of appeals refused to limit the waiver of subrogation contained in the lease to claims against the current tenant so as to permit the otherwise subrogated insurer to pursue the former tenant after assignment. First Tape, therefore, was able to retain the protection of the waiver of subrogation clause even after the lease was assigned.

(3) Valid Despite Negligence Of Released Party

In Texas, waiver of recovery and waiver of subrogation clauses are valid if properly drafted. *See International Co. v. Medical-Professional Building of Corpus Christi*, 405 S.W.2d 867 (Tex. Civ. App.— Corpus Christi 1966, *writ ref'd n.r.e.*)—lessee waived in advance any claims for damages caused by lessor's negligent failure to maintain boilers in portion of premises under landlord's control "to extent that lessee was compensated by insurance for such damages;" and *Williams v. Advanced Technology Ctr., Inc.*, 537 S.W.2d 531 (Tex. App.-- Eastland 1976, *writ ref'd n.r.e.*)—subrogation suit brought against lessee by lessor's fire insurance carrier was barred by lessor's waiver of subrogation clause contained in lease, notwithstanding lessee's breach of the lease by permitting the leased premises to be used for an extra hazardous operation.

The indemnity and waiver provisions in the form Leases in the Texas Real Estate Forms Manual are drafted to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993). See discussion below as to the failure of the AIA waiver of claims language to comply with Texas' fair notice doctrine.

c. Conflicts - Return Of Premises Covenant *vs.* Waiver Of Recovery Provision

A lease may require the tenant at the termination of the lease to return the leased premises in its original condition except for "reasonable wear and tear and damage by casualty not occurring through the tenant's negligence". Such a clause is potentially in conflict with a waiver of subrogation clause.

3. <u>Policies</u>

a. Outdated Terminology

Outdated terminology requiring that the policy provide "***fire and extended coverage***" is often used in contracts. "***Extended coverage***" refers to an endorsement that was once added to a standard fire policy to cover the perils now insured under ISO's basic causes of loss form. Since this endorsement is no longer used, a better approach to requiring this coverage would be to refer to the ISO "basic," "broad," or "special" causes of loss form. Prior property insurance forms used the terms "risk" and "perils." Pre-"causes of loss" property insurance was written either on a "named peril" basis which insured property against loss or damage from causes of loss expressly enumerated in the policy or an "all risks" basis, which insured property against loss or damage from all causes of loss except those which were expressly excluded. "Fire and extended coverage" insurance was a named peril property insurance.

b. Format

The ISO commercial property insurance is a form comprised of the following documents combined to make the policy: the ISO form CP 00 10, Building and Personal Property Coverage Form; declarations

(ISO form IL 00 19, or a variation); one of the 3 forms of causes of loss forms (CP 19 19, 10 20 or 10 40); commercial property conditions (CP 10 90); common policy conditions (IL 00 17); endorsements describing property covered, additional limits and optional coverages.

c. Current Coverage Forms

(1) Basic, Broad And Special

<table>
<tr><th colspan="2">PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS</th></tr>
<tr><td>Basic Causes of loss Form (CP 10 10)
• Fire
• Lightning
• Explosion
• Windstorm or hail
• Smoke
• Aircraft or vehicles
• Riot or civil commotion
• Vandalism
• Sprinkler leakage
• Sinkhole collapse
• Volcanic action</td><td>Broad Causes of Loss Form (CP 10 20)
Basic causes of loss form perils, plus:
• Breakage of glass
• Falling objects
• Weight of snow, ice, or sleet
• Water damage from leaking appliances
• Collapse from specified causes

Special Causes of Loss Form (CP 10 30)
• All perils except as excluded
• Collapse from specified causes</td></tr>
</table>

(2) Buildings and Personal Property

Commercial property insurance covers "**Buildings**" and "**Business Personal Property**."

"**Buildings**" means a building or structure and includes completed additions, fixtures, permanently installed machinery and equipment; and personal property owned by the named insured and used to maintain or service the Building (for example, fire extinguishers and floor coverings). The term "Buildings" does not cover land, water or lawns; foundations machinery or boilers, if the foundations are below the lowest basement floor, or the surface of the ground, if there is no basement; bridges, roadways, walks, patios or other paved surfaces; bulkheads, pilings, piers, wharves or docks, underground pipes, flues or drains; retaining walls not part of the building; or costs of excavations, grading, backfilling or filling.

"**Business Personal Property**" means personal property located within the Building and personal property out in the open within 100 feet of the Building. Business Personal Property includes furniture and fixtures; machinery and equipment; stock (merchandise held in storage or for sale, raw materials and in-process or finished goods), all other personal property owned by the named insured and used in its business; labor, materials, or services furnished by the named insured on the personal property for others; the named insured's use interest as tenant in improvements and betterments (for example, fixtures, alterations, installations or additions to a structure occupied but not owned by the named insured which are acquired or made at the expense of the named insured but are not legally removable by the named insured); leased personal property for which the named insured has a contractual responsibility to insure; and personal property of others that is under the care, custody or control of the named insured and located in or on the Premises. Business Personal Property does not cover accounts, bills, currency, money, notes, securities; automobiles held for sale; personal property while airborne or waterborne; electronic data.

(3) Valuation Terminology

"**Replacement cost**" is the cost of repairing or replacing insured property at time of the occurrence of the loss, without reduction for loss of value through depreciation. Recovery is limited to the lesser of (a) the policy limit, (b) the cost to replace the lost or damaged property with other property of comparable material and quality and used for the same purpose, or (c) the amount actually spent to repair or replace the damaged or lost property.

"**Actual cash value**" means replacement cost of the covered property at the time of loss with like-kind and quality less physical depreciation. Depreciation may be determined by consideration of age, condition at time of loss, obsolescence and other factors causing deterioration. An "agreed value endorsement" is an optional endorsement used where the named insured and the insurer agree upon the actual cash value or the replacement cost of the covered property before the policy is written and agree that co-insurance will not apply.

"**Inflation guard**" is an optional endorsement designed to offset potential inflation by specifying a percentage in the declarations by which the coverage will increase annually as to the portion of the covered property specified.

d. Standard Endorsements

Generally, to be eligible for insured status under a property policy, the insured must have an ***insurable interest*** in the insured property. The assumption by a tenant of liability for damage to leased premises is recognized as creating an insurable interest in the tenant. Leases for single tenant buildings sometimes require the tenant to insure the improvements and to name the owner-lessor as an additional insured. Unlike the standard mortgagee coverage, other additional insurable interests endorsements do not provide coverage despite the acts of the insured, whether the first named insured (e.g., tenant) or the additional insured or loss payee (e.g., landlord). Under current ISO commercial property forms, intentional concealment or misrepresentation of a material fact by any insured voids coverage for the additional insured.

(1) ISO CP 12 19 Additional Insured – Building Owner

See the **App. Form B.6** for a copy of this endorsement form.

(a) Building Owner Designated As An Additional Insured

In November 2008 ISO issued its form CP 12 19 Additional Insured – Building Owner endorsement to designate a building owner as the Named Insured for damage to the building on a tenant's property policy covering the building. It is the insureds who receive the loss payment under a property policy. Thus it is unnecessary to specify that the building owner also be designated as a *loss payee*.

(b) "As Their Interests May Appear"

The phrase "*as their interests may appear*" often is added in a property additional insured endorsement. This is done in order to limit the additional insured's recovery rights to covered property with respect to which the additional insured has an interest. Without these limiting words, if the policy covers multiple properties, the insurer could include the additional insured on all policy proceed checks. Under the CP 12 19 the building owner is an additional insured with respect to the coverage provided for direct physical damage to the building and covered loss is adjusted with and payable to both the tenant, as the first named insured (the insured whose name is listed first in the Declarations), and to the building owner, as additional insured.

(c) No Notice Of Cancellation to Landlord

The ISO CP 12 19 Building Owner Additional Insured Endorsement does not provide for notice of cancellation to be given to the landlord/additional insured. Further, the cancellation provision in the ISO common policy conditions states that notice of cancellation is given only to the first named insured. Thus, the tenant's property policy provides notice of cancellation will only be given to the tenant. In *Scottsdale Ins. Co. v. Mason Park Partners, LP,* 2007 WL 2710735 (5th Cir. – Tex. 2007) the landlord learned the hard way that it needed to follow up and obtain a corrected additional insured endorsement on the tenant's

property policy. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". In addition to issuing the additional insured endorsement to the property policy, the landlord should also have obtained an endorsement to the property policy requiring notice of cancellation be given to it of policy cancellation. The standard property policy only requires notice of cancellation be sent to the first named insured.

Caveat: To assure notice of cancellation by the insurer, the landlord must obtain a notification endorsement to the policy. Additionally, note that the notification endorsement likely will not address notification as to cancellations by the tenant and will need to be manuscripted to include notice to the landlord of tenant cancellations.

(2) ISO CP 12 18 Building Owner Loss Payable

See ISO CP 12 18 06 07 Loss Payable Provisions, Optional Clause F Building Owner Loss Payable Clause in the **App. Form B.5**.

In November 2008 ISO amended its CP 12 18 Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the CP 12 19. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

(3) Business Income And Additional Expenses

This type of insurance covers two types of loss: loss of earnings (formerly called "business interruption insurance") and extraordinary additional expenses. Frequently recovery is limited to the length of time required to rebuild or repair the damaged property, plus an additional 30 days for recover business that may have been lost to competitors. ISO CP 0030 or ISO CP 00 32 (excludes extra expense coverage). "***Business Income Rental Value***" may be added to either of these forms of insurance. Rental value protects the landlord against loss of rents during reconstruction and abatement of rentals if the abatement results from a loss under a named cause of loss in the property insurance.

ISO CP 15 03 Business Income – Landlord As Additional Insured (Rental Value) Endorsement

ISO has recently promulgated an additional insured endorsement form. This endorsement to the tenant's property policy adds the person identified in the endorsement (the landlord) as an insured for loss of "rental value" and thus meets lease requirements that the tenant obtain coverage for loss of the additional insured's rental income. The ISO CP 15 03 provides that notice of insurer cancellation will be provided by the insurer to the additional insured, landlord.

B. Vacancy Clauses

See 17 Am. Jur. Proof of Facts2d 103 "Vacancy" of Insured Commercial Structure (2010); Annot., *What constitutes "vacant or unoccupied" dwelling within exclusionary provision of fire insurance policy* 47 A.L.R.3d 398 (1973); 45 C.J.S. Insurance § 999 Change in Use or Occupancy and §1002 What Constitutes Vacancy or Nonoccupancy.

1. <u>Provisions Of The Standard Commercial Property Policy</u>

The standard commercial property policy addresses the increased insurance risk arising out of the vacancy of the covered property. See Paragraph E.6 on page 13 of the standard commercial property policy form in the **Appendix**. The standard commercial property policy states that a building is "***vacant***" unless

at least 31% of its total square footage is: (i) Rented to a lessee or sub-lessee and used by the lessee or sublessee to conduct its customary operations; and/or

(ii) Used by the building owner to conduct *customary operations*.

a. Customary Operations

The court in *Langill v. Vermont Mut. Ins. Co*., 268 F.3d 46 (Ma. 2001) found that a property is vacant even though the owner sporadically spent time refurbishing an unoccupied rental property vacated by tenants three months prior to arson loss; in *Catalina Enterprises v. Hartford Ins.*, 67 F.3d 63, 64 (Md. 1995) the court held that an industrial storage warehouse was considered to be vacant even though scaffolding and a hand truck had remained in the premises after tenant vacated five months previously; and in *Schmidt v. Underwriters*, 82 P.3d 649 (Or. 2004) the court held that an intent to commence residency in premises that had been vacant for more than 60 days at time of fire was not sufficient to constitute use.

b. Building Under Construction Or Renovation

A building under construction or renovation is not considered vacant under the standard commercial property policy. See Paragraph E.6a(2) on page 13 of standard commercial property policy form in the **Appendix**. The court in *Myers v. Merrimack Mut. Fire Ins.*, 601 F.Supp. 620, 621 (Il. 1985), judgment aff'd, 788 F.2d 468 (7th Cir. 1986) interpreted a fire policy that contained a construction exception to the vacancy clause as not excepting repairs or renovations but only the construction of something which did not previously exist or the creation of something new.

c. 60 Consecutive Days Vacancy – 6 Excluded Causes Of Loss

It further provides that if the building has been vacant for more than 60 consecutive days losses or damages from the following six causes are not covered losses: (1) vandalism; (2) sprinkler leakage, unless the insured has protected the system against freezing; (3) building glass breakage; (4) water damage; (5) theft; or (6) attempted theft. In *Sorema N. Am. Reinsurance Co. v. Johnson*, 574 S.E.2d 377 (Ga. 2002) the vandalism exception applied preventing a mortgagee, which acquired property through foreclosure, from coverage for damages caused post foreclosure by vandals; the fact that the former mortgagor's equipment was left on premises did not mean that the property was not vacant; in *MDW Enterprises v. CNA Ins. Co.*, 772 N.Y.S.2d 79 (NY 2004) the vandalism exception did not exclude coverage for arson destroying a building that had been vacant for the preceding 15 months while pending sale. In *Essex Ins. Co. v. Eldridge Land, L.L.C.*, 2010 WL 1992833 (Tex. App. – Hou. [14th Dist.] May, 2010) the court held that damage to the interior of an insured building inflicted by thieves incidentally to their theft of copper wiring and copper pipe fell within the theft exclusion to vacancy coverage under a standard commercial property policy. Also see *Nautilus Ins. Co. v. Steinberg*, 316 S.W.3d 752 (Tex. App. – Dallas 2010, no writ) similarly holding that damage to roof HVAC caused by thieves removing copper wiring is excluded from coverage under the standard policy.

d. 15% Reduction in Proceeds

The standard commercial policy further provides that with respect to Covered Causes of Loss other than those listed as (1) – (6) above, the amount the insurer would otherwise pay for the loss or damage is reduced by 15%.

2. <u>Typical Provision of Non-Standard Commercial Property Policies</u>

a. Vacancy Clause In Some Policies Provides for Cancellation of Coverage

Some commercial property policies provide that the policy is cancelled and no proceeds are payable if the property is vacant for a specified period. In *Lynn v. USAA Casualty Ins. Co.*, 1997 WL 61485 (Tex. App. – San Antonio 1997, writ denied) a vacancy clause prevented coverage. In this case the vacant house did not contain any appliances, furniture or other contents, except for one metal desk, as all contents had been stolen during various break-ins and the owner had not spent a night at the house for more than a year as there was no bed. Also see *Carolina Ins. Co. of Wilmington, N.C. v. St. Charles*, 98 S.W.2d 1088 (Tenn. 1936); and *Republic Ins. Co. v. Dickson*, 69 S.W.2d 599 (Tex. Civ. App. – Beaumont 1938, writ dism'd).

Some commercial property policies suspend coverage rather than void the policy where the insured property is vacant. *Barlow v. Allstate Texas Lloyds*, 214 Fed. Appx. 435 (5th Cir. 2007).

b. Policy Issued With Insurer's Knowledge Of Vacancy Or Partial Vacancy

Policies are sometimes written with knowledge of the insurer that a portion of the premises will be vacant and in such cases the insured will covenant to keep the vacant portion secure. In *730 J&J LLC v. Twin City Fire*, 740 N.Y.S.2d 119 (NY 2002) the policy did not cover fire loss; insured breached warranty to keep vacant 3rd and 4th floors of building locked and secured.

c. Notice Provision

Also, some commercial property policy forms require the insured to notify the insurer that the premises have become vacant and permit the insurer to elect to continue coverage or cancel coverage unless a vacancy permit or rider issue issued and paid for. *National Mut. Fire Ins. Co. v. Duncan,* 98 P. 634 (Colo. 1908); *Corey v. Niagara Fire Ins. Co.*, 47 S.W.2d 955 (Ky. 1932); *Hartford Fire Ins. Co. v. Merrimack Mut. Fire Ins. Co.*, 457 A.2d 410 (Me. 1983); *Lumbermens Mut. Cas. Co. v. Thomas*, 555 S.2d 67 (Miss. 1989).

d. Occupancy Requirement

Some commercial property policies trigger coverage termination if the property is "***unoccupied***" for a specified period as distinguished from being "vacant". In *Grannemann v. Columbia Ins. Gro.*, 931 S.W.2d 502, 504 (Mo. 1996) a city's order prohibiting occupancy due to disrepair of property did not render insured's performance impossible and excuse compliance with occupancy requirement in property policy and vandalism loss was excluded from coverage of loss on premises that was unoccupied for over four months prior to loss; in *Rojas v. Scottsdale Ins. Co.*, 678 N.W.2d 527, 529 (NE 2004) sporadic presence of insureds and their workers to make renovations did not rise to the level of residency; and in *Young v. Linden*, 719 N.E.2d 556 (Oh. 1998) a court held that a property policy did not cover loss due to erroneous demolition of an unoccupied tavern by a contractor hired by the purchaser at a tax lien foreclosure sale, which was subsequently set aside, as vacancy clause in the policy provided for no coverage for any loss or damage occurring if building became "vacant" *or* "unoccupied" for more than specified periods (presence of $100,000 worth of personal property in tavern did not constitute "occupancy").

3. <u>Standard Homeowners Property Policies</u>

a. Residence Premises

(1) To Reside

See MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 5th Ed. HO 00 03 10. The standard homeowners policy defines covered property as being a "***residence premises***", a place where the insured resides. To be a "residence premises" some courts have held that the insured must have resided at the premises and intent to reside at the premises at some indefinite future date may not be sufficient. In *Varsalona v. Auto-Owners Ins. Co.*,, 637 S.E.2d 64 (Ga. 2006) the court found that the premises were not the insured's residence premises as the insured had never lived there or used it as their residence; and despite their intent originally to reside in the house when they purchased it, a change in the insureds' plans led to occupancy by the insureds' daughter; in *Schmidt v. Underwriters,* 82 P.3d 649, 650 (Or. 2004) the court found it was not sufficient that son intended to live at the insured house in order for it not to be vacant at the time of a fire; *also see Marshall v. Tower Ins. Co. NY*, 845 S.2d 90, 91, 44 A.D.3d 1014 (NY 2007) where the court found there was no coverage as the insured never resided at the premises. Vacancy issues occur frequently in the context of estates. In *Estate of Higgins v. Wash. Mut.*, 838 A.2d 778 (Pa. 2003) the court held that a 60-day vacancy clause precluded coverage where policy was renewed by named insured's estate after she died.

(2) Occupancy by Tenants

Some courts have extended coverage to a rental by the insured after an initial occupancy by the insured. In *Dixon v. First Premium Ins.*, 934 So.2d 134, 139 (La. 2006) the court held that the homeowners policy covered a fire loss to the insured's home, which occurred after the insured moved out of the home but while it was rented to a tenant.

(3) Periods of Remodeling

Some policies provide that periods of remodeling do not constitute vacancy. In *Garcia v. Farmers* Ins. *Exchange*, 122 F.Supp.2d 926, 928 (Il. 2000) the court held that the policy covered fire damage to a house purchased by the insured with the intention of remodeling, where trespassers broke in, lit a candle, and fell asleep, even if the insured misrepresented to the agent that the house would be occupied; the vacancy provision did not preclude coverage; the fire was accidental, and not the result of vandalism. However, the court in *Mortgage Bancorp. v. New Hampshire Ins.*, 677 P.2d 726, 727 (Or. 1984) held that where remodeling had ceased due to unavailability of financing, 30 day vacancy exclusion operated to avoid coverage for vandalism.

b. Vacancy For More Than 60 Consecutive Days

Most homeowners property policies provide that they do not insure against loss caused by vandalism and malicious mischief, if the dwelling has been vacant for more than 60 consecutive days immediately before the loss. If the dwelling is vacant for longer than 60 days, most homeowners policies also will exclude losses ensuing from vandalism and malicious mischief.

(1) Arson And Other Excluded Causes of Loss

There is a split in jurisdictions as to whether arson is classified as vandalism: courts holding arson is a form of vandalism – *Costabile v. Metro Prop. & Cas. Co.* 193 F.Supp.2d 465, 474 (Ct. 2002), *Estes v. St. Paul Fire & Marine Ins. Co.*, F.Supp.2d 1227, 1229 (Ks. 1999), and *Battishill v. Farmers Alliance*, 127 P.3d 1111, 1112 (N.M. 2006); courts holding arson is not a form of vandalism – *Mutual Fire v. Ackerman*, 872 A.2d 110, 116 (Md. 2005).

(2) Unoccupied But Not Vacant

A dwelling may be "unoccupied" but not "vacant". Vacancy is a fact question. In *Andrews v. USAA*, 837 So.2d 1190, 1191 (Fl. 2003) it was determined that the lower court abused its discretion in directing a verdict on whether a dwelling was vacant where different conclusions could be drawn from the evidence. A determination of vacancy may not be avoided if the premises do not convey the appearance of residential living. The court in *Venneman v. Badger Mutual Ins. Co.*, 334 F.3d 772, 773(Minn. 2003) held that an insured's sporadic nighttime visits and remodeling projects did not qualify the property for the "being constructed" exception to the vacancy exclusion under the homeowners policy in question; *also see Rojas v. Scottsdale Ins. Co.*, 678 N.W.2d 527, 529 (Ne. 2004) and in *Barlow v. Allstate Texas Lloyd*, 214 Fed. Appx. 435, 436 (Tex. 2007) the court found that a fire loss not was covered in a case where the insured had moved out of residence and removed all furniture.

See Hungelmann, Insurance for Dummies (www.JackHungelmann.com) for good advice on how to avoid a "vacant" home. Hungelmann advises his readers that a home may be considered vacant unless it has kitchen appliances, a table and chairs, at least one bed on which to sleep, and somewhere to sit. He further advises his readers to furnish a home with rental furniture to avoid it being classified as vacant. Further mentions that the owner's real estate agent could "stage" the home with furnishings. Further advice from Hungelmann is for the home owner to reduce the risk of a major loss from break-ins, fires, smoke damage and water damage from frozen pipes in an unoccupied home by installing a central alarm monitored for burglar and fire/smoke and to add an optional temperature sensor to protect the pipes from freezing. Depending on policy terms, a dwelling may not be vacant, if it is occupied by a caretaker or a month-to-month tenant.

c. Insurers

Most insurers will not continue to insure a vacant home. There are a very limited number of insurers in the business of insuring vacant homes and the premium can be five times the premium for an occupied dwelling. If an insurer is willing to insure a vacant home, it may limit coverage to actual cash value as opposed to replacement cost.

C. Contractual Waivers Of Subrogation

1. Rationale

Many commercial property policies and inland marine policies include subrogation clauses that imply permission to grant pre-loss waiver. However, some forms may specifically deny the insured the right to waive subrogation. The ISO form expressly recognizes the right of the insured to waive subrogation. Since the landlord's primary interest is insuring the landlord's improvements, and the tenant's primary interest is in insuring the tenant's property, why make the other party liable for a risk that is already insured? Because both parties can be protected by insurance, neither is particularly interested in imposing liability on the other. The issue is how to allocate the risk of loss or, more precisely, which party should pay the property insurance premiums.

a. Avoids Double Coverage

To require each party to carry coverage for negligently causing damage to another party's property forces the landlord and the tenant to insure both the landlord's and the tenant's property, which results in each insuring its own and the other party's property. To avoid this need for double coverage each party can agree to look to its own insurance carrier for property loss caused by the acts or omissions of the other party and waive rights of recovery and subrogation against each other. If both landlord and tenant are to be liable for the risk of negligently caused loss to the property of the other, then the landlord and every tenant in a multi-tenant project must not only be sure to have a policy for its own property but must be sure that their liability insurance is sufficient to cover the replacement cost of the entire building and all of tenants' property therein. A more sensible approach is to have the landlord take out a casualty policy and have the premium costs paid by the tenants in the building under an operating cost pass-through provision in the lease.

b. Allocates Risk To Property Insurer

A waiver of subrogation clause assures that the insurance carrier for the property owner pays for the property loss as opposed to the other party's (the negligent landlord's or tenant's, as the case may be) liability insurance carrier. *See* Hagan, *Using Waivers and Indemnities in Commercial Leases,* THE PRACTICAL REAL ESTATE LAWYER 11 (1993), also repeated at ALI- ABA'S PRACTICE CHECKLIST MANUAL FOR DRAFTING LEASES: Checklists, Forms, and Drafting Advice from *The Practical Lawyer* and *The Practical Real Estate Lawyer* 149 (1994), for the rationale that the appropriate allocation of risk is to require each party to insure its own property and waive recovery, and waive subrogation against the other for damages to each other's property due to the negligence of either party.

c. Usually Inadequate Liability Insurance To Cover Risk

Why is this the best approach? This question incorrectly assumes that there is adequate liability insurance to cover the loss. Many times there will be no liability insurance because the party self insures. The more likely situation is that the liability insurance policy of the negligent party will have limits far short of the loss involved (for example, where a negligent employee of the tenant leaves the coffee pot on at night which results in a large office building burning down). In a large multi-tenant building, the loss could easily exceed the liability insurance coverage of a small tenant. Even if there is sufficient property loss coverage under the liability policy, there usually is a large deductible and dissipation of the time and energy in a contest between the insurance companies and the parties over the issue of who negligently caused the fire.

d. Risk Already Factored In To Property Insurance Premium.

Also, more importantly, is the fact that claims against property insurance are much less likely to result in higher premiums or loss of coverage than claims against the liability insurance. The property insurance carrier has more than likely already calculated its premium based on the assumption that it will not be able to recoup its costs via subrogation against a negligent tenant.

2. Scope Of Insurer's Claims Waived

Care should be taken in drafting the scope of the waiver of subrogation. A waiver of subrogation as to "the premises" does not include the tenant's furniture, equipment, machinery, goods or supplies which the tenant might bring on to the premises. *See International Medical Sales, Inc. v.* Prudential *Ins. Co. of America*, 690 S.W.2d 84 (Tex. Civ. App.-- Dallas 1985, *no writ*).

3. Waiver Limited To Insured Risks Or Claims Waived?

Should the waiver extend to specified risks or only to the extent of the proceeds actually recovered from the insurer? If the waiver is only as to the insurance proceeds, then the parties are exposed for the deductible or losses in excess of the other party's insurance coverage.

4. Verification Of Effect Of Waivers On Insurance Coverage And Cost Of Insurance Coverage.

Before the parties agree to waivers of recovery or subrogation, they should verify that their respective insurance policies will not be voided due to the waiver. Also, the parties should determine, in advance, if the waivers will impact the cost of coverage. Confirmation of endorsement reflecting contractual indemnity, waiver of subrogation and additional insured/loss payee should be verified as a condition of extending the waivers.

D. Builder's Risk Insurance

1. Standard Commercial Property Policy

Standard commercial property insurance policies usually will not cover loss associated with buildings under construction except for additions under construction, alterations and repairs to the building or structure. See definition of Covered Property at Paragraph A.1.a(5)(a) on page 1 of **App. Form B.4**, the standard Building and Commercial Property Coverage Form. Also, on to a limited extent will standard commercial property insurance cover buildings under construction on newly acquired premises through an extension of coverage. See Coverage Extension at Paragraph A.1.a(5)(a) on page 1 of **App. Form B.4**, the standard Building and Commercial Property Coverage Form.

2. No Standard Builder's Risk Policy

There is no standard builder's risk policy, like there is a commonly recognized standard ISO CGL policy. ISO has a builder's risk policy, but builder's risk policies are considered to be ***Inland Marine*** policies and there is a wide divergence in builder's risk coverages insurer to insurer. Inland marine policies are policies that are customized to the loss sought to be insured, and are designed to provide coverage for special exposures typically associated with the type property at which they are directed and the special valuation methods need to address the exposure. Construction is recognized as a special exposure. A commonly used inland marine policy for builder's risk coverage is the Commercial Inland Marine Conditions (Form CM 00 01 09 04).

3. Insureds

The owner and all contractors and major subcontractors should be named as named insureds under a builder's risk policy. *Employers' Fire Ins. Co. v. Behunin*, 275 F.Supp. 399 (Colo. 1967); *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32 (Tex. 1974); *LeMaster Steel Erectors, Inc. v. Reliance Ins. Co.*, 546 N.E.2d 313 (Ind. 1989); and *Tri-State Ins. Co. v. Commercial Group W., LLC*, 698 N.W.2d 483 (N.D. 2005).

Phrases like "***as their interests may appear***" should not be included either in contractual specifications, insurance certificates or the policy, as this qualification has been the source of subrogation claims by insurers against an insured under builder's risk policies in cases where there has not been an express waiver of subrogation. *Paul Tishman Co., Inc. v. Carney & Del Guidice, Inc.*, 320 N.Y.S.2d 396 (1971), aff'd 359 N.Y.S.2d 561 (N.Y. 1974); *Turner Constr. v. John B. Kelly Co.*, 442 F.Supp. 551 (Penn. 1976) subrogation against named insured subcontractor permitted even though policy contained a waiver of subrogation endorsement. *But see St. Paul Fire & Marine Ins. Co. v. F. D. Sprinkler, Inc.*, No. 119 021/06, N.Y. Sup. Ct. (Aug. 2009) where the court rejected the insurer's argument that ATIMA language limited the insurable interest of the sprinkler subcontractor to its work as opposed to the consequential damages to 21 floors of the building which arose out of an accidental discharge from a sprinkler head located in a temporary bathroom on the 21st floor.

4. Common Errors and Problems

a. Review of Policy Delayed Until After Construction Commencement

Like the other insurance products discussed in this article, the actual builder's risk insurance policy may not, and likely will not, be issued or available prior to commencement of construction! The actual policy in many cases is not issued and delivered for weeks or months after work has begun. As noted above in the discussion of the perils of reliance on an ACORD Certificate of Property Insurance, an ACORD Evidence of Insurance or even a ACORD Binder, the policy itself is the contract of insurance and contains extensive terms and conditions that should be reviewed and approved prior to commencement of work. A great level of "distress" can occur, if an assumed coverage in fact is not included in the policy, despite the best written insurance specifications, and a loss occurs before issuance of the policy. If construction will commence before issuance and delivery of the policy, one avenue may be to have the insurer deliver a specimen policy and specimen endorsements.

b. Coverage Amount

Failure of the policy amount to reflect the full loss exposure is a common error. The contractor's contract sum is a guide in setting the coverage amount. In projects involving remodeling (especially if the structure is a historic structure) or improvement to an existing building, limiting the coverage amount to the contractor's contract sum could lead to a significant uninsured loss.

c. Coverage for Architect's Fees, Owner Supplied Materials, Debris Removal, Full Limit Coverage of Flood and Earthquakes, and Elimination of Law and Ordinance Exclusions

Many commonly expected coverages are available only through policy endorsement and are not part of the issuer's standard policy form, such as coverage for the owner's additional architect's fees arising out of an insured loss; coverage for owner supplied materials; amending the law and ordinance exclusion to cover costs of demolition of the intact portion of a building when a law, ordinance or regulation requires that the entire structure be torn down; endorsement to include full collapse coverage, including collapse resulting from design error; and verification that sublimits (e.g., sublimits for flood and earthquake coverage) are adequate or eliminated.

d. Delay Damages

See Bruner and O'Connor on Construction Law (2010) §§ 11:116 Builder's risk soft cost coverage; Delayed completion and force majeure insurance.

(1) Soft Cost Endorsement

See the manuscripted **App. Form B.7** Additional Expense – Soft Cost Coverage Endorsement in the Appendix. Builder's risk policies typically do not cover damages caused by delays arising out of a covered loss. These "soft costs" can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes.

(2) Delayed Completion and Force Majeure Endorsement

Another endorsement that may be available to insure against a financial distress risk is a delayed completion and force majeure endorsement. This endorsement supplements the risk of covered loss to cover consequential damage losses due to completion delays and force majeure events not otherwise covered. This endorsement extends coverage for losses due to strikes and labor disputes, changes in law (e.g., building codes, emission standards), acts of God, adverse weather conditions and off-site physical damage to materials or equipment.

5. Waivers Of Recovery; Waivers Of Subrogation

a. AIA's Waiver Of Subrogation

Waivers of subrogation in the AIA system are designed to shift to the owner and its property insurance carrier the risk of loss to the project during construction. Such provisions are a valid risk allocation for the following reasons: (1) They avoid disruption and disputes between the parties involved in the construction project; (2) They allow the parties to identify and allocate the risks associated with the project; and (3) They allow one party to contract to provide the property insurance for all risks associated with the project for all parties. Under the AIA documents, the owner is responsible for obtaining the type and amounts of property coverage. The form of waiver of subrogation contained in the AIA documents is a "waiver of recovery" between the parties (*e.g.,* the owner and the contractor in Paragraph 11.3.7 to the AIA A201 General Conditions of the Contract for Construction), but also is a waiver of recovery by the parties against "any of their subcontractors, sub-subcontractors, agents and employees" and requires that these third parties similarly provide a waiver of recovery against all such parties to the project.

The waiver of subrogation contained in the AIA A201 waives recovery between the parties to the extent covered by property insurance applicable to the Work. This provision does not expressly address loss within the deductible, loss above the amount of property insurance or uninsured losses.

This provision does not waive claims or subrogation as to liabilities arising out of bodily or personal injuries.

Since releases are construed by courts narrowly, the AIA waiver of subrogation language has been interpreted narrowly. In *SSDW Co. v. Brisk Waterproofing Co.,* 556 N.E.2d 1097 (N.Y. 1990), a New York court held that the waiver clause found in the AIA Construction Projects of a Limited Scope form applied only to damages occurring to areas within the limits of the "***work***" and not to the parts of the building outside the "work". *Also see Public Employees Mutual Ins. Co. v. Sellen Constr. Co.,* 740 P.2d 913 (Wash. App. 1987).

The time period covered by the "waiver" has been the subject of litigation. In *Automobile Ins. Co. v. United H.R.B.,* 876 S.W.2d 791 (Mo. App. 1994) an insurer of the owner brought a subrogation action against a contractor for property damaged caused by a fire that occurred five months after final payment had been made to the contractor and after the owner had exclusive control of the premises. The court found an ambiguity between the AIA provisions. The contractor took the position that it had an insurable interest in the property as long as the owner maintained the insurance policy in effect at the time the work was being done. The court, however, held that the waiver of subrogation provision no longer applied after final payment because the contractor no longer had an insurable interest in "the work."

Provision: Par. 11.3.7 AIA Document A201

> The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub- subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein.

(1) Fails Fair Notice Test

The AIA Waiver of Subrogation provision is drafted as a waiver of recovery. However, this provision does **not** meet the fair notice requirements for releases articulated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) in order to release liabilities arising out of the Released Party's negligence. The provision is neither conspicuous nor does it expressly refer to the negligence of the party being released.

(2) Fails Express Negligence Test

The waiver should expressly cover loss due to the negligence of the other party. Although no Texas case has yet addressed whether the waiver of subrogation clause must meet the fair notice requirements, such clauses are exculpation clauses identical in effect as those held unenforceable for failing to meet the fair notice requirements, including the express negligence test, in *Dresser Industries, Inc. v. Page Petroleum, Inc.* 853 S.W.2d 505 (Tex. 1993). If so, then most waiver of subrogation clauses in standard use are not enforceable as written!

b. ISO Builder's Risk Form Prohibits Waiver of Subrogation

Builders risk insurance is written on a variety of forms. Therefore, it is important to determine whether the policy prohibits waiver of subrogation. The typical mutual waiver of subrogation in the owner - contractor construction contract form may invalidate the builder's risk coverage. The following is the **ISO Builders Risk Coverage Form CP 00 20 10 91** provision:

> 4. Waiver of Recovery Against Others
>
> You may not waive your rights to recover damages from an architect, engineer or building trades contractor or subcontractor with respect to the described premises except as agreed to in writing by us. This provision supersedes any provision to the contrary in the TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US Commercial Property Conditions.

See Comiskey, *Builder's Risk Requirements and Strategies*, State Bar of Texas, Construction Law Conference (2010).

E. Boiler and Machinery Coverage

Boiler and machinery coverage is added by endorsement or by a separate policy. Property insurance typically excludes damages due to explosion of pressure vessels and sudden and accidental, mechanical or electrical breakdown of machinery. Boiler and machinery coverage includes damages arising out of pressure vessels, hot water heaters, air conditioning and heating equipment, and electrical switchgear. If a separate policy is to be written to cover boiler and machinery caused damages then there needs to be added to both the primary policy and the boiler and machinery policy an ISO CP 12 72 Joint or Disputed Loss Agreement.

F. Flood Insurance

Flood losses are commonly excluded from property insurance policies. Flood losses are losses caused by rising waters, back up of storm sewers and storm surges. The Flood Disaster protection Act of 1973 mandated that federally regulated lending institutions could not "make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified ... as an area having special flood hazards and in which flood insurance has been made available under the national Flood Insurance Act of 1968 without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. 42 U.S.C.A. § 4012a(b(1). Regulations implementing the flood insurance program are found at 44 C.F.R. pts. 59-78 (2006). *See also* TEX. LOC. GOV'T CODE ANN. 240.901; TEX WATER CODE ANN. §§ 16.311-.324. Coverage can be obtained for these losses through flood insurance, a difference in conditions policy, or as an endorsement to a property policy.

G. Ordinance Or Law Coverage

Ordinance or law coverage may be purchased using ISO CP 04 05 to cover the cost above the limit available under the ISO property insurance for cost of construction incurred to comply with an ordinance or law. The base form ISO property insurance limits such coverage to the lesser of $10,000 or 5% of the policy limits.

H. Glass Insurance

Damage to plate glass caused by vandalism or settling of the building is commonly excluded in property policies. Coverage can be obtained through "plate glass insurance," issued by endorsement or as a separate policy.

I. Sign Insurance

Exterior signage is not covered under most property insurance policies and its coverage for damage to exterior signage must be added by endorsement or covered under a separate policy.

IV. BONDS

A. Coverage For Contractor's Failure To Provide Insurance

There is authority that the party to be protected, performance bond obligee, may recover from the performance bond surety if the contractor/bond obligor fails to provide contracted for insurance. In *Carroll-Boone Water Dist. V. M & P Equip. Co.*, 661 S.W.2d 345 (Ark. 1983) the Arkansas supreme court held that a performance bond covered damage to a project caused by a subcontractor that would have been covered by insurance specified to be carried by the contractor but which contractor failed to carry; also see *Hartford Fire Ins. Co. v. Reifolo Constr. Co.*, 410 A.2d 658 (N.J. 1980) court held that performance bond protected owner against fire loss which would have been covered by the builder's risk policy had contractor not breached its contract by allowing the policy to lapse; and *U.S. Fid. & Guaranty Co. v. Doheny*, 123 F.2d 746 (9th Cir. 1941) finding that performance bond covered loss which would have been covered had contractor provided auto liability insurance as was erroneously specified in the certificate of insurance.

B. Coverage Of Delay Damages

Subject to the terms of the construction contract, delay damages and other consequential damages arising out of a contractor's default may be included within the scope of the surety's obligations under the standard performance bond. AIA Document A201-General Conditions of Contract § 15.1.6 provides that the Owner waives claims against the Contractor for consequential damages as follows:

> § 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES
>
> The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes
>
> .1 damages incurred by the Owner for rental expenses, for loss of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
> .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.
>
> This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

The AIA Performance Bond form addressed in the next footnote still reflects the pre-1997/2007 revisions to the A201 General Conditions. The AIA 312-1984 reflects the pre-1997 language of the A201 which did not include a mutual waiver of consequential damages. ConsensusDOCS Document 200 at ¶ 6.3 excludes from the effect of the mutual waiver of consequential damages, both liquidated damages (as does the AIA A201) and insurance (which is not excluded in the A201). ConsensusDOCS 200 provides:

> The Owner and the Contractor agree to waive all claims against each other for any consequential damages that may arise out of or related to this Agreement. The Owner agrees to waive damages including but not limited to the Owner's loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, or loss of reputation. The Contractor agrees to waive damages including but not limited to loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity or loss of reputation.

AIA Document A312-1984 Performance Bond expressly allows recover of delay damages attributable to the contractor's default or the surety's delayed completion under a takeover agreement. A312 provides:

> 6. … To the limit of the amount of this Bond, but subject to commitment by the Owner of the Balance of the Contract Price to mitigation of costs and damages on the Construction Contract, the Surety is obligated without duplication for:
>
> 6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
> 6.2 Additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Paragraph 4; and
> 6.3 Liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.

See Langley and Houston, *Liability of the Performance Bond Surety for Damages (Under Contract of Suretyship)*, THE LAW OF PERFORMANCE BONDS 431 (2d. 2009); Sheak, *Liquidated Damages and the Surety: Are They Defensible?*, 9 CONSTR. LAW 19 (Ap. 1989); Douglas, McCarthy and Nelson, *Delay Claims Against the Surety*, 17 CONSTR. LAW 4 (July 1997).

Finding Coverage. *Prudence Co. v. Fidelity & Deposit Co. of Maryland,* 297 U.S. 198, 56 S. Ct. 387, 80 L. Ed. 581 (1936), amended on other grounds, 298 U.S. 642, 56 S. Ct. 935, 80 L. Ed. 1374 (1936) surety liable to dual obligee for delay damages; *Mason v. City of* Albertville, 158 So.2d 924 (Ala. 1963) liquidated damages; *Amerson v. Christman,* 68 Cal. Rptr. 378 (3d Dist. 1968); *Cates Construction, Inc. v. Talbot Partners,* 980 P.2d 407, 413-15 (Ca. 1995) lost equity delay damages; *New Amsterdam Cas. v. Mitchell*, 325 F.2d 474 (5th Cir. – Ga. 1963) lost rents and additional interest; *U S. for Use and Benefit of D & P Corp. v. Transamerica Ins. Co.*, 881 F. Supp 1505 (D. Kan. 1995); *Phoenix Assurance Co. of N.Y. v. Appleton* City, 296 F2d 787 (8th Cir. 1961) interest on bonds – bond provided: "In event that the contractor shall not complete work on this project in the specified time there shall be deducted from the total payment an amount equal to the interest on all bonds issued for this project, for the time required to complete over the specified time".; *Miracle Mile Shopping Ctr. v. National Union Indem.* 299 F.2d 780, 783 (7th Cir. – Indiana 1962) value of lost use; *Hemenway Co. v. Bartex, Inc. of Tex.*, 373 So.2d 1356 (La. App. 1979) lost rent and loss of use; *General Ins. Co. of Am. v. Hercules Constr.*, 385 F.2d 13 (8th Cir.-Mo. 1967) delay damages-extra erection labor and equipment costs, premium time, and extra costs for keeping project open *Siemens Westinghouse Power Corp. v. Dick Corp.*, 293 F. Supp.2d 336 (S.D. N.Y. 2003), judgment entered, 220 F.R.D. 232 (S.D. N.Y. 2004) holding a performance bond surety liable for $6 million in liquidated damages owed by its principal); *Southern Roofing & Petroleum v. Aetna Ins.*, 293 F. Supp. 725, 731-32 (E. D. Tenn. 1968) liquidated damages; *Smart v. U. S. Fid. & Guar.*, 513 S.W.2d 291, 296 (Tex. App. 1974) lost profits; *Continental Realty v. Andrew J. Crevolin Co.*, 380 F. Supp. 246, 251 (S. D. W.Va. 1974) lost profits and loan interest.

Finding No Coverage. *American Home Assur. Co. v. Larkin General Hosp., Ltd.*, 593 So.2d 195 (Fla. 1992) no delay damages under AIA A-311; *Mycon Const. Corp. v. Board of Regents of* State, 755 So.2d 154 (Fla. Dist. Ct. App. 4th Dist. 2000) "Because the performance bond contains no provision for damages for delay, the surety cannot be held liable for such damages… . [The delay] was not related to any breach of duty by the surety. Any delay in payment by the surety is covered by interest".; *Downingtown Area School Dist. V. International Fidelity Ins. Co.* 769 A.2d 560 (Pa. Commw. Ct. 2001) no delay damages; *Marshall Contractors v. Peerless Ins.*, 827 F. Supp. 91, 94-96 (D.R.I. 1993) no exposure for consequential damages.

Finding No Coverage or Reduced Coverage Based on Terms of Bonded Contract. *McNally Wellman Co., a Div. of Boliden Allis, Inc. v. New York State Elec. & Gas Corp.*, 63 F.3d 1188 (2nd Cir. 1995) based on clause protecting contractor from liability for "special, incidental or consequential damages"; *U.S. Fidelity and Guar. Co. v. West Rock Dev. Corp.*, 50 F. Supp.2d 127 (D. Conn. 1999) construction contract's liquidated damage provision capped surety's delay damage liability.

V. MORTGAGES AND SECURITY INTERESTS

One of the primary concerns of the lender is the right to claim insurance proceeds arising from destruction of the mortgaged property. Joshua Stein, *What a Mortgage Lender Needs to Know About Property Insurance: The Basics*, The Real Estate Finance Journal Winter 2001; and *Benchmark Insurance Requirements for Commercial Real Estate Loans and Why They Say What They Say*, The Real Estate Finance Journal Winter 2004, each found at www.joshuastein.com. If the mortgagee does not carry its own insurance, but requires the mortgagor to carry insurance for the benefit of both parties, the mortgagee must also verify that its interests are properly reflected in the policy. There are more than one form of endorsement for this purpose and they provide widely different protection.

A. Mortgagee's Rights to Insurance Proceeds

See 13 WILLISTON ON CONTRACTS § 37:51 Mortgagee's Rights under Fire Insurance Policy (4th ed. 2010).Both the mortgagor and mortgagee have insurable interests in mortgaged property. Either mortgagor or mortgagee can purchase a property insurance policy on the mortgaged property. A mortgagor may insure the mortgaged property in an amount equal to the property's value. The two most common approaches are replacement cost and actual cash value. Under a replacement cost policy, the insured may recover the cost to repair or replace damaged property without deduction for depreciation. Coverage written on actual cash value is subject to deduction to reflect physical depreciation from the replacement cost. Both approaches are based on the cost to replace the property at the time of the loss. Neither original purchase price nor market value enters into the calculation. The amount of the mortgage is irrelevant. Most property policies include a coinsurance clause that penalizes the insured for failing to insure the property the required amount (e.g., 80% of replacement cost) by deducting a proportionate amount from loss recoveries.

A mortgagee does not have an insurable interest in the property in excess of its secured debt. *See Sportsmen's Park v. N. Y. Prop. Underwriting Ass'n,* 470 N.Y.S.2d 456, 459 (N.Y. 1983):

> The extent of a mortgagee's interest is determined, in the first instance, by the total amount of its lien, including the outstanding principal amount of the debt plus interest, plus any amounts expended to protect its security (*i.e.*, taxes, insurance premiums, etc.), all as of the date of the fire [citations omitted].

Absent a contractual undertaking to insure the mortgaged property and to insure the interest of the mortgagee, the mortgagor does not have an obligation to do so. However, it is customary in commercial financing to require the mortgagor to carry insurance for the joint interest of both mortgagor and mortgagee.

B. Different Forms of Mortgagee Interest Endorsements

At least three types of mortgagee clauses cover the mortgagee's interest under a hazard insurance policy and the policy's proceeds: the open mortgage clause, the standard mortgage clause, and the assignment of the mortgagor's interest clause.

1. Simple Loss Payee/Open Mortgage Clause

Courts have held that a clause that simply provides that insurance proceeds will be payable to a mortgagee "as its interest may appear" links the mortgagee's recovery to the right of the mortgagor to recover and exposes the mortgagee to risks that the insurer will be afforded a defense to payment to the mortgagee based upon inequitable conduct of the mortgagor. An "open" mortgage clause provides that any loss is payable to the lender "as its interest may appear". This type clause exposes the lender to all the defenses and limitations that the insurer has against the insured mortgagor, such as failure to pay the premium or perform a condition for coverage under the policy. See cases and discussion at 48 A.L.R. 121 (1927) and 38 A.L.R. 367 (1925) and Lee R. Russ and Thomas F. Segalla, Couch on Insurance 3d § 65:8 (2010). Examples of the effect of such a clause are *Commerce Bank & Trust Co. v. Centennial Ins. Co.*, 446 N.E.2d 73 (Mass. 1983) and *Pioneer Food Stores Coop., Inc. v. Fed. Ins. Co.*, 563 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991). In *Commerce Bank* the mortgagee claimed that it should receive the insurance proceeds regardless of whether the loss was caused by a fire set by the mortgagor. While the court did not determine the question of arson, it held that because the mortgagee was essentially merely a loss payee, it could recover only if the mortgagor would have been entitled to recover. *Pioneer* also involved suspected arson by the mortgagor; because the mortgagor would not provide financial information or submit sworn affidavits regarding the loss, the mortgagee was denied recovery. Not all borrowers facing financial difficulty consider insurance fraud as the way out of their problems, but the mortgagee of one who has taken this path

will be unprotected if it is simply named as loss payee or is covered under an "open mortgage clause" type of endorsement.

2. Standard Mortgage Clause

See 4 COUCH ON INSURANCE 3d § 65:48 "Standard" or "Union" Mortgage Clause – General Rule That Mortgagee Unaffected (2010). Also, see the **Appendix** for the standard commercial property policy, **App. Form B.4 ISO CP 00 10 06 07 Building and Personal Property Coverage Form**, at Paragraph F, Additional Conditions, Paragraph 2 Mortgageholders on pages 13 and 14 of the policy for the inclusion within the standard policy of the standard mortgage clause protections for the mortgagee.

Standard commercial property policies (e.g., ISO's CP 00 10) automatically extend coverage to the mortgagee as an insured through the inclusion of the ***standard mortgage clause***. Other property insurance forms that do not include a mortgage clause must be endorsed to provide coverage equivalent to that contained in CP 00 10. The standard mortgage clause was developed to protect recovery by the mortgagee even though the insurance contract between the mortgagor and the mortgagee might be voided by the insurance company because of certain omissions or acts by the mortgagor (for example, neglect, arson, concealment). Attached in the Appendix is the standard mortgage clause found in **App. Form B.4 ISO CP 00 10 Commercial Property Policy**. The most significant protections afforded by the standard mortgage clause are the following:

(1) insurance proceeds are paid to the mortgagee, not to the insured or to the mortgage and the insured jointly;

(2) coverage applies for the benefit of the named mortgagee even if coverage is denied the insured because of some violation by the insured of the policy's conditions;

(3) the mortgagee is to be given notice of policy cancellation by the insurer – 10 days' notice of cancellation for nonpayment of premium and 30 days' notice when cancellation is for other reasons; and

(4) the mortgagee is to be given 10 days' notice on nonrenewal.

Numerous cases exist upholding the standard mortgage clauses requirement that notice must be given. *E.g., Firstbank Shinnston v. West Virginia Ins. Co.*, 408 S.E.2d 777 (W. Va. 1991) held that a fire insurance company could not remove the lender under a deed of trust from the owner's insurance policy without giving notice to the lender of the cancellation. In that case, a homeowner had agreed through a standard mortgage clause to maintain fire insurance on his home, which was subject to a deed of trust securing a loan from Firstbank Shinnston. After two items of correspondence sent to the bank were returned undelivered to the insurance company, the insurance company unilaterally deleted the bank as an additional insured under the policy. The house burned, and the homeowner collected $18,000 from the insurance company but did not rebuild. As a result, the insurance company canceled the policy. The homeowner also defaulted on his loan. Firstbank Shinnston sought to collect the insurance proceeds from the fire, and the insurance company refused coverage. This court held on those facts that cancellation of the policy was not effective as to Firstbank Shinnston, because the insurance company failed to notify the bank that its interest as mortgagee was being canceled.

Courts hold that a standard mortgage clause grants independent rights to the mortgagee from the insurer that can be enforced regardless of the actions of the mortgagor. A standard mortgage clause, like the open mortgage clause, provides that the loss will be payable to the mortgagee "as its interest may appear", but it goes further to provide that the insurance, as to the mortgagee, will not be invalidated by acts of the insured. Lee R. Russ and Thomas F. Segalla, Couch on Insurance § 65:9 (3d ed. 1997). Examples of cases that provided payments to the mortgagee under such clauses are *Nat. Comm. Bank & Trust Co. v. Jamestown Mut. Ins. Co.*, 334 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1972) and *Foremost Ins. Co. v Allstate Ins. Co.,* 460 N.W. 2d 242 (1990). In the *National Commercial Bank* case the insurer claimed that material misrepresentations of the insured voided the policy. However, the court found that the standard mortgage clause created a separate contract between insurer and mortgagee that was not affected by the actions of the insured. *Foremost* involved yet another case of arson by the insured, but because the policy named the mortgagee under the standard or union clause, it was entitled to recover despite the actions of the insured. *See*, John W. Steinmetz and Stephen E. Goldman, *The Standard Mortgage Clause in Property Insurance Policies*, 33 Tort & Ins. L. J. 81 (1997).

3. Nature of Mortgagee's Interest – Ownership Interest In Proceeds vs. Security Interest

See 44A Am. Jur.2d Insurance § 1704 Creditors; Lienholders—As Loss Payee on Property Insurance (2010).

A mortgagee clause gives the mortgagee a direct contractual right with the insurer to be paid the policy's proceeds up to the balance owing on the secured debt, but subject to the limitations discussed at Section C.1 below. In the context of a mortgagor's bankruptcy proceeding, the property policy's proceeds up to the mortgagee's insurable interest are not property of the bankrupt. *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d 949, 951 (5th Cir. 1978) the court states

> Because the mortgagee has a contractual right to money payable under the loss payable clause, the mortgagor has no right to that money. Thus the money or right to receive the money is not property or a right to property belonging to the mortgagor.

The UCC recognizes that a mortgagee loss payee's interest in mortgaged property policy proceeds takes precedence over claims of a holder of a perfected security interest in collateral that has been damaged or destroyed. *Judah AMC & Jeep, Inc. v. Old Republic Ins. Co.,* 293 N.W.2d 212 (Io. 1980); *United Companies Life Ins. Co. v. State Farm & Fire Cas. Co.,* 477 S.2d 645 (Fla. App. 1 Dist. 1985); 9 Anderson, Uniform Commercial Code, § 9-306:15 (3rd ed. 1985). At least one state, California, requires the mortgagee to give written notice to the insurer to perfect the mortgagee's security interest in insurance proceeds. Ca. Comm. Code §9312(b)(4).

4. Equitable Lien On Insurance Proceeds

If a mortgagor is charged with the duty of obtaining insurance on the mortgaged property with loss proceeds payable to the mortgagee but the policy does not contain such a loss payable provision, courts in equity in many jurisdictions will treat the policy as having contained the loss-payable provision and entitle the mortgagee to recover under the policy. *State Farm Fire & Casualty Co. v. Leasing Enterprises*, 716 S.W.2d 553, 554 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Wade v. Seeburg*, 688 S.W.2d 638, 639 (Tex. App.—Texarkana 1985, no writ); *see also Beneficial Standard Life Insurance Co. v. Trinity National Bank*, 763 S.W.2d 52, 54-55 (Tex. App.—Dallas 1988, writ denied). In *U.S. Bank N.A. v. Safeguard Ins. Co.*, 422 F. Supp.2d 698 (N. D. Tex. 2006), the court held that although the mortgagee was not listed on the mortgagor's property policy as an additional insured, the mortgagee was entitled to the insurance proceeds under the equitable lien doctrine because the mortgage required the mortgagor to cause the insurance company to list the mortgagee as an additional insured. The court also held that the mortgagee's right to the proceeds could not be defeated by its subsequent foreclosure on three of the four apartment projects insured under the policy, including the two projects that sustained insured damage, as a deficiency still existed, even though the deed of trust expressly provided that the mortgage lien continued as a lien on the balance of the mortgaged property.

C. Personal Property

A person with an insurable interest in personal property may be designated as a ***loss payee*** under the property insurance covering the personal property. Two forms of loss payee clauses are a ***loss payable clause*** and a ***lenders loss payable clause***. In the **Appendix** is the ISO CP 12 18 06 07 Loss Payable Provisions endorsement. This endorsement provides a schedule to designate the loss payee, the property in which the loss payee has an insurable interest, and which type of loss payable clause applies. The difference between the protection afforded under lenders loss payable clause as compared to a loss payable clause is analogous to the difference between the protection afforded under to a mortgagee by the standard mortgage clause as compared to an open mortgage clause.

1. Loss Payable Clause

See **¶ C Loss Payable Clause** in **App. Form B.5 ISO CP 12 18 06 07 Loss Payable Provisions** endorsement found in the **Appendix**. Under the standard loss payable clause losses are adjusted with the insured and policy proceeds are payable jointly to the insured and the loss payee. Under the standard loss payable clause the loss payee does not have any further rights or responsibilities. The loss payee has no more right to recover under the policy than does the insured and the loss payee's recovery may be lost due to the acts of the insured. In *Wometco Home Theatre, Inc. v. Lumbermen's Mut. Cas. Co.*, 468 N.Y.S.2d 625 (N.Y. App. Div. 1983) the court construed the rights of a loss payee under the following standard

policy language, "Loss if any, shall be adjusted with the insured and shall be payable to the insured and Wometco Home Theatre … as their interest may appear". The court held that the insured's failure to comply with the policy's condition that suit be filed against the insurer within 12 months of the discovery of the covered occurrence barred both the insured's and the loss payee's right to recovery. The court stated,

> In the absence of a provision that the insurance policy shall not be invalidated by an act or neglect of the insured … a "los payee" is not itself an insured under the policy; it is merely the designated person to whom the loss is to be paid. It is established that such a loss payee may only recover if the insured could have recovered.

2. Lenders Loss Payable Clause

See **¶ D Lender's Loss Payable Clause** in **App. Form B.5 ISO CP 12 18 06 07 Loss Payable Provisions** endorsement found in the **Appendix**. A secured party that is designated on the insured's personal property policy as a loss payee under a *lenders loss payable clause* has the same rights and responsibilities that a mortgage holder has under the standard mortgage clause. While the mortgage clause is automatically a part of a standard property policy as to mortgaged real property, a personal property secured party must request that it be designated as a loss payee with a lenders loss payable clause endorsement.

VI. INSURANCE PROVISIONS

A. Certificates Of Insurance

1. Certificates Of Insurance Are Not Insurance

See Additional Insured Book, Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance, pp. 345 (International Risk Management Institute, Inc. www.IRMI.com 5th ed. 2004); Contractual Risk Transfer (International Risk Management Institute, Inc. 2010) §15A-D Insurance Certificates; and 2 Insurance Claims and Disputes (5th ed. 2010) § 6:37A. Certificates of Insurance.

a. Not Reasonable To Rely On An ACORD Certificate Or Evidence of Insurance

(1) Disclaimers

An ACORD Certificate of Insurance and ACORD Evidence of Insurance should not be relied on as being accurate or as properly defining coverages, exclusions, and deductibles. W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* Probate & Property 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, Probate & Property 54 (Jan./Feb. 1995).

Sample of Cases Finding Reliance Unreasonable. Alabama. *Alabama Elec. Co-Op Bailey*, 950 So.2d 280, 284 (Al. 2006). Connecticut. *Prudential Property and Casualty Ins. Co. v. Anderson*, 922 A.2d 236 (Conn. 2007). Zurich's agent issued a certificate of insurance on behalf of its insured contractor to a homeowner listing the homeowner as an additional insured on the contractor's CGL policy, but the policy was cancelled for nonpayment of premium before issuance of the certificate and thus no insurance in fact existed either on date of the certificate's issuance or on date of loss, which occurred the next day after issuance of the certificate. Holding for Zurich based on the ACORD-disclaimers, the court stated

> Troublesome as it may be that Zurich permits its agents to issue certificates when it knows prior to the certificate's being issued that coverage was cancelled and lacks an identifiable procedure for notifying certificate holders that coverage has been cancelled, the allegations in plaintiff's complaint do not state a cause of action against Zurich.

Illinois. *National Union Fire Ins. Co. v. Glenview Park Dist.*, 594 N.E.2d 1300 (1st Dist. 1992) and judgment aff'd in part, rev'd in part, 632 N.E.2d 1039 (1994) court held the fact that certificate of liability insurance did not contain notation that the additional insured endorsement did not cover the additional insured's negligence did not obligate the insurer to cover the additional insured's negligence; the certificate was issued "for information only"; *Lezak & Levy Wholesale Meats v. Illinois Employers Ins. Co.*, 460 N.E.2d 475 (Ill. 1984) the certificate's disclaimer notice protected the insurer from claims by a meat

packing company falling within the exclusion in the cold storage company's liability policy for loss caused by failure of refrigeration equipment. New Hampshire. *Bradley Real Estate Trust v. Plummer & Rowe Ins. Agency*, 609 A.2d 1233, 1235 (N.H. 1992) court found that a certificate of insurance did not create a duty to inform an additional insured of cancellation of coverage. The court stated

> In effect, the certificate is a worthless document; it does not more than certify that insurance existed on the day the certificate was issued. We leave it to the legislature or to future bargaining of parties to rectify inequities in the notification process.

New York. In *Greater NY Mut. Ins. Co. v. White Kansas*, 776 N.Y.S.2d 257, 258 (N.Y. 2004) the court held that a broker was under no duty to an owner and contractor to provide them with additional insured coverage as was stated in the certificates of insurance, as disclaimers in the certificate made it unreasonable to rely on the certificate. Washington. *Postlewait Construction, Inc. v. Great American Ins. Co.*, 106 Wash.2d 96, 720 P.2d 805 (1986) finding that an erroneous certificate of insurance listing lessor and certificate holder as an insured did not create a cause of action by lessor against insurer for breach of an insurance contract.

The ACORD 24, 25, 27 and 28 contain the following disclaimer negating reliance. The first disclaimer, which is in all caps and bold print, appears at the top of the form and reads:

> **THIS CERTIFICATE [*EVIDENCE OF PROPERTY INSURANCE / EVIDENCE OF COMMERCIAL PROPERTY INSURANCE*] IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER [*ADDITIONAL INTEREST NAMED BELOW*]. THIS *CERTIFICATE* [*EVIDENCE OF INSURANCE*] DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THE CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER [*ADDITIONAL INTEREST*].**

An additional disclaimer appears in each of the ACORD forms following the Coverages heading and immediately before the specification of the coverages of the described insurance. This disclaimer is in all caps but is not in bold print. It reads:

> [*THIS IS TO CERTIFY THAT*] THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

The September, 2009 revision to the ACORD Certificate of Liability Insurance also moved from the back of the certificate to a new disclosure box on the front of the certificate immediately following the first disclosure box the following notice:

> **IMPORTANT: If the certificate holder is an additional insured, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s). If subrogation is waived, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

In *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002), *aff'g* 184 F.Supp.2d 591 (S.D. Tex. 2001), the client (Safety Lights) of a delivery service (U. S. Delivery) and the client's insurer (TIG) sued an insurance broker (Sedgwick James of Washington), alleging that the broker had misrepresented on an insurance certificate that Safety Lights was an additional insured on U.S. Delivery's liability insurance policy issued by Lumbermens Mutual Casualty Co. The suit arose after Wright, an independent contractor hired by U. S. Delivery, was injured delivering a steel plate to Safety Light's facility. TIG, Safety Light's liability insurer, defended the claim by Wright and sought reimbursement for

the settlement and the costs of defending the suit after Lumbermens denied that Safety Lights was an additional insured on its liability policy. The certificate of insurance certified that Safety Lights was an additional insured on the Lumbermens CGL policy. The Fifth Circuit found that Sedgwick did not have authority, either actual or apparent, to make Safety Lights an additional insured on Lumbermens CGL policy. The court found that the disclaimer on the certificate of insurance (the first ACORD disclaimer discussed above) effectively negated reliance by Safety Lights on the express statement of additional insured coverage in the certificate of insurance, absent the existence of proof of Sedgwick's apparent authority to alter the terms of Lumbermens CGL policy to add Safety Lights as an additional insured. The district court held as a matter of law that Safety Lights could not have reasonably relied on the insurance certificate. The court made the following statements:

> An insured has a duty to read the insurance policy and is charged with knowledge of its provisions…. The Court concludes that (the party to be protected), claiming to be an additional "insured" under (the policy) should be held to the same obligation as a named insured to review a policy of insurance on which it seeks to rely, and its reliance solely on the agent's certificate of insurance is not reasonable under the circumstances presented by the admissible evidence. …. [T]here is no admissible evidence to suggest that (the party to be protected), had it made the request, would have been unable to obtain and read the insurance policy in issue…. Moreover, (the party to be protected), the holder of a certificate of insurance, was warned it was not entitled to rely on the certificate itself for coverage. The certificate stated to the holder that the certificate did not create coverage…. The certificate issued by (the insurance broker) prominently stated that it was "issued as a matter of information only" and did not "amend, extend or alter" coverage provided by the listed policies. Had Plaintiffs taken the reasonable step of obtaining a copy of (the policy) … Plaintiffs would have learned that there was no additional insured coverage in the policy at all. Thus, the Court finds that the Plaintiff's reliance upon (the insurance broker's) representation of (the party to be protected's) additional insured status was not reasonable. Accordingly, as a matter of law, Plaintiffs' claims for negligent and fraudulent misrepresentation fail.

184 F.Supp.2d at 603-04 (footnotes omitted).

(2) Signed By An "Authorized Representative"?

ACORD Certificates or Evidences of Insurance are issued by a "***Producer***" and are signed by an "***Authorized Representative***". Neither of these terms are defined on the face of the standard ACORD form. Except for the multiple disclaimers of authority and accuracy, the ACORD Certificate of Insurance and the Evidence of Insurance are silent on the authority of the Authorized Representative to bind the listed Insurers. The ACORD Certificate of Insurance and Evidence of Insurance do not identify whether the Producer is the agent for the Insured, the agent for the Insurer, or a dual agent for both the Insured and the Insurer.

Some courts in determining whether an ACORD form may be relied on despite the disclaimers have drawn a distinction on whether the Authorized Representative is a "broker"; a "soliciting agent"; a "recording agent"; a "dual agent"; a "special agent"; or an "insurer's agent". Other courts have held that the insurer is estopped from denying the coverage stated in the certificate or evidence of insurance, if the insurer or a person with apparent authority from the issuer issued the certificate, especially if the certificate does not contain ACORD-type disclaimers.

See discussion at 43 Am. Jur.2d (2 ed. 2010) Insurance §§ 128 Brokers – Generally; 129 Brokers – Status While and After Procuring Policy. 4 Bruner and O'Connor on Construction Law (2010) §11:171Certificates of Insurance – Generally; Couch on Insurance (3 ed. 2010) §§ 27:20 Act of Soliciting Agent – Insufficient to Justify Reformation; 45:1 Brokers Versus Agents; Definitions and Distinctions; 48:61 Soliciting and Collecting Agents; 48:62 Recording Agents; 27 Tex. Prac., Consumer Rights and Remedies § 5.5 Insurance Agents (3d ed. 2009); and Tex. Prac. Guide, Insurance Litigation § 6:4 Insurer's Vicarious Liability for Agent's Conduct – Agency – "Who are "Agents"/ What Constitutes "Acting as Agent"?; § 6:10 Insurer's Vicarious Liability for Agent's Conduct – Authority of Agent – Historical Distinction Between "Recording" and "Soliciting" Agents (2009).

Certificate Issued by "Soliciting Agent". In *TIG Ins. Co v. Sedgwick James of Washington,* 276 F.3d 754 (5th Cir. 2002) the Fifth Circuit agreed with the district court's determination that the issuing agent (Sedgwick) was a "soliciting agent" as opposed to a "recording agent", and thus did not have actual authority to amend the policy to add Safety Lights as an additional insured. The court noted that the agency agreement between Sedgwick and Lumbermens authorized Sedgwick to solicit insurance on behalf of Lumbermens but permitted Sedgwick to bind Lumbermens only "to the extent specific authority (was) granted in the schedule(s) attached". Sedgwick had the authority to issue certificates of insurance and binders but lacked the authority to modify the policy itself. Also see for example, *Benjamin Shapiro Realty Co., LLC v. Kemper Nat'l Ins. Cos.*, 303 A.D.2d 245 (N.Y. – 1st Dept. 2003) where the court held that a tenant's insurance broker, which issued certificate of insurance to a landlord which erroneously stated that the tenant's insurance policy, naming landlord as an additional insured, contained rental coverage insurance for landlord's benefit, had no liability to landlord on ground that the broker and the landlord had no contractual relationship, privity, requisite to the imposition of liability for negligent misrepresentation.

Certificate Issued by "Recording Agent". The court in *United States Fidelity and Guaranty Co. v. Travis Eckert Agency, Inc.*, 824 S.W.2d 628 (Tex. App. – Austin 1991, writ denied) held that USF&G was bound by an additional insured endorsement issued by its recording agent even though the endorsement form was not an authorized form.

Certificate Issued by Insurer. Another court, *Horn v. Transcon Lines, Inc.*, 7 F.3d 1305 (7th Cir. 1993), faced with an insurer-issued certificate certifying to a certificate holder that the insured had business auto liability insurance, held that the certificate bound the insurer to cover an injury that occurred before the policy was issued, where the list of covered trucking companies did not include the certificate holder. The court concluded that as of the date of the accident, the certificate was the policy and the insurer could not rely on the policy's disclaimer that "the insurance afforded by the listed policy(ies) is subject to all their terms, exclusions, conditions" as there was no policy at the time of the certificate's issuance.

(3) Errors Are Common In Certificates And Evidences Of Insurance

An amazingly common problem in the insurance industry is the issuance by the Producer of a certificate of insurance certifying to a party to be protected that it is an additional insured on the protecting-party's insurance, but then its failure to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company refuses to provide coverage. As observed by one commentator:

> Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This practice may not provide additional insured status and, thus is sometimes called the "fictitious insured syndrome." Sometimes this problem stems from a lack of communication. The insurance agent, for example may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the additional insured later seeks protection, the insurer denies such protection, shifting the blame elsewhere.

The ADDITIONAL INSURED BOOK 5th Ed., Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance pp. 349-50 (International Risk Management Institute, Inc. www.IRMI.com 2004). As another commentator notes,

> Although a broker for the subcontractor (policyholder) may have prepared the certificate of insurance, in many cases he or she did not follow through and actually obtain the necessary endorsement…. As a result, although a developer may hold a certificate that states it is named as an additional insured on the subcontractor's policy of insurance, the subcontractor's carrier will deny the tender of defense and contend that the agent did not have express authority to bind the carrier.

Richard H. Gluckman, *et al*, *Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation*, 21 CONSTRUCTION LAWYER 30, 33-34 (Winter 2001).

The commentator in COUCH ON INSURANCE offers the following advice:

> Where an entity requires another to procure insurance naming it an additional insured, that party should not rely on a mere certificate of insurance, but should insist on a copy of the policy. A certificate of insurance is not part of the policy - if it states that there is coverage but the policy does not, the policy controls.

Lee R. Russ and Thomas F. Segalla, Couch on Insurance § 242:33 (3d ed. 1997).

Failure timely to discover the error in the certificate or evidence of insurance can bar a breach of contract action against the insured. In *Via Net v. TIG Ins. Co.,* 211 S.W.3d 310 (Tex. 2006), the follow up breach of contract state court action for failure to provide additional insured protection to the holding in *TIG Ins. Co v. Sedgwick James of Washington,* 276 F.3d 754 (5th Cir. 2002), the Texas Supreme Court held that the discovery rule did not apply to defer accrual of the 4 year statute of limitations. Safety Lights and TIG, under their subrogation rights, filed suit against Via Net and its parent, U. S. Delivery, within 4 years after they had been notified by Lumbermens that Safety Lights was not an additional insured on Lumbermens CGL policy. This was however more than 4 years after the issuance of the certificate of insurance. The court of appeals had held that Safety Lights could not have discovered the breach of contract by Via Net until the denial of coverage by Lumbermens and thus the discovery rule postponed accrual of the 4 year statute of limitations applicable to breaches of contract. The Texas Supreme Court disagreed and held:

> Contracting parties are generally not fiduciaries. (citation omitted). Thus, due diligence requires that each protect its own interests. (citation omitted).… Due diligence may include asking a contract partner for information needed to verify contractual performance. (citation omitted). If a contracting party responds to such a request with false information, accrual may be delayed for fraudulent concealment. (citation omitted). But failing to even ask for such information is not due diligence. (citation omitted). Safety Lights argues that it acted diligently by obtaining a certificate of insurance listing it as an additional insured. But the certificate warned that it conferred no rights and was limited by the underlying policy. Safety Lights argues, with some force, that there is little use for certificates of insurance if contracting parties must verify them by reviewing the full policy. But the purpose of such certificates is more general, "acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers". Black's Law Dictionary 240 (8th ed. 2004). Given the numerous limitations and exclusions that often encumber such policies, those who take such certificates at face value do so at their own risk. Moreover, in this case Safety Lights learned of the breach within a few months after it occurred. While the facts of this specific case do not govern the categorical inquiry, they are not atypical. Additional-insured status under a general liability policy generally provides coverage for personal injury and property damage claims, most of which must be brought within two years of injury. (citation omitted). Accordingly, unless no claims are filed for a long time, breach will generally be discovered within four years…. Some contract breaches may be inherently undiscoverable and objectively verifiable. But those cases should be rare, as diligent contract parties should generally discover any breach during the relatively long four-year limitations period provided for such claims.

(4) Certificates And Binders Are Sometimes Issued Prior To Policy Issuance

A certificate of insurance is only evidence of insurer's intent to provide insurance and is not a contract to insure. In *Kermanshah Oriental Rugs v. GO*, 47 A.D.3d 438 (N.Y. 2008) the court held that a certificate of insurance was merely evidence of a carrier's intent to provide coverage, but not a contract to insure the designated party; nor was the certificate conclusive proof, standing alone, that a contract for insurance existed; the claim that insurance was never procured remained unchallenged. In *Griffin v. DaVinci Development, LLC*, 845 N.Y.S.2d 97 (N.Y. 2007) the court found no privity of contract with insurer or insurance broker and no right to claim third party beneficiary status by premises owner in a suit against an insurer and contractor's insurance broker for broker having issued multiple certificates of insurance showing owner as an additional insured when in fact no insurance was subsequently issued.

Certificates and binders are on many occasions issued prior to the issuance of the policy. This can result in situations where a subsequently issued policy excludes coverages expected by an additional insured shown in the certificate. In *American Country Ins. v. Kraemer Bros., Inc.*, 699 N.E.2d 1056 (Ill. 1998) a general contractor, which as designated as an additional insured on subcontractor's insurance certificate, was bound by policy exclusions and conditions in a subsequently issued policy and additional insured endorsement limiting coverage to strict liability. The endorsement read: "This endorsement provides no coverage to the Additional Insured for liability arising out of the claimed negligence of the Additional Insured, other than which may be imputed to the Additional Insured by virtue of the conduct of the Named Insured". The court noted "Just because there are fewer strict liability claims than negligence claims does not make the coverage illusory".

Even in the case of a renewal, additional insured status may be dropped and reliance on a certificate designating insured status may not be relied upon.

(5) Deficient Insurance Specifications Excuse Certificates Which Incorrectly Certify Existence of Additional Insured Coverage

In one case, *Public Administrator of Bronx County v. Equitable Life Assurance Society,* 198 A.D.2d 105, 603 N.Y.S.2d 830 (N.Y. 1993), a general contractor's failure to include in its insurance specifications that it be listed as an additional insured on its subcontractor's CGL policy prevented it from recovering against its subcontractor for breach of contract in failing to provide additional insured coverage, even though the subcontractor had provided the contractor with a certificate of insurance certifying to the general contractor that it was an additional insured. The court found that the ACORD certificate's disclaimer negated reasonable reliance by a landowner on an erroneous statement in the certificate the landowner was an additional insured. The court noted that the landowner did not attempt to obtain a copy of the policy or the endorsement. This case involved a contract that did not call for the landowner to be designated as an additional insured, but prior to execution of the contract, the contractor told the landowner that it would be an additional insured and produced a certificate of insurance designating the landowner as an additional insured. The court held that the contractor had no duty to cause the landowner to be an additional insured.

(6) Certificates Which Correctly Certify Existence of Additional Insured Coverage, But Coverage Is Unsuitable

An Illinois court, *Pekin Ins. Co. v. American Country Ins. Co.*, 213 Ill. App.3d 543, 572 N.E.2d 1112 (Ill. 1991), has held that an insurer was not liable to an additional insured, a general contractor, for coverage of injuries suffered by an employee of the named insured, a roofing subcontractor, even though the named insured provided the additional insured with a certificate of insurance reflecting that the additional insured was covered by the named insured's liability insurance as to a particular project, where the insurance policy was endorsed to exclude coverage to the subcontractor for bodily injury arising out of the subcontractor's roofing work! The court, relying on the ACORD disclaimer language, held:

> Plaintiffs (the general contractor-additional insured and its own CGL insurer) argue that there was an ambiguity in the certificate at issue because the language of the certificate implied that some form of insurance was provided but the exclusion in the policy excluded all possible coverage for the … project. However, pursuant to the statements in the certificate, the plaintiff was advised to look at the policy to ascertain the nature and the extent of coverage. We conclude it was also … (the general contractor) rather than American Country's (the roofer's CGL insurer) duty to determine whether this coverage was adequate for the intended purpose. To hold otherwise would place an excessive burden on insurers to review all construction contracts in order to determine the insurance needs of the project prior to issuing a certificate of insurance. Lastly, although plaintiffs argue that they never received a copy of the policy, there is no evidence in the record that they requested one.

In *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000), a case where the court applied Texas law, the court's decision emphasizes why it is important to obtain and read a copy of the additional insured endorsement and not to rely either upon a statement in the certificate of insurance that the party to be protected is an additional insured for liabilities arising out of the protecting party's work or upon a general statement in the contract that the party to be protected is to be listed as an additional insured on the protecting party's commercial general liability policy. The court in this case held that the additional insured endorsement meant exactly what it said "the negligence of the additional insured is excluded" and

that the certificate of insurance stating that party to be protected was an additional insured and the contractual provision in the contract between the party to be protected and the protecting party that the party to be protected be listed as an additional insured did not clearly provide for coverage of the additional insured's negligence.

But see the holding of the Texas Supreme Court in *ATOFINA Petrochemicals, Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005) in which the court noted that a similarly worded endorsement, if so interpreted, would be illusory.

b. Standard Certificate Does Not Disclose Policy "Exclusions" Or "Modifications"

The 2009 revision to the ACORD 25 Certificate of Liability Insurance eliminated from the Remarks box the directive to disclose "exclusions added by endorsement". The standard certificate does not disclose whether the insured's CGL policy contains or excludes coverage for the insured's liability assumed under an "***insured contract***" (this coverage is known as "***contractual liability insurance***", and is referred to in this article as "***indemnity insurance***"). The standard CGL policy provides indemnity insurance. It provides indemnity insurance by stating that an insured contract is an exception to one of the policy's exclusions from coverage. The standard certificate does not disclose whether the insured's liability policies, including the additional insured endorsement thereto, have been modified with one of the following endorsements limiting or eliminating indemnity insurance. The endorsements noted in the next two paragraphs materially reduce the scope of the indemnity insurance coverage provided by the standard policy. The CG 21 39 is not classified as an "exclusion" even though it is one of the most severe exclusions in the industry. As discussed in these paragraphs addition of these endorsements to the CGL policy potentially materially reduces the scope of the indemnity insurance provided by the standard CGL policy. Perhaps, an insurance certificate's producer will be responsive to insurance specifications specifically requiring that the certificate of insurance disclose modification of the policy by either a CG 21 39 or a CG 24 26.

c. Cancellation Notice Statement

The ACORD 24 Certificate of Property Insurance, ACORD 25 Certificate of Liability Insurance and ACORD 28 Evidence of Commercial Property Insurance were revised in late 2009 and early 2010 to change the Cancellation notice language to read as follows:

> **SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.**

The prior version of these certificates and evidence contained the following statement concerning advance notice to be given by the Insurer to the Additional Interest holder:

> **SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL ___ DAYS WRITTEN NOTICE TO THE [*CERTIFICATE HOLDER NAMED TO THE LEFT/ADDITIONAL INTEREST NAMED BELOW*], BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.**

Similar language appeared in the ACORD Certificate of Property Insurance.

A New York appeals court has held that the presence of an ACORD "endeavor"-type notice of cancellation provision in the certificate does not impose on the insurer a contractual obligation to give the certificate holder notice of cancellation of the policy for the insured's premium non-payment. The court held that the insurer satisfied its contract obligations by complying with the contract's requirement of giving notice to the "first named insured" (the insurer's customer). The court pointed to a New York statute which required notice to the first named insured but did not also specify that notice be given to additional insureds. The court dismissed the additional insured/certificate holder's arguments as follows:

> Charlew contends that it reasonably relied, to its detriment, upon the certificate of insurance which named it as an additional insured and, therefore, under our decision in [citation omitted], Merchants Mutual was equitably estopped from denying coverage. Notably, however, the situation presented herein is distinguishable because

> the Merchants Mutual insurance policy was not in existence at the time of (the employee's) accident. "Where there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel cannot be used to create coverage." (citations omitted). Furthermore, Charlew argues that the policy was not properly cancelled because it was not notified of such action, as an additional insured…. Even assuming that Merchants Mutual received the policy change request from Weller-Marcil, we disagree with that argument. Since Merchants Mutual strictly complied with the notice of cancellation provisions set forth in … (reference to NY statute omitted) by mailing a timely notice of cancellation to the "first-named insured" (Regels) and "such insured's authorized agent or broker" (Weller-Mercil), the policy was effectively cancelled … (citation omitted), irrespective of its failure to comply with its "courtesy" policy of notifying additional insureds of a cancellation. Charlew's (the additional insured's) argument is further belied by the unambiguous disclaimer contained in the certificate of insurance … (quotation of the ACORD language is omitted.).

Id. at 753-54.

2. Benefits From Obtaining A Certificate

Even though it may not be reasonable to rely upon a certificate of insurance which contains disclaimers, there are benefits to having a certificate and potential detriments from a failure to obtain a certificate. Some courts have held that the party to be protected has waived the protecting party's obligation to procure contractually specified insurance by failing to insist upon being furnished the contractually required certificate. There are benefits arising from the standard certificate, even though it contains disclaimers, which will not obtain in the absence of a certificate. Some of the benefits are the following: (1) the standard certificate sets out important information, which in the event of a claim, may provide a quick means of resolution (e.g., agent and insurer contact information, policy numbers); (2) under particular circumstances a court may be willing to disregard the certificate's disclaimers and find coverage for the party to be protected; (3) a erroneous certificate may provide a basis for recovery on the issuing agent's E & O policy or establish a contractual undertaking by the agent to provide the certificated coverage.

B. Insurer Ratings

BEST'S KEY RATING GUIDE published by A.M. Best Company assigns to insurance companies one of three types of rating opinions, a "*Best's Rating*," a "*Financial Performance Rating*" or a "*Qualified Rating.*" In addition Best's assigns all companies to "*Financial Size Categories*." More information concerning best's and its ratings is available at Best's website, http://www.ambest.com. Insurance specifications in real estate documents will typically specify both the minimum acceptable Best Rating and minimum Financial Size Category for the insurance issuer. For example, "the insurer will be at least a Best's A/VIII."

Secure Best's Ratings	
A++, A+	Superior
A, A-	Excellent
B++, B+	Very Good
Vulnerable Best's Ratings	
B, B-	Fair
C++, C+	Marginal
D	Poor
E	Under Regulatory Supervision

F	In Liquidation
S	Rating Suspended

Financial Size Category	**Policy Holders' Surplus ($ millions)**
I	Up to 1
II	1 to 2
III	2 to 5
IV	5 to 10
V	10 to 25
VI	25 to 50
VII	50 to 100
VII	100 to 250
IX	250 to 500
X	500 to 750
XI	750 to 1000
XII	1000 to 1250
XIII	1250 to 1500
XIV	1500 to 2000
XV	2000 or more

Rating modifiers of "u" for "Under Review or "q" for Qualified sometimes appear with a Best's Rating. For companies that are not rated are designated "NR-1" for "insufficient data" and "NR-2" for "insufficient size and/or operating experience."

C. Common Errors And Problems

1. CGL Policies

a. "Commercial" vs. "Comprehensive" General Liability

Probably the most common error encountered in specifying CGL coverage is the use of outdated descriptive language. The ***commercial general liability*** form replaced the ***comprehensive general liability*** form in all states during the mid 1980s. However, many contracts will specify "*comprehensive* general liability insurance." Along with that, these contracts will often require a number of endorsements that were needed on this old form, but which were incorporated into the commercial general liability form. These include the following:

- Contractual liability endorsement
- Broad form property damage endorsement
- Personal and advertising injury liability endorsement

- Host liquor liability endorsement

This terminology should be avoided in modern contracts.

b. "Combined Single Limit"

Another antiquated term that is often used is "***combined single limit***." Versions of the CGL form used prior to 1986, and many other types of liability policies, had what were called "split limits." Split limits applied different limits to property damage liability and bodily injury liability. There was a "combined single limit endorsement" that could be added to the policy to make both bodily injury and property damage liability coverage subject to the same occurrence limit. This has been incorporated into the commercial liability form but without the terminology "combined single limit." Therefore, this term conveys to meaning and should generally be avoided.

Antiquated Terminology	Current Terminology
Comprehensive general liability insurance	Commercial general liability insurance
Public liability insurance	Commercial general liability and umbrella liability insurance
Manufacturers and contractors ("M&C") liability insurance	Commercial general liability insurance
Owners, landlords and tenants ("OL&T") liability insurance	Commercial general liability insurance
Contractual liability insurance	Commercial general liability insurance
Public liability insurance	Commercial general liability insurance
Independent contractors (protective) coverage	Commercial general liability insurance
Additional named insured, named insured, coinsured	Insured status using ISO endorsement CG 20 XX or equivalent (Use CG 20 10 for construction contracts, CG 20 11 for premises leases, CG 20 28 for equipment leases.)
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO forms' separation of insureds clause
Broad form comprehensive general liability endorsement	Commercial general liability insurance
Broad form property damage endorsement	Commercial general liability insurance
Combined single limit ("CSL")	Per-occurrence limit, general aggregate limit, and products-completed operations aggregate limit
Fire damage legal liability	Damage to premises rented to you.

c. "Named Insured" vs. "Additional Insured" vs. "First Named Insured"

General liability insurance such as that provided in the standard commercial general liability (CGL) coverage form developed by Insurance Services Office, Inc. is the basic source of contractual liability coverage for most of the loss exposures created by hold harmless agreements. For this reason, it is also the policy with respect to which additional insured status is most often requested as a complement to or

reinforcement of the hold harmless agreement. A number of standard endorsements have been developed by ISO to address the coverage requirements of various categories of additional insureds.

"***Named Insured***" is not a defined coverage term of the CGL policy, nor is it extensively used in CGL policy language. The term appears only in the following four sections of the policy.

1. The policy condition pertaining to premium audit (where the "***first Named Insured***") is given specific rights and duties with respect to the payment and reimbursement of policy premiums)

2. The policy condition pertaining to separation of insureds (in which it is stipulated that insurance applies "as if each Named Insured were the only Named Insured")

3. The provision that newly acquired organizations may qualify as named insureds, and that past partnerships, joint ventures, and limited liability companies must be listed as named insureds in order for coverage to apply to them.

4. The provision of notice of cancellation and nonrenewal to the "first Named Insured"

Named insureds frequently are referred to in the CGL policy, however, under the title "***you***," as explained in the policy's introductory language.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.

Therefore, a CGL named insured is a person or organization listed as such in the policy declarations or qualifying otherwise for that status (as in the case of a newly acquired organization.) When more than one named insured is listed in the declarations, the first of those listed entities acquires certain rights and duties as the "first Named Insured."

Other parties having insured (but not *named* insured) status under the CGL policy include partners in a named insured partnership, members of a named insured joint venture; executive officers, directors, stockholders, and –with certain exceptions–employees of a named insured corporation; the named insured's legal representative if the named insured dies; the named insured's real estate manager; and *any entity added to the policy as an insured by endorsement*. All of these insureds have slightly different rights and duties from those conferred on the policy's named insureds.

Additional insureds have less stringent obligations with respect to reporting occurrences that might give rise to a claim under the policy. Certain CGL policy exclusions apply only to the named insured. For instance, the policy's property damage exclusion applies to damage to property owned by, rented by, occupied by, or loaned to the *named* insured ("you"), but it applies to damage to personal property in the care, custody, or control of "the insured." That is, it applies with respect to *each* insured's liability for personal property in that insured's care, custody, or control. The *named* insured's officers, directors, and employees qualify as insureds themselves, but not the officers, directors, or employees of additional insureds.

Aside from these differences, basic general liability coverage depends upon the language of the CGL insuring agreement and its references to "the insured." The language reads as follow:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

An entity named as an additional insured in an endorsement to the CGL policy is as much "the insured" in the context of this insuring agreement as is the named insured who purchased the policy.

Occasionally one party to a contract will require that it be added as an ***additional named*** insured to the liability policy of another contracting party. Such requests often have their origins in a time when named insured status (but not all categories of insured status) carried with it a right to be notified if the policy was going to be canceled. (Cancellation of an indemnifying person's insurance is obviously a matter of vital concern to an indemnified person.) Standard CGL forms currently in use guarantee notice of cancellation only to "the first named insured" identified in the policy declarations, not to all named insureds. Therefore,

the most commonly perceived advantage of named insured status under a general liability policy no longer exists.

CGL POLICY PROVISIONS NAMED INSURED VERSUS INSURED		
Named Insured	**Insured**	**Policy Provisions**
		Insuring Agreement
	✓	Pay on behalf of
		Exclusions
	✓	Intentional injury from the standpoint of
	✓	Obligation to pay damages by reason of contractual liability[1]
	✓	Liquor liability[2]
	✓	Obligations under workers compensation and other laws
	✓	Employers liability
	✓	Except for liability assumed under contract by[3]
✓	✓	Environmental pollution by
	✓	Watercraft, aircraft and autos[4]
	✓	Transportation of mobile equipment by auto of
✓		Property damage to owned, rented or occupied property of
✓		Property sold, given away or abandoned of
✓		Property loaned to
	✓	Personal property in care, custody of control of[5]
✓		That particular part of any real property being worked on by
✓		That particular part of property to be restored because of the work of
✓		Property damage to product of
✓		Property damage to work of
		Property damage to impaired property detailing with:
✓		a product of
✓		a delay or failure to perform a contract by
		Damages incurred for the:
✓		recall of products of
✓		work

[1]The exception to this exclusion is an "insured contract" as defined. However, part f. of "insured contract" specifically applies to contracts pertaining to the named insured's (your) business and under which the named insured (you) assumes the tort liability of another.
[2]The policy makes the exclusion applicable to any insured, but the exception to the exclusion only applies if the named insured (you) manufactures, sells, serves, etc. alcoholic beverages.
[3]The employers liability exclusion provides an exception for liability assumed by the *insured* under any contract or agreement. However, contractual liability coverage as provided by the policy in subpart f. is specifically limited to liability assumed by the *named insured* (you). See (2) above. This presents a possible ambiguity.
[4]Three of the five exceptions to this exclusion apply specifically to the named insured (you).
[5]The 1986 CGL policy excluded personal property in the named insured's (your) care, custody, or control.

Source: *The Additional Insured Book*, 4th ed., International Risk Management Institute, Inc., 2000

INSURED AND NAMED INSURED DIFFERENCES	
1. The named insured (NI) has more stringent occurrence reporting requirements. 2. The NI's employees, executive officers, and directors are insureds. 3. Certain exclusions apply only to the NI (e.g., property damage). 4. The NI must reimburse the amount of any deductible paid by the insurer.	5. The *first* NI is required to pay premium. 6. The *first* NI receives any premium return. 7. The *first* NI may cancel the policy. 8. The *first* NI receives cancellation notice.
Source: *The Additional Insured Book*, 4th ed., International Risk Management Institute, Inc., 2000	

Another feature of some requests for additional insured status is the stipulation that the indemnifying person's policy, to which the indemnified person is being added as an insured, be modified to provide "***cross-liability***" coverage. Cross-liability refers to the loss exposure created when one insured under a policy sues another. Standard general liability policies in use today provide "cross-liability" coverage–without the need for any modification–by virtue of the "***separation of insureds***" condition. This condition of the policy states that coverage will apply "separately to each insured against whom claim is made or suit is brought." For this reason, it may be a legitimate precaution to include in contract language a stipulation that liability insurance as required by the contract provide cross-liability *coverage*, but not a demand for a cross-liability *endorsement*, which is unnecessary when the standard CGL form is being used.

2. Business Auto Policies

Antiquated Terminology	Current Terminology
Comprehensive auto liability insurance	Business auto coverage form
Additional insured or coinsured status (unless a vehicle lease)	Insured status
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO forms' separation of insureds clause
Combined single limit	Each accident limit

3. Workers Compensation

The standard workers compensation and employers liability policy used in most states was substantially revised in 1984 and again to a lesser extent in 1992. As compared to the previous 1954 policy, these revisions included some slight changes in terminology and coverage approaches that should be reflected in contract insurance requirements. One of these was a change in the name from "workmen's compensation" to "***workers compensation***." Another more important change was the inclusion of "other states coverage" in the basic form and the elimination of the "broad form all states" endorsement, which was previously used to provide this coverage.

Antiquated Terminology	Current Terminology
Workmen's compensation insurance	Workers compensation and employers liaiblity insurance
Borrowed servant endorsement	Alternate employer endorsement
All states coverage/broad form all states coverage	Other states coverage
In rem endorsement	Maritime coverage endorsement

A very problematic requirement sometimes included in contracts is one for additional insured status. The workers compensation policy covers injuries to its insured's employees. If additional insured status were to be provided to another party, the policy would cover injuries to that party's employees, and the insurer would be entitled to a commensurate additional premium.

4. <u>Property Insurance</u>

a. No Such Designation As "Additional Named Insured"

A problem that sometimes arises is a requirement of "*additional named insured status*". There are no advantages provided to a party who is not an owner of the property to be a named insured on the policy, and commercial property insurance underwriters have no endorsements in their forms portfolios to comply with such a contractual requirement. For most contracting situations, additional insured status, a loss payee clause, a lenders loss payable endorsement, or a mortgage clause is quite sufficient for protecting the contracting party's interest in the property.

b. "Fire And Extended Coverage" Is Antiquated Terminology

Outdated terminology requiring that the policy provide "*fire and extended coverage*" is often used in contracts. "Extended coverage" refers to an endorsement that was once added to a standard fire policy to cover the perils now insured under ISO's basic causes of loss form. Since this endorsement is no longer used, a better approach to requiring this coverage would be to refer to the ISO basic causes of loss form.

c. Correct Terminology - Causes of Loss Coverage: Basic, Broad And Special

AVOID OUTDATED AND MISLEADING PROPERTY INSURANCE TERMINOLOGY	
Antiquated Terminology	**Current Terminology**
Fire and extended coverage or extended coverage endorsement	Basic causes of loss form
Additional named insured	Additional insured, loss payee, or mortgagee clause.