



## INSURANCE FOR REAL ESTATE LAWYERS

(A DOZEN THINGS YOU WISH YOU HAD KNOWN)

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This Article alerts the reader to mistakes frequently made by lawyers and their clients in the manner of specifying insurance for commercial projects. These mistakes can lead to catastrophic uninsured losses. Detailed insurance specifications are relatively standard in construction contracts, but not so in leases. Leases generally set out insurance specifications in a narrative format as opposed to a checklist format. Attached to the Article are insurance specifications in a checklist format as a lease exhibit. These specifications are crafted to avoid the insurance specification drafting mistakes noted by the authors. Also, attached to the Article are standard insurance industry forms which have been annotated by the authors. These and additional insurance industry forms have been annotated by the authors.



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Filed on the Graves, Dougherty, Hearon & Moody website at [http://www.gdhm.com/images/pdf/ALI\\_All\\_Forms\\_-\\_April\\_2014.PDF](http://www.gdhm.com/images/pdf/ALI_All_Forms_-_April_2014.PDF) are the following forms, which have been annotated with commentary and citations to case and treatise discussions:

**Liability Insurance Forms:**

ISO CG DS 01 10 01 Commercial General Liability Declarations  
ISO CG 00 01 04 13 Commercial General Liability Coverage Form  
ISO CG 02 05 12 04 Texas Changes - Amendment of Cancellation Provisions or Coverage Change  
ISO CG 04 37 04 13 Electronic Data Liability  
ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition  
ISO CG 20 10 04 13 Additional Insured - Owners, Lessees or Contractors - Scheduled Person Or Organization  
ISO CG 20 11 04 13 Additional Insured – Managers Or Lessors Of Premises  
ISO CG 20 24 04 13 Additional Insured – Owners or Other Interests From Whom Land Has Been Leased  
ISO CG 20 26 04 13 Additional Insured - Designated Person or Organization  
ISO CG 20 33 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement With You  
ISO CG 20 37 04 13 Additional Insured – Owners, Lessees Or Contractors – Completed Operations  
ISO CG 20 38 04 13 Additional Insured – Owners, Lessees Or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement  
ISO CG 21 39 10 93 Contractual Liability Limitation  
ISO CG 21 42 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations)  
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ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others to Us  
ISO CG 24 26 04 13 Amendment of Insured Contract Definition  
ISO CG 25 04 05 09 Designated Location(s) General Aggregate Limit

**Property Insurance Forms:**

ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page  
ISO IL 00 17 11 98 Common Policy Conditions  
ISO CP 00 10 10 12 Building and Personal Property Coverage Form  
ISO CP 00 30 10 12 Business Income (And Extra Expense) Coverage Form  
ISO CP 00 90 07 88 Commercial Property Conditions  
ISO CP 04 05 10 12 Ordinance or Law Coverage  
ISO CP 04 15 10 12 Debris Removal Additional Insurance  
ISO CP 10 30 10 12 Causes of Loss – Special Form  
ISO CP 12 18 06 07 Loss Payable Provisions  
ISO CP 12 19 06 07 Additional Insured - Building Owner  
ISO CP 00 60 06 95 Leasehold Interest Coverage Form

**Certificates:**

ACORD 25 (2010/05) Certificate of Liability Insurance  
ACORD 28 (2011/11) Evidence of Commercial Property Insurance  
ACORD 75 (2010/04) Insurance Binder

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**LAW RELATED PUBLICATIONS: \***

The following articles are at [http://www.gdhm.com/index.php/site/ourattorneys/william\\_h\\_locke/](http://www.gdhm.com/index.php/site/ourattorneys/william_h_locke/)

**CONDOMINIUMS:**

Houston Bar Association – Real Estate Section: *Business and Mixed Use Condominiums* (2013); State Bar of Texas: Advanced Real Estate Drafting Course, *Documentation for the To-Be-Built Office Condominium* (2005).

**CONSTRUCTION:**

State Bar of Texas: Advanced Real Estate Law Course, *Liability of Architects and Engineers for Observation and Inspection Services: Breaking the Bonds of Privity* (2012).

**FORECLOSURE:**

State Bar of Texas, TEXAS FORECLOSURE MANUAL (3<sup>rd</sup> Ed. 2006); and Advanced Real Estate Law Course, *Ins and Outs of Deed of Trust Foreclosures - Practical Tips for the Practitioner* (2005).

**INSURANCE AND RISK MANAGEMENT:**

ICSC: *An Insurance Presentation You Can Use: How to Write Insurance Specifications for a Shopping Center Lease* (2012).

ACREL: General Session: *Distress and Insurance: When the Going Gets Rough, Does Your Risk Get Going?* (2011); and *CGL Coverage of Defective Work* (2009). Insurance Committee: *Best Practices for Lease Insurance Specifications: Checklist Versus Narrative Format* (2012); *Leases and Property Insurance* (2012); *Landlords: Beware of Insurance Certificates (A Trojan Horse)* (2012); and *Annotated Lease and Indemnity Specifications* (2011).

State Bar of Texas: Annual Advanced Real Estate Law Course: *Annotated Insurance Specifications* (2011); *Allocating Extraordinary Risk in Leases: Indemnity, Insurance, Releases and Exculpations and Condemnation (Including a Review of the Risk Management Provisions of the Texas Real Estate Forms Manual's Office Lease)* (2006); and *Shifting of Extraordinary Risk: Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation and Exculpation – The Law and Risk Management – The Forms* (2004).

Annual Advance Real Estate Drafting Course: *Insurance Issues in Distressful Times* (2011); *Additional Insured Endorsements: Typical Defects and Solutions* (2008); and *Protecting Landlords, Tenants and Contractors as Additional Insureds and Indemnified Parties* (2004).

Mortgage Lending Institute: *Top Ten Insurance Tips for Mortgage Lending* (2011).

PRACTICAL REAL ESTATE LAWYER: *Top Ten Insurance Tips for Lenders* (2012).

**SALES:**

ABA, Environmental Transactions and Brownfields Committee Newsletter, *Selling "As Is" in a Contaminated World* (Dec. 2012).

State Bar of Texas: REAL ESTATE, PROBATE AND TRUST LAW REPORTER Vol. 49, No. 1 *"As Is" in a Contaminated World* (2011); Agricultural Law Institute, *The Law of As Is* (2009); Advanced Real Estate Law Course, *Papering The Deal: From Land Acquisition to Development* (2004); and *Field Guide for Due Diligence on Income Producing Properties* (2000).

**HONORS:** AV® Preeminent™ Peer Review Rating, Martindale.com; American College of Real Estate Lawyers (2007 – 2014); The Best Lawyers in America (Real Estate) (1999 - 2014); Who's Who in America (1995 - 2014) and Who's Who in American Law (1985 - 2014); *Texas Monthly*, Super Lawyer - Real Estate (2001-2014); Received The Jerry Charles Saegert Award for "Best CLE Paper" for *Annotated Insurance Specifications*, State Bar of Texas, Annual Advanced Real Estate Law Course (2011).

# **Insurance for Real Estate Lawyers**

## **(A Dozen Things You Wish You Had Known)**

### **1. What You Did Not Know, and Could Have Known, Can Hurt You**

It is the author's opinion and experience that lawyers drafting transactional documents are resistant to undertaking the effort required to understand the insurance provisions they include in their documents and to following up with their clients to assure that the drafted insurance provisions are fulfilled by the parties and their insurance brokers.<sup>1</sup> On occasion this resistance has risen to heated rhetoric to the effect "I only draft the provisions. I am not an insurance person. It is up to the client to understand and implement the provisions."

Perhaps this choice arises out of concern that professing some knowledge as to one's craft exposes the practitioner to a greater likelihood of being held accountable in cases where "things go wrong" than being silent. The insurance industry's forms promote taking this position. The standard certificates of insurance are simple appearing one page documents.<sup>2</sup> Industry forms are not readily accessible to the practitioner. Once obtained, they appear complicated.<sup>3</sup> They are identified by a seemingly complicated numbering system.<sup>4</sup>

These circumstances lead the authors to present to you *Insurance for Real Estate Lawyers (A Dozen Things You Wish You Had Known)*. It is the authors' hope that exposure to these "traps for the unwary" will result in change in your approach to drafting insurance provisions and will lead to your more active involvement in implementing the insurance program contemplated thereby.<sup>5</sup>

### **2. Certificates of Insurance Are Not Certificates**

#### **a. An All Too Typical Specification**

Specifying appropriate insurance coverages is the first step. The next step is to confirm the insurance has been obtained and is in full force and effect.<sup>6</sup> Many contracts require that a certificate of insurance be furnished as evidence of the existence of the specified insurance. The following is an all too typical specification:

Tenant shall provide Landlord a certificate of insurance certifying the coverages required herein.

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<sup>1</sup> **Confession.** "I confess that I fell into the camp that it is better to be ignorant than take the responsibility of education," Bill Locke. However, he has changed this aspect of his practice due to his unwillingness to continue drafting and providing clients with documents containing provisions neither understood by the client nor himself.

<sup>2</sup> **ACORD Certificates.** See the ACORD certificates attached in the Appendix of Forms.

<sup>3</sup> **Industry Forms.** The liability insurance forms published by the Insurance Services Office ("ISO") are recognized nationally as "the industry standard". However, they are not freely available to the public or the practitioner. These forms are prepared by an industry trade organization for use by its members. Copies may be purchased by contacting ISO. Neither ISO's property insurance forms nor the forms promulgated by any other industry trade organization have gained recognition as the industry standard. Also, insurers including some of the leading insurers craft their own liability and property insurance and these forms are not readily available to the public or practitioner in advance of their employment.

<sup>4</sup> **ISO Form Numbering System.** See Endnote 2 to the Commentary on Insurance Forms in the Appendix to this Article for an explanation of the ISO form numbering system.

<sup>5</sup> **Pogo.** "We have met the enemy and he is us." Pogo by Walt Kelly (1913 - 1973).

<sup>6</sup> **Lender an Interested Party.** See Bill Locke and Marilyn C. Maloney, *Top Ten Insurance Issues for Lenders*, THE ACREL PAPERS Tab 11 (Las Vegas, Spring 2012).

Is this sufficient? Unfortunately, **no**. Prior to 2006, the ACORD form of certificate of insurance appeared to be evidence of insurance and appeared to give rights against the insurer (including independent rights to notice upon cancellation). When ACORD changed its certificate forms in 2006 to clearly state that they conferred no rights on the certificate holder, insureds and their attorneys attempted to negotiate with insurers and agents to restore some enforceability to insurance certificates. Unfortunately, these efforts did not succeed. In response to these efforts the insurance industry approached state insurance commissioners and legislatures to gain support for their position that a certificate of insurance could not vary the underlying policy or grant rights that did not exist under the applicable policy. At last count, 42 states have either insurance regulations or statutes on this point.

The result? A certificate of insurance does not provide coverage if coverage is not provided in the underlying policy.

### **b. It is Not Reasonable to Rely Upon an ACORD Certificate of Insurance**

The ACORD 25 Certificate of Insurance is labeled a certificate, is addressed to a “certificate holder” and states “This is to certify that the policies of insurance listed below have been issued to the insured named above for the policy period indicated.” However, it also contains the following disclaimers:

**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. THE CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.**

**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.**

**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).**

Many courts have held that these disclaimers effectively negate reliance by certificate holders.<sup>7</sup> See *e.g.*, the following statements by courts: *Prudential Property and Casualty Ins. Co. v. Anderson*, 922 A.2d 236 (Conn. 2007):

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

<sup>7</sup> **Not Reasonable to Rely Upon an ACORD Certificate.** Macbeth, “It is a tale, told by an idiot, full of sound and fury, signifying nothing.” 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).

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.

*Bradley Real Estate Trust v. Plummer & Rowe Ins. Agency*, 609 A.2d 1233, 1235 (N.H. 1992):

In effect, the certificate is a worthless document; it does no 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.

*TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002), *aff'd* 184 F. Supp.2d 591 (S.D. Tex. 2001):

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 Plaintiffs' reliance upon (the insurance broker's) representation of additional insured status was not reasonable. Accordingly, as a matter of law, Plaintiffs' claims for negligent and fraudulent misrepresentation fail.

A certificate of insurance, if incorrect, may provide a claim against the agent who issued the incorrect certificate, but it does not obligate the underwriter under the policy.<sup>8</sup> A claim against the agent may be of small consolation under the circumstances. Attached are the following ACORD certificates: ACORD 25 (2010/05) Certificate of Liability Insurance; ACORD 28 (2011/11) Evidence of Commercial Property Insurance; and ACORD 75 (2010/04) Insurance Binder.

### **3. Antiquated, Problematic and Just Plain Wrong Terminology**

Even after almost 27 years since the insurance industry changed their policy forms in 1986, leases, construction contracts and other forms drafted by many lawyers still employ "antiquated, problematic and just plain wrong" terminology.

#### **a. Liability Insurance Terminology:**

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<sup>8</sup> **Fictitious Insured Syndrome.** 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 5<sup>th</sup> Ed., Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance pp. 349-50 (International Risk Management Institute, Inc. [www.IRMI.com](http://www.IRMI.com) 2004).

<i>Don't Say This</i>	<i>Say This</i>
comprehensive general liability policy	commercial general liability policy
blanket or broad form contractual liability coverage	contractual liability coverage
broad form property damage	(automatically covered)
deletion of personal injury employee exclusion	(this exclusion no longer exists, automatically covered)
cross liability or severability of interests endorsement	separation of insureds
products/completed operations for 2 years following completion of the Work	(See discussion below.)

### **(1) “Comprehensive General Liability Policy”**

A “comprehensive general liability policy” was anything but comprehensive. It was a very basic liability insurance policy to which numerous endorsements had to be added. When the commercial general liability policy was introduced, it incorporated many of those changes that were previously required to be added by endorsement.

### **(2) “Blanket or Broad Form Contractual Liability Coverage”**

Since 1986, “blanket” or “broad form contractual liability coverage” has not existed. The current commercial general liability definition of contractual liability in the standard CGL policy achieves the same result.<sup>9</sup>

### **(3) “Broad Form Property Damage,” “Broad Form CGL Endorsement,” and “Deletion of the Personal Injury Employee Exclusion”**

The same thing is true of “broad form property damage,” “broad form CGL endorsement,” and “deletion of the personal injury employee exclusion.” Use of such terminology is indicative of lack of awareness of changes that occurred almost 27 years ago.<sup>10</sup>

### **(4) “Cross Liability Endorsement” or “Separation of Insureds Endorsement”**

Requiring a “cross liability endorsement” is even more problematic. A cross liability endorsement in today’s vernacular is an exclusion, not a provision or extension of coverage, the purpose of which is to prevent one insured from being provided coverage when sued by another insured. A “separation of insureds endorsement” or “severability of interests provision” states that each insured against whom claim is made or suit is brought will be provided a separate defense. This protection is automatically included in today’s standard form commercial general liability policy.<sup>11</sup>

### **(5) Products/Completed Operations for 2 Years Following Completion of the Work**

A requirement that coverage be provided for a specified number of years following substantial completion of a construction job is not a requirement that can be met by any standard insurance

<sup>9</sup> Contractual Liability Coverage – An Exception to an Exclusion From Coverage. See Endnote 26 in the Commentary on Insurance Forms.

<sup>10</sup> Commercial General Liability Insurance (CGL). See Endnote 21 in the Commentary on Insurance Forms.

<sup>11</sup> Separation of Insureds. See Endnote 27 in the Commentary on Insurance Forms.



program, as all such programs expire annually. A requirement for the continued provision of coverage is instead a performance requirement being placed on the insured.<sup>12</sup>

**b. Property Insurance Terminology:**

<i>Don't Say This</i>	<i>Say This</i>
fire insurance	basic, broad or special causes of loss form
extended coverage	
vandalism and malicious mischief	
special extended coverage	
all risk	

In 1986 the insurance industry ceased using phrases such as “fire insurance”, “extended coverage”, “vandalism and malicious mischief”, and “special extended coverage”. Introduced to take their place were policies referred to as “basic causes of loss”, “broad causes of loss”, and “special causes of loss”. That said, the vast majority of insurers in the insurance industry no longer describe coverage as “all risk” due to decisions against insurers arising out of the perception created by such terms that the policy did not include the exclusions, conditions, and limitations that all policies have.

A “basic causes of loss” policy is extremely basic in the scope of coverage provided. A “broad causes of loss” policy is broader than a basic form, but is not very broad. A “special causes of loss” policy is what most lawyers, laymen and many insurance professionals think of as an “all risk” form and is by far the most common form of property insurance in use.<sup>13</sup>

**4. Additional Insureds Are Not Automatically Notified of Cancellation or Modification, and Never Notified of Non-Renewal of Coverage**

<i>Don't Say This</i>	<i>Say This</i>
30 day notice of cancellation, amendment, reduction of limits or nonrenewal	30 day notice of cancellation

The standard ISO CGL policy provides that notice of cancellation will be provided to the first Named Insured.<sup>14</sup> Similarly, the ISO Common Policy Conditions, which is a component of the ISO property policy, provides that notice of cancellation is to be given only to the first Named Insured.<sup>15</sup> Neither the ISO CP 12 18 06 07 Loss Payable Provisions nor the ISO CP 12 19 06 07 Additional Insured – Building Owner endorsement issued to tenants insuring a building on leased premises provides for notice of cancellation to be given to the landlord.<sup>16</sup> Additional insureds are not first; they are “additional” and, therefore, the standard policy without

<sup>12</sup> **Products-Completed Operations.** See Endnote 68 in the Commentary on Insurance Forms.

<sup>13</sup> **Property Insurance – “Causes of Loss”.** See Endnote 47 in the Commentary on Insurance Forms.

<sup>14</sup> **Mortgagee Protections.** See Endnote 147 for a discussion of protections of mortgagees included in the standard CGL policy, such as the insurer’s obligation to give mortgagees notice of cancellation in advance of policy cancellation.

<sup>15</sup> **Notice Only to First Named Insured.** See Par. A Cancellation in the ISO IL 00 17 11 98 Common Policy Conditions attached in the Appendix of Forms. See Endnote 16 in the Commentary on Forms for a discussion of the change in 2006 to the ACORD Certificate of Insurance deleting the statement that the insurer is to endeavor to give notice of policy cancellation to the certificate holder.

<sup>16</sup> **No Notice to Landlord.** See ISO CP 12 18 06 07 Loss Payable Provisions and ISO CP 12 19 06 07 Additional Insured – Building Owner attached in the Appendix of Forms.

endorsement does not commit the insurer to give notice to the additional insured if the insurer cancels the policy for nonpayment of premium or for any other reason.<sup>17</sup>

Some but not all states permit policies to be endorsed with a “notice of cancellation” endorsement obligating the insurer to give Named Insureds other than the first Named Insured or additional insureds advance notice of policy cancellation.<sup>18</sup> Even in states where some form of notice endorsement has been approved by the state insurance industry regulatory body, it is difficult to get insurers to commit to give notice of cancellation to persons that are not the first Named Insured. Further, insurance companies will not provide a “notice of nonrenewal” endorsement. When any term, condition or verbiage is changed in a policy at time of renewal, that policy is technically no longer a renewal. Hence, every time there is even a minor change (and something is almost always changed), a nonrenewal notice would have to be sent. Insurance companies are unwilling to commit to such a burden and expense.

## **5. Not All Indemnified Liabilities Are Insured**

### **a. An Indemnitor is a Private Insurer**

An obligation to defend, indemnify and hold harmless another party for risks other than those prescribed by law is a contractual assumption of those risks by the indemnitor. The indemnitor has *agreed* to be liable for those risks. Subject to the limits of anti-indemnification legislation, the scope of risks that can be transferred by indemnity are quite broad, potentially including the indemnitee’s joint, concurrent, sole, strict and even gross negligence. Indemnification agreements can be drafted to include “any and all liabilities including fines, penalties, and all other associated expenses.” Most indemnification provisions are unlimited in amount (*i.e.*, a blank check!). An indemnitor becomes a private insurer of the indemnified liabilities, but usually one under an indemnification agreement not approaching the detail of an insurance policy.

### **b. Applying Contractual Liability Coverage to the Indemnification Agreement**

What portion of this transferred risk is insured, or even insurable? Contractual liability insurance is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. This insurance coverage is provided in the standard CGL policy as (1) a series of definitions to (2) an exception to (3) an exclusion to (4) the coverage provision for bodily injury

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<sup>17</sup> **The Risk of Failing to Confirm Insured Status.** If you want to find out how bad it can be when you do not insist on confirming the issuance of the requisite additional insured and notice of cancellation endorsements to the tenant’s property policy, read *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5th Cir. – Tex. 2007) – landlord of the Taste of Katy restaurant failed to obtain endorsements on its tenant’s property policy designating it as an additional insured and the insurer’s agreement to give the landlord notice of policy cancellation. 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”. The landlord sustained a catastrophic uninsured loss.

<sup>18</sup> **Texas: Better Than Most.** The Texas Department of Insurance (“TDI”) currently permits a “notice of cancellation or material change” endorsement. See ISO CG 02 05 12 04 Texas Changes – Amendment of Cancellation Provisions or Coverage Change. TDI has not defined what constitutes a “material change”.

and property damage liability only.<sup>19</sup> In other words, contractual liability insurance applies to allegations of bodily injury and physical injury to tangible property, and nothing else.

### Problematic Insurance Spec

\_\_\_\_\_ shall provide contractual liability insurance covering the liabilities assumed in the indemnification agreement.

Standard CGL insurance does not and cannot “cover” an indemnity. It does not cover “any and all liabilities, fines, or penalties”. Only “bodily injury” and “property damage” are covered. Coverage is also limited to the policy amounts.

### Revised Insurance Spec

\_\_\_\_\_ shall provide contractual liability insurance applying to the indemnification agreement.

The application of contractual liability coverage to a broad form indemnity provides coverage for a limited portion of the indemnified liabilities. It must be kept in mind that, since insurance potentially covers so few of the exposures for which indemnification may be required, the indemnification provision is potentially bankrupting to the indemnitor. Also, as noted in Item 9 *Exclusions May Be Invisible*, in this *Dozen Things* list, you cannot assume that contractual liability coverage afforded by the standard commercial general liability policy has not been limited or even deleted by endorsement.

Furthermore, there is no duty to defend an indemnitee found in the standard commercial general liability policy. When defense is required in the indemnification provision, a funny thing happens. Unlike the way costs of defense is provided in most liability coverages, costs of defense provided on behalf of an indemnitee are deemed to be damages, meaning that those costs are included in the limit of liability (not outside of or in addition to that limit) and therefore erode the limit.

### Hypothetical:

If \$400,000 is paid for defending the indemnitee, only \$600,000 is left for payment of settlement. Who wins? Not the indemnitee, who thought it was being provided, for example \$1,000,000, in coverage by the indemnitor. And certainly not the indemnitor (the Named Insured), who not only (1) paid dearly for the coverage but (2) is now having to share its limits of liability with the indemnitee and (3) is having those limits rapidly eroded by the indemnitee’s defense costs.

## **6. A General Specification for “Additional Insured Status” Is Meaningless**

### **a. Complementary Risk Management Tools**

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<sup>19</sup> **Contractual Liability Coverage**. See Endnote 26 in the Commentary to Forms in the Appendix for the ISO CGL policy provision granting contractual liability coverage for bodily injury and property damage to the policy’s Named Insured for its contractual indemnities.

It is not a matter of choosing between indemnification and additional insured status – properly done, you should seek both. Indemnification and additional insured status are two complementary risk-transfer provisions. They perform similarly in most respects but are two totally independent coverage provisions. They act as two separate contracts for coverage.

Many attorneys negotiate long and hard regarding indemnification but fail to take into consideration the ramifications of additional insured status. Do not do that. Require a scope of additional insured coverage that coordinates with the indemnity provision.

## **b. Additional Insured Advantages**

If the indemnitee is an additional insured, among other advantages it has the following:

- The additional insured party is an insured under the policy. It has the right to contact the insurance company directly and place a claim. It does not have to even notify the named insured of its intent to do so.
- Each insured, including each additional insured, must not only be provided a separate defense but the cost of that defense is unlimited in amount, being outside of or in addition to the limit of liability, until the insurance company’s obligations are fulfilled.
- Additional insured status can provide coverages that include the concurrent or sole negligence of the additional insured party.
- In most jurisdictions, there are no “fair notice rules” applicable to drafting of additional insured specifications, substantially reducing the likelihood of litigation to enforce this specification.

### Returning to the Hypothetical:

Now, return to the Hypothetical. The additional insured party not only receives the desired limit of liability for settlement, but also has its defense costs paid in addition to that limit. The named insured still has to share its limit of liability with the additional insured, but is no longer having that limit eroded by defense costs of the other protected party. Now who wins? Everybody, except the insurance company. Additional insured status achieves a dramatic shift in coverage for defense costs.

## **c. Most Common Drafting Error**

Unfortunately, although additional insured coverage is the most common risk management technique, it is also the most commonly misunderstood, even by professionals in the field such as risk managers, insurance agents and lawyers. The most common error is failing to specify the coverage terms to be contained in the additional insured endorsement. Parties commonly cover the additional insured requirement by specifying

(The Named Insured) will cause its CGL insurer to list _____ as an additional insured on its CGL policy.
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A landlord may specify in its lease that the tenant and the tenant's contractors will cause each of their CGL insurers to list the landlord, its lender and management company as additional insureds on the tenant's and the tenant's contractors' CGL policies; a tenant may specify in its contract with its tenant-finish contractor that the contractor is to cause its CGL insurer to list the tenant, its landlord, the landlord's lender and the management company as additional insureds on the tenant-finish contractor's CGL policy; the tenant's contractor may specify in its subcontract with its subcontractors that the subcontractors list the contractor as an additional insured on the subcontractor's CGL policy. Unfortunately, in each of these cases, the person desiring protection as an additional insured has, by this wording of its insurance clause, left it up to the other party's insurance carrier to define the scope of the coverage to be provided. This is equivalent to "*letting the fox determine how, when, and if to protect the chicken.*"<sup>20</sup>

A mistake has been made because there is **no** commonly accepted definition of what is an "additional insured." The above-quoted specification neither specifies the triggers to coverage nor what exclusions to coverage are to be permitted. There are literally hundreds of different additional insured endorsements in current use, each providing a different scope of coverage. Without a detailed specification of the scope of coverage to be afforded by the insurer to the additional insured, you have left it up to the insurer to select the form of additional insured coverage to provide. Simply requiring "additional insured status" may get the additional insured coverage that (1) includes both completed and ongoing operations and concurrent and sole negligence, or (2) includes only ongoing operations and excludes sole negligence of the additional insured, or (3) includes only certain ongoing operations and excludes both concurrent and sole negligence of the additional insured, and has additional exclusions added to it, or (4) innumerable additional options.

#### **d. What to Look For In An Additional Insured Endorsement**

The most common and well recognized additional insured endorsements are drafted for use by the insurance industry by ISO, or Insurance Services Office. ISO endorsements will include a footer that reads © ISO Properties, Inc., 20\_\_" or © Insurance Services Office, Inc., 20\_\_".<sup>21</sup>

The following are questions to be answered in reviewing an additional insured endorsement (the "Coverage Matrix"):

- Who? Who is being added as an additional insured?

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<sup>20</sup> **A Common Mistake.** See ACREL News, Vol. 28, No. 2 (May 2008) William H. Locke, Jr., *The Most Common Yet Most Misunderstood Risk Management Tool – the Additional Insured Endorsement.*

<sup>21</sup> **ISO and ACORD Forms.** Following the Appendix of Forms is a Commentary on Forms which sets out by Endnotes a discussion of various provisions in the Forms. See Endnote 2 for a discussion of ISO and the ISO insurance form numbering system. See Endnotes 10 and 17 - 20 for a discussion of the ACORD certificate forms. Many insurance companies utilize manuscript additional insured endorsements. A manuscript endorsement is one that an insurance company makes up, which may or may not include some ISO wording. Beware of any endorsement that includes a footer reading "Includes Copyrighted Material of Insurance Services Office, Inc. With Its Permission". All manuscript endorsements require careful scrutiny. They frequently:

- Limit the parties being added as an additional insured;
- Limit the scope of coverage being provided;
- Limit the operations being covered; and
- May add new exclusions.

An example of a new exclusion is "No coverage is provided for damages because of bodily injury to employees of the insured". This obviously adversely affects the risk transfer allowed even under many of the anti-indemnification statutes recently adopted across the nation.

- What? What scope of negligence is being transferred? What activity is covered (e.g., operations, work, ownership, use, maintenance)?
- When? Is there a time period covered?
- Where? Is there a location covered?
- Exclusions? Are there exclusions to coverage?
- Limitations?<sup>22</sup>

Pay careful attention to edition date of the endorsement. Each new edition restricts coverage that was provided in previous edition. Also, confirm that the issued additional insured endorsement is the form specified in the insurance specifications. Two forms of clerical errors of an issuing agent are issuing the wrong additional insured endorsement form and assuming that an existing blanket insured endorsement form appropriately applies to the transaction (for example, the authorized representative signing the certificate of insurance may erroneously believe that the blanket additional insured endorsement attached to the policy applies to a landlord/tenant relationship, but the blanket endorsement covers an owner/contractor relationship).

#### e. Frequently Used Additional Insured Endorsements

##### (1) ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization

The most common ISO additional insured endorsement used for the construction industry is the ISO CG 20 10 04 13. A copy of this additional insured endorsement is found in the Appendix of Forms. This additional insured endorsement provides the following coverage:

Who? This endorsement “includes as an insured the person or organization shown in the Schedule.” If you desire that a person or persons or classes of persons be covered as additional insureds, you need to list them in the endorsement’s Schedule (e.g., name the primary additional insured; list as additional insureds, the named additional insured’s “officers, directors, employees, and its successors and assigns”; list the project manager as an additional insured; list the primary additional insured’s lender as an additional insured).

<sup>22</sup> **2013 Additional Limitations.** ISO has changed all additional insured endorsements effective April, 2013, so the new endorsements will reflect a 04 13 edition date. It is uncertain when these endorsements will begin to be utilized by any specific insurance company. This change was brought about by the wave of anti-indemnification sweeping the country and the many different manners in which the legislation is drafted. These recently revised endorsements provide that the insurance afforded to the additional insured (the “2013 Additional Limitations”):

- Applies only to the extent permitted by law;
- Will be no broader in scope than required by contract; and
- Will provide no greater amount of coverage than required by contract.

Regarding that last point, what if the contract calls for coverage to be provided in an amount “of at least” or “shall be no less than” a stated amount? Note, some manuscripted additional insured endorsements specify a sublimit for additional insured coverage that is less than the policy limits applicable to the Named Insured. See MALECKI ON INSURANCE, *Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (August, 2005, Vol. 14, No. 10, pp. 1-8) which reviews the following manuscripted endorsement to a CGL policy that specified on its Declaration Page a sublimit for additional insured coverage in an amount less than the policy limits applicable to the Named Insured:

The Limits of Insurance applicable to the additional insured are those specified in the written contract or written agreement, if any between you and the additional insured regarding the work described above, or in the Declarations of this policy, whichever is less. The coverage provided to the additional insured by this endorsement and by paragraph f. of the definition of “insured contract” under Definitions (Section V), as amended by this endorsement, does not apply to “bodily injury” or “property damage” beyond: ... d. The effective date of any deletion of, any removal of, or any non-continuance of, this additional insured endorsement from this policy.

Note that this manuscripted language provides that the additional insured coverage can be terminated by the insurer’s unilateral issuance of a deletion endorsement. Unless the policy is endorsed to provide the additional insured notice of the insurer’s issuance of an endorsement deleting additional insured coverage, the additional insured may never learn of the termination of its coverage.

What? Coverage is afforded “but only with respect to liability for ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ *caused in whole or in part by your* (the Named Insured’s) *acts or omissions*; or the acts or omission of those acting on your (the Named Insured’s) behalf ....”

When? Coverage is afforded for “liability ... in the performance of your (the Named Insured’s) *on-going operations* for the additional insured(s)....” Coverage to the additional insured for exposures arising out of completed operations is lost.

Where? The additional endorsement limits coverage to “liability ... in the performance of your on-going operations for the additional insured(s) *at the location(s) designated above*” (the endorsement provides a blank for insertion of the “Location(s) of Covered Operations”).

Exclusions? The additional insured endorsement expressly sets out the following two exclusions: “This insurance does not apply to ‘bodily injury’ or ‘property damage’ occurring after: (1) All work ... 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....”

Limitations? Additionally, the ISO CG 20 10 04 13 contains the 2013 Additional Limitations.<sup>23</sup>

## (2) ISO CG 20 11 Additional Insured – Managers or Lessors of Premises

The ISO CG 20 11 04 13 endorsement is used when a landlord or the property manager, or both, is to be listed as an additional insured on the tenant’s liability insurance policy. A common risk transfer strategy is for a landlord to provide in its lease that its tenant indemnify and make the landlord and its property manager an additional insured on the tenant’s CGL policy. These provisions recognize that the tenant’s occupancy creates an additional liability exposure to the landlord for injuries and property damage resulting from the tenant’s activities. A copy of this additional insured endorsement is found in the **Appendix of Forms**. This additional insured endorsement provides the following coverage:

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<sup>23</sup> **Prior Editions of the 20 10.** ISO 20 10 11 85. The original CG 20 10 endorsement was CG 20 10 11 85, meaning that it was promulgated in November of 1985. Coverage Matrix: (1) Who? This endorsement “includes as an insured the person or organization shown in the Schedule.” (2) What? Coverage is afforded “but only with respect to liability *arising out of* your [the named insured’s] *work* for that insured by or for you.” The “arising out of” language has been held to include the concurrent and sole negligence of the additional insured party, as that party ostensibly wouldn’t be involved in the litigation but for its agreement with the named insured. (3) When? “*Work*” is defined including both ongoing and completed operations. (4) Where? The additional endorsement does not limit coverage to a specified location. (5) Exclusions? The additional endorsement does not contain exclusionary language. This endorsement is rarely possible to obtain as it offers quite broad coverage to the additional insured and it is quite old and a variety of more current endorsements are available.

ISO 20 10 10 01. (1) Who? This endorsement “includes as an insured the person or organization shown in the Schedule.” (2) What? Coverage is afforded “but only with respect to liability *arising out of* your [the named insured’s] *on-going operations*.” (3) When? Coverage to the additional insured for exposures arising out of completed operations is lost. (4) Where? The additional endorsement does not limit coverage to a specified location. (5) Exclusions? The additional endorsement does not contain exclusionary language.

ISO 20 10 07 04. (1) Who? This endorsement “includes as an insured the person or organization shown in the Schedule.” (2) What? Coverage is afforded “but only with respect to liability for ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ *caused in whole or in part by your* [the Named Insured’s] *acts or omissions*; or the acts or omission of those acting on your [the Named Insured’s] behalf in the performance of *on-going operations*.” Coverage to the additional insured for exposures arising out of completed operations is lost. (3) When? Not only is coverage to the additional insured for exposures arising out of completed operations lost, but so is coverage for the additional insured’s sole negligence. (4) Where? The additional endorsement limits coverage to “ongoing operations *at the locations designated above*” (locations designated in the Schedule). (5) Exclusions? The additional endorsement does not contain exclusionary language.

Who? This endorsement “includes as an insured the person or organization shown in the Schedule.” As noted above, all intended additional insureds need to be scheduled in the endorsement’s Schedule.

What? Coverage is afforded “but only with respect to liability arising out of the *ownership, maintenance or use*” of that part of the premises leased to you (the named insured). . . .”

When? This endorsement expressly sets out as a time of coverage limitation “This insurance does not apply to ... (a)ny ‘occurrence’ which takes place after you cease to be a tenant in that premises.”

Where? The additional insured endorsement limits coverage to “that part of the premises leased to you *and shown in the Schedule*” (the endorsement provides a blank for “Designation of Premises (Part Leased to You)”.

Exclusions? In addition to the time coverage limitation, this endorsement expressly sets out the following exclusion: “This insurance does not apply to ... (s)tructural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.”

Limitations? The ISO CG 20 10 04 13 contains the 2013 Additional Limitations.

#### **f. Recap and Practical Advice**

If the insurance provision simply calls for additional insured status to be provided, who decides which one will be provided? The insurance company for the downstream party gets to make that decision. If an insurance provision fails to specify an adequate scope of additional insured coverage to be provided and a claim occurs that falls outside of the limited scope of additional insured status provide, how is coverage potentially provided? The policy may still have to respond to the indemnification provision, in which case defense costs are shifted from outside the limit to inside the limit. In either case, who wins? The insurance company. Don’t let that happen to your client.

Remember your audience. The people that most need to understand what is being required are the downstream party’s insurance brokers. Make it easy for them to understand. Require a specific ISO endorsement or a specific scope of coverage. If requiring a specific ISO endorsement, do not say “or equivalent”. What does that mean? What it does not mean is “identical”. Make the downstream party declare what in fact they do have. Get a copy and read it. Make sure that it complies with your requirement.

Sample wording including the sole negligence of the additional insured:

Contractor shall obtain additional insured coverage in favor of Landlord Parties on commercial general liability and excess liability policies. Additional insured status shall be provided on a combination of unmodified ISO endorsements CG 20 10 10 01 and CG 20 37 10 01.
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Sample wording excluding the sole negligence of the additional insured:



Contractor shall obtain additional insured coverage in favor of Landlord Parties on commercial general liability and excess liability policies. Additional insured status shall be provided on a combination of unmodified ISO endorsements CG 20 10 07 04 and CG 20 37 07 04.

### **g. Primary and Noncontributory Liability**

Many agreements call for the downstream party's insurance to be primary. The problem with this is that all general liability policies state that they are primary, and that, if two or more policies cover a claim, they will share in payment of that loss. The insurance industry attempted a fix to this by including a provision that states that a Named Insured's coverage is excess where that Named Insured is added to another party's coverage as an additional insured. That works fine so long as the downstream party hasn't also modified its additional insured coverage to be provided on an excess liability or other modified basis.

#### Example – Manuscript Wording:

##### **Primary & Noncontributory Additional Insured Endorsement**

Who Is An Insured is amended to include as an insured the person or organization shown in the schedule of this endorsement, but only with respect to liability arising out of "your work" for that insured by or for you.

As respects additional insured as defined above, this insurance also applies to "bodily injury" or "property damage" arising out of your negligence when the following written requirements are applicable: Coverage available under this coverage part shall apply as primary insurance.

The first paragraph is the same wording as the CG 20 10 11 85 additional insured endorsement, offering broad coverage that includes coverage for the concurrent and sole negligence of the additional insured. What could possibly be wrong? Examine the second paragraph closely. For what causes of loss is primary coverage provided? Only for liability arising out of the named insured's negligence – not the additional insured.

We strive to address these issues contractually by calling for the downstream party to provide "primary and noncontributory" liability coverage, but isn't that title nonsensical? ISO has a new endorsement that will resolve some of these problems. ISO's new primary and noncontributory endorsement CG 20 01 04 13 (see form in Appendix of Forms) reads:

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that: The additional insured is a Named Insured under such other insurance; and You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

This new endorsement will resolve some problems, if the requirement for it is carefully drafted.<sup>24</sup>

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<sup>24</sup> **Primary Liability vs. Horizontal Exhaustion.** Neither the recommended insurance spec nor the new ISO endorsement resolves the horizontal exhaustion issue which is beyond the scope of this paper. See Endnote 28 for further discussion of the term "primary and noncontributing".

### Recommended Insurance Spec:

It is the intent of the parties to this Agreement that all insurance coverage required herein shall be primary to and shall seek no contribution for all insurance available to [Upstream Parties], with [Upstream Parties'] insurance being excess, secondary and non-contributing. This CGL coverage shall be endorsed to provide such primary and noncontributory liability.

### **h. Umbrella and Excess Liability**

Most “umbrella liability policies” are not umbrellas. Most are really a form of excess liability policy. Umbrella liability policies are most recognizable by the provision of Parts A and B. Part A is the excess liability over the underlying primary liability coverages, and Part B is the “umbrella” portion. Most “excess liability policies” do not provide pure excess liability, meaning that the coverage provided is not usually on a following form basis. Both kinds of policies frequently include gaps with regard to such matters as additional insured status, primary and noncontributory liability, waivers of subrogation and the like.

### Recommended Insurance Spec:

Such insurance shall be excess over and no less broad than all coverages described above.

Keep in mind that umbrella or excess liability policies provide additional limits only over those underlying liability policies specifically listed in the policy.

### **7. Completed Operations Coverage is Important**

Failure to require, and then follow up and assure maintenance by contractors and subcontractors of, products and completed operations coverage for up to the jurisdiction’s statute of repose can lead to catastrophic uninsured losses and can leave an owner or developer with little financial recourse. “Products and completed operations” coverage is a major general liability sub-line which provides coverage for an insured, including an additional insured, if coverage is maintained, against claims arising out of products sold, manufactured, handled or distributed, or operations which are complete. This line of coverage applies to claims for bodily injury and/or property damage and not for the Insured’s failure to complete a job or operation on time.

The following are examples of injuries or property damage occurring after work completion, which are covered by products and completed operations coverage: injuries occurring from an explosion of a gas pipe after it was negligently installed; building collapse after completion; window leaks after installation; popping out of windows from a high rise condominium hotel after construction completion; cupping or upward warping of wood flooring due to negligent installation over wet subflooring. The “injury” or “property damage” occurs (manifests itself) after cessation of the contractor’s ongoing operations when the pipeline explodes, the building collapses, the windows pop or the flooring warps, or a person is injured or killed.

The following most commonly issued standard additional insured endorsements issued in connection with construction exclude coverage for bodily injury and property damage occurring after completion of construction operations: ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person Or Organization, ISO CG 20 33 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement with You and ISO CG 20 38 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction in Written Construction Agreement. These endorsements define coverage as arising out of “ongoing operations” of the contractor or subcontractor as follows:

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, 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) ....

They also contain the following exceptions to coverage:

This insurance does not apply to:

2. “Bodily injury” or “property damage” occurring after:
  - a. 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
  - b. 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 part of the same project.

Additional insured coverage is available through issuance of ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations. This form is contained in the Appendix of Forms.

Products and completed operations coverage only covers occurrences occurring during the CGL policy’s term. For products and completed operations coverage to continue year-to-year after work completion, the Named Insured contractor must purchase from the insurer completed operations coverage either year-to-year after the original policy term or purchase such coverage for a specified term after work completion with the project scheduled as a covered project and endorsed to include the owner as an additional insured under ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations. Another approach is to purchase a project specific policy written for the term of construction plus the extended coverage period negotiated by the parties (*e.g.*, up to a jurisdiction’s statute of repose). An insurer may be unwilling to issue a completed operations extension endorsement on the original policy after its term without there being also issued a current term CGL policy for the periods covered by the completed operations sub-line.

Ideally, contractors (and subcontractors) should be required to maintain additional insured coverage of owners and tenants for bodily injury and property damage arising out of the work for up to the maximum time limit in which a cause of action can be maintained against the owners and tenant. The length of time a contractor should be required to maintain products and completed operations coverage can be, depending on the risk tolerance of an owner (or other party desiring such protection, *e.g.*, tenant or contractor), between two years (a typical state's tort statute of limitations) and 10 years (a typical state's statute of repose) after work completion.

See **Specification 2.A-1.3** Post-Completion Coverage specifying that

Contractor agrees to maintain Products-Completed Operations coverage with respect to "Bodily Injury" and "Property Damage" caused, in whole or in part, by Contractor's work at the Premises and Property for a period of \_\_\_ years after final completion of the construction of the Improvements. This insurance is to be endorsed with an ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement to schedule Landlord Parties for the entirety of this post-completion period.

## **8. Additional Insureds May Not Be Covered by a Blanket Additional Insured Endorsement**

Many additional insured endorsements are provided on a "blanket" or "automatic" basis. This is important for two reasons:

- It means that additional insured status is provided where required by written contract. If a written, executed contract does not exist, neither does additional insured status.
- It tells you nothing whatsoever about the coverage provided by that additional insured endorsement, only that one exists. It may be an ISO endorsement or a manuscripted endorsement. It may offer broad coverage or essentially no coverage.

It is essential to obtain a copy of the policy and read it as was learned by the general contractor in *Westfield Ins. Co. v. FCL Builders, Inc.*, 948 N.E.2d 115 (Ill. 2011). FCL, a general contractor, relied upon a certificate of insurance provided to it by its subcontractor listing FCL as an additional insured on the CGL policy of the sub-subcontractor. A tort action was brought by a severely injured employee of the sub-subcontractor against the general contractor. Unfortunately, although subcontractor's CGL policy was issued with an blanket additional insured endorsement, it extended additional insured coverage only to "persons for whom you are performing operations when you and such person have agreed in a written contract that such person be added as an additional insured." There was no written agreement between the sub-subcontractor and the general contractor. A similar circumstance exists between a landlord and a tenant's improvement contractor.<sup>25</sup>

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<sup>25</sup> **ISO Blanket Additional Insured Endorsements.** ISO has two forms of blanket additional insured endorsements for contractors and subcontractors: the ISO CG 20 33 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement With You and the ISO CG 20 38 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement. The ISO CG 20 38 (unlike to the ISO CG 20 33) provides that the following persons are additional insureds protected by the endorsement: "Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1 above". Paragraph 1 provides that the following person is an additional insured: "Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy". FCL would have been protected if its subcontractor had its sub-subcontractor's CGL policy endorsed with an ISO CG 20 38 instead of with an ISO CG 20 33! See William H. Locke, Jr., *Landlord's Beware of Insurance Certificates (A Trojan Horse)*, presented at the ACREL Las Vegas March 2012 Leasing and Insurance Committee meetings.

## **9. Exclusions May Be Invisible**

There is today a plethora of “invisible” exclusions and limitations being added to general liability coverage by endorsement by the insurance industry to minimize the carrier’s exposures. These are invisible because they never show up on any certificate of insurance unless you are careful in your drafting of the insurance specifications. Some of these invisible exclusions are the following.

### **a. CG 21 39 Contractual Liability Limitation**

As stated above in addition to additional insured coverage, Contractual Liability Coverage is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. ISO CG 21 39 10 93 Contractual Liability Limitation is one of the most egregious endorsements in the insurance industry. This form is contained in the Appendix of Forms. As stated above, the provision of contractual liability coverage includes a series of definitions of “insured contract”. The first five definitions are referred to as incidental provisions, but the sixth definition is the provision that provides for the contractual assumption of tort liability. The sixth type of “insured contract” is most frequently the basis of insurance of a Named Insured on its indemnity of third parties (*e.g.*, indemnity for injuries to an employer’s employees; indemnity for injuries to a subcontractor’s employees). The CG 21 39 deletes this sixth definition in its entirety, deleting coverage for an indemnitor’s indemnity of a third party for its negligence. If the indemnifying party’s indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer, unless its indemnity falls within one of the five defined “insured contracts”. Note as discussed in the Endnotes, the Anti-Indemnity Statutes in many states preclude enforcement of indemnities as to a third party’s negligence, sole or even concurrent, except in statutorily limited circumstances.

### **b. CG 24 26 Amendment of Insured Contract Definition**

ISO CG 24 26 04 13 Amendment of Insured Contract Definition modifies the sixth definition to eliminate coverage for the contractual assumption of another party’s sole negligence. If the indemnifying party’s indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer. This form is contained in the Appendix of Forms.

### **c. CG 22 94 and CG 22 95 Exclusions – Damage to Work Performed by Subcontractors**

Exclusion L in the standard CGL policy contains a significant exception (the subcontractor work performed exclusion) to its coverage exclusion. Exclusion L states:

This insurance does not apply to “property damage” to “your work” arising out of and included in the “products-completed operations hazard”. This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Endorsements ISO CG 22 94 10 11 Exclusion – Damage to Work Performed by Subcontractors and ISO CG 22 95 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your

Behalf – Designated Sites or Operations delete the exception to the exclusion, thereby eliminating the single most important coverage under which many construction defect claims have historically been paid.<sup>26</sup> A copy of the ISO CG 22 94 is in the Appendix of Forms.

**d. CG 21 42 12 04 and CG 21 43 12 04 Exclusions – Explosion, Collapse and Underground Property Damage Hazard**

The standard CGL policy does not exclude “explosion, collapse and underground property damage” hazards (commonly referred to as “XCU”). However, XCU coverage is deleted by addition of endorsement ISO CG 21 42 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations) and CG 21 43 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations Excepted).

**e. Employer’s Liability Manuscript Exclusion**

Exclusion E to the standard CGL policy states in part:

This insurance does not apply to bodily injury arising out of and in the course of: *Employment by the insured*; or Performing duties related to the conduct of the insured’s business. This exclusion does not apply to liability assumed by the insured under an “insured contract”.

Manuscript endorsements to this provision may change “Employment by the insured” to “Employment by an insured”, may delete the exception altogether, or may modify this provision in some other manner. All of these changes are aimed at eliminating coverage for third-party over actions.

**f. Construction Defect - Completed Operations Manuscript Exclusion**

One of the nation’s leading providers of construction insurance sometimes includes the following endorsement:

This insurance excludes coverage for the actual or alleged deficiency in new construction, conversion, reconstruction, rehabilitation, renovation, remodeling, repair, maintenance or demolition.

What’s left? Only bodily injury and on-going operations.

**g. Classification Limitation Manuscript Exclusions**

Classification limitation endorsements can defy logic. Their intent is to state that coverage is provided only for exposures declared to an insurance company, and new types of undeclared operations are not automatically included.<sup>27</sup>

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<sup>26</sup> **Construction Defect Coverage.** See William H. Locke, Jr., *CGL Coverage of Defective Work*, THE ACREL PAPERS Tab 9 (Washington, D.C. Fall 2009); but see Ray Iwamoto, *The Uninsured Risks of Development*, THE PRACTICAL REAL ESTATE LAWYER Vol. 26, No. 1 (2010) for a discussion of jurisdictions, like Hawaii, which hold that construction defects, even if caused by the work of a subcontractor, are not an occurrence under a contractor’s CGL policy.

## **h. Escape Clauses and Manuscript Negligence Exclusions**

Particularly egregious manuscripted exclusions are escape clauses and negligence exclusions.<sup>28</sup>

## **i. Subsidence Manuscript Exclusion**

This is truly a construction defect exclusion aimed at contractors engaged in any type of earth movement work, including but not limited to soil compaction, fill, or installation of storm or sewer drains.

## **j. Insured vs. Insured Manuscript Exclusion**

A “Named Insured vs. Named Insured Exclusion” is acceptable, as it is aimed at preventing coverage for claims between insureds within the same economic family. An “Insured vs. Insured Exclusion” should never be accepted (except in professional liability policies, where it is customary), as it excludes coverage when the additional insured desires to bring claim against the named insured.

## **k. Controlled Insurance Program (CIP) or “Wrap” Manuscript Exclusion**

All CIP programs include coverage for product-completed operations, but some limit the period for which that coverage is provided to two or three years after completion of the work. The subcontractor working on that project, however still has a liability exposure after the CIP’s completed operations coverage expires for the entire statute of repose.

## **l. Electronic Data Liability**

Not an endorsement but a relatively new exclusion in all general liability policies is that of injury to or damage of electronic data. Exclusion P in general liability policies states:

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<sup>27</sup> **Important to Confirm Classification Scope of Work Covered.** See *Pekin Ins. Co. v. American Country Ins. Co.*, 213 Ill. App.3d 543, 572 N.E.2d 1112 (Ill. 1991), where the court 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 subcontractor 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. The insurance policy was endorsed to expressly exclude coverage to the subcontractor for bodily injury arising out of the subcontractor’s roofing work!

<sup>28</sup> **Escape Clauses and Negligence Manuscript Exclusions.** The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E.D. Tex. 1994) 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”). The Named Insured’s policy contained the following 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 an Escape Clause. Timely review and objection may need to occur to defeat this waiver argument!

The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000) 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 of ‘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 “‘x” be listed as an additional insured did not clearly provide for coverage of the additional insured’s negligence. The additional insured endorsement provided “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”.

This insurance does not apply to damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data. As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

Coverage is readily available to cover this gap through an Electronic Data Liability endorsement CG 04 37 04 13 and should be required. Be sure to specify the amount of coverage required, as this endorsement is frequently provided with only a minimal sublimit (*e.g.*, \$25,000 coverage).

## **10. Self-Insurance Is Not Insurance**

What is Self-Insurance? "Self-insurance" is not insurance.<sup>29</sup> Self-insurance is nothing more than a risk retention device (a method of "financing" certain risks), and an indemnity by the "self-insurer", the indemnifying party. Self-insurance and large self-insured retentions are a popular method for financing certain risks, particularly among very large commercial businesses<sup>30</sup> and public entities.<sup>31</sup> Self-insurance has the benefit of retaining dollars otherwise payable for insurance for cash flow purposes until needed to pay claims.

The term "self-insurance" is used to describe a range of risk retentions by the self-insurer. Self-insurance can range from no insurance ("going bare"), to a policy deductible, to insurance purchased over a large self-insured retention ("SIR"). A SIR is sometimes referred to as a "retained limit".<sup>32</sup> In the case of a deductible or SIR it may be designated as a dollar amount or a percentage. A deductible or SIR is the monetary threshold of the insurer's obligation to pay liabilities or losses covered by the policy.

### Liability Risks: Deductibles, SIRs and Self-Insurance

*Deductibles.* Deductibles on a liability policy are determined on a per claim or on a per occurrence basis. Generally, a liability policy's aggregate or occurrence limits are not reduced by deductibles. The industry standard liability policy (ISO CG 00 01) does not provide for a deductible, deductibles are added by an endorsement to the policy (*e.g.*, the ISO CG 03 00). The industry standard ISO deductible endorsement obligates the *named* insured to pay the deductible. Thus, an additional insured on an ISO deductible endorsement is not required to pay the

<sup>29</sup> **A "Misnomer".** *Hertz Corp. v. Robineau*, 6 S.W.3d 332 (Tex. App. - Austin 1999, no writ), J. Woodfin Jones, Justice:

To understand why a self-insurer's coverage is not "other insurance," it is \*336 helpful to recognize that the term "self-insurance" is a misnomer; in effect, a self-insurer does not provide insurance at all. "To say that a self-insurer will pay the same judgments and in the same amounts as an insurance company would have had to pay is one thing; while it is obvious that to assume all the obligations that exist under a Standard Automobile Liability Policy is quite another thing."

<sup>30</sup> **Self-Insurance by Large Commercial Businesses.** *Hertz Corp. v. Robineau*, 6 S.W.3d 332 (Tex. App. - Austin 1999, no writ) (J. Woodfin Jones); *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526 (5<sup>th</sup> Cir. 1998).

<sup>31</sup> **Self-Insurance by Public Entities.** *Green v. Alford*, 274 S.W.3d 5 (Tex. App. Hou. [14<sup>th</sup> Dist.] 2008, writ den'd) (City of Pasadena).

<sup>32</sup> **Deductibles, SIRs and Self Insurance.** 4 BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 11:11 Deductibles and self-insured retentions (2014); Windt, 3 INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSURED § 11:31 Self-insured retention (6<sup>th</sup> ed. 2014); Hermanson and Toren, A Fact of Life - Retained Limits, Deductibles, and Self-Insurance 55 No. 5 DRI FOR THE DEFENSE 64 (May, 2013); Hamilton and Murphy, SIRs and Deductibles - Evolving Policies and Their Impact on Carrier Duties, 78 DEFENSE COUNSEL JOURNAL 411 (Oct. 2011); CONTRACTUAL RISK TRANSFERS Considerations for General Insurance Provisions XIV.B.5 Deductibles and Retentions and XIV.B.6 Self-Insurance (International Risk Management, Inc. 2014).



deductible in order to trigger coverage. Manuscript endorsements may, however, require payment of the deductible by *the insureds*, which would include an additional insured.

*Deductibles v. SIRs.*<sup>33</sup> There are four major differences between liability deductibles and SIRs:

		Deductibles	SIRs
1.	<u>Defense Costs</u>	The insurer pays all defense costs from the first dollar.	Insured usually is responsible for defense costs from the first dollar until the full amount of the retention is paid out.
2.	<u>Policy Limits</u>	Amount of the deductible is included in the policy limits.	Policy limits, including defense costs, are on top of the SIR amount. Once the SIR is paid, the insurer is obligated to pay costs above the SIR within the policy limits. <sup>34</sup>
3.	<u>Payment to the Claimant</u>	The insurer pays the full amount of a judgment against the insured up to policy limits, and then can seek reimbursement from the insured, if it can.	Insurer does not pay the portion of the judgment within the retention. The insured pays the SIR. <sup>35</sup>
4.	<u>Certificates of Insurance</u>	A deductible need not be divulged on a certificate of insurance.	An SIR must be divulged on a certificate of insurance, as the insurer has no responsibility to pay claims until the SIR is exhausted.

Unfortunately, courts and insurance industry personnel use the terms "deductible" and "self-insured retention" interchangeably and without care, and the four listed differences are not well understood. The actual operation of a deductible or SIR provision usually can only be determined through a review of the written policy and discussion with the insurer. The scope of a contract's indemnity and the financial ability of the indemnitor may reduce concern as to this distinction.<sup>36</sup>

*Settlement.* Liability policies with deductibles sometimes contain provisions granting settlement authority to the insurer, even over an insured's objections, and permit the insurer to recover from the insured the portion of the settlement within the deductible. The same settlement right may be granted to the insurer by the SIR insured, but it is more common for an insured with a large self-insured retention to also retain settlement rights, even if the settlement exceeds the SIR amount.<sup>37</sup> In circumstances where the policy with a SIR grants settlement rights to the insurer, a conflict of interest can exist between the insurer and its insured.<sup>38</sup>

<sup>33</sup> **Deductibles v. SIRs.** Turner, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 4:6 Deductibles and Self-Insured Retentions (2d ed. 2014).

<sup>34</sup> **Insurer Pays Above the SIR.** *Lexington Ins. Co. v. National Oil Well Nov, Inc.*, 355 S.W.3d 205 (Tex. App. - Hou. [1<sup>st</sup> Dist.] 2011, no writ) - Once self-insured retention paid out in defense costs, insured not required to participate in costs of defense paid out by insurer.

<sup>35</sup> **Payment of SIR as Trigger to Insurer's Payment.** Many policies with SIRs provide that the insurer's obligation to pay the policy amount is not triggered until the insured *actually* pays the portion of the settlement or judgment within the SIR amount. Some courts have held that there is no coverage where the insured does not or cannot pay the SIR amount, for example if the insured is bankrupt. *Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co.*, 2005 WL 3487723 (W.D. Tex. 2005) - insured's bankruptcy and resultant non-payment of the SIR excused the insurer (policy did not include a "bankruptcy of the insured clause"). However, some other courts have held that the standard bankruptcy clause in most liability policies (bankruptcy of the insured does not excuse covered payments by the insurer) results in the insurer not being excused by the bankrupt's nonpayment of the SIR (bankruptcy clause: "Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part."). See *Seaman and Schulze*, ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS § 9:4 The Impact of the Policyholder's Bankruptcy - Impact on self-insured retentions (2013); e.g., *Gulf Underwriters Ins. Co. v. McClain Indus., Inc.*, 2008 WL 3021134 (Mich. Ct. App. 2008).

Some SIR provisions are drafted to permit payment of the SIR amount through other insurance available to the insured, such as when the another policy is primary and the policy with a SIR is excess to it.

<sup>36</sup> **SIRs May Apply on a Per Occurrence Basis.** Since SIRs may apply on a per occurrence basis under a liability policy, the financial strength of the insured financing risk through its SIR may need to be evaluated by a party permitting the other party to finance a portion of its risk through a SIR. See *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526 (5<sup>th</sup> Cir. 1998) - court held that independent acts of sexual abuse by an H.E.B. employee of two children constituted two "occurrences" subject to separate \$1,000,000 SIRs payable by H.E.B.

<sup>37</sup> **No Conflict of Interest Between Insured and its Insurer Where Settlement Rights Retained by SIR Insured.** See generally, *International Ins. Co. v. Dresser Industries, Inc.*, 841 S.W.2d 437 (Tex. App. - Dallas 1992) - insured, who agreed to take on additional role as primary insurer, owed no duty to excess insurer to settle underlying products liability case within limits of primary coverage.

<sup>38</sup> **Conflict of Interest Between Insured and its Insurer Where Settlement Rights Granted SIR Insured to Insurer.** As noted in *Roehl Transport, Inc. v. Liberty Mut. Ins. Co.*, 784 N.W.2d 542, 554 (Wis. 2010) "the insurance company might offer an unnecessarily high settlement

*Self-Insurance Specification Drafting.* If self-insurance is to be considered, consideration should be given to establishing financial means tests and monitoring procedures. See Exhibit A - Insurance Specifications, **Spec. A.10 Self-Insurance, Large Deductibles and/or Retentions.** A self-insurance right should be limited to the named entity and care should be addressed in the permitted assignment or successor provisions so as to avoid assignment or succession by entities of lesser credit worthiness.

*Self-Insurance and Additional Insured Status.* Being named as an “additional insured” on a self-insurance program, does not provide any additional insurance to the “additional insured”, as the indemnitor is the sole funding entity.<sup>39</sup>

*Funding Self-Insurance.* Unless the parties have established a restricted and encumbered fund or a reinsurance program, all that you have is the unsecured indemnity of self-insurer. The term “self-insurance” does not, without further detail, specify what procedures are to be followed and what protection is available.

#### Property Loss Risks: Deductibles and Self-Insurance.

*Deductibles.* Under a property or builder's risk policy, the deductible is subtracted by the insurer from its loss payment. The insured who suffers the loss absorbs the deductible, unless the deductible is allocated between the parties in a different fashion. For example, if a builder's risk policy has a deductible, the party that owns the damaged property absorbs the deductible (absent a contractual provision reallocating the loss within the deductible).<sup>40</sup>

*The Self-Insured Owner and "Waivers of Subrogation".* The concept of a waiver of subrogation is technically applicable only to an insurer. With a waiver of subrogation, the insurer waives its right to step in to the shoes of its insured and seek to recoup either from a specified person or all persons the policy proceeds paid out to the insured. A waiver of recovery by an insured often effectuates a waiver of an insurer's right of subrogation. In the self-insurance context, parties sometimes use the term “waiver of subrogation,” but in reality what is meant is a “waiver of recovery;” the self-insured is waiving its right of recovery as to the other party. A self-insuring property owner may balk at waiving its right of recovery. However, when an owner elects to self-insure it likely has done so for sound economic reasons. By waiving recovery (aka granting a waiver of subrogation) against the other party, the waiving party assumes the risk of loss due to

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within the deductible to avoid the expense of diligent investigation and adjustment. Or it might expend insufficient effort to investigate a claim unless and until the insurance company's own money is at risk when the value of the claim approaches or exceeds the deductible.”

<sup>39</sup> **Self-Insurance is Not "Other Insurance" to Contribute as Primary Insurance.** Also, another question is sometimes raised concerning self-insurance. In a case where a loss is covered by another party's insurance, which insurance provides that it is primary coverage, and the self-insurer also is liable, is the self-insure required to share in the loss payment by the insurer? This question is sometimes stated, is self-insurance “other insurance”? If multiple policies cover a loss, the “other insurance” provisions of each the policies will dictate how the loss is allocated among the policies' proceeds. If both policies state they are primary, then the policies need to be consulted. The standard CGL policy states that its coverage is primary with respect to “other insurance” unless the other insurance is also primary, in which case the policy will pay a share of the loss. See discussion of “other insurance” at Footnote 28 Primary and Noncontributing at the end of this article. The majority rule, and the rule in Texas, is that self-insurance is not “other insurance” within the other insurance provision of a primary policy. See Holloway, Annot., Self-Insurance against Liability as Other Insurance with Meaning of Insurance Policy, 46 A.L.R. 4<sup>th</sup> 707 (1986). *Allstate Ins. Co. v. Zellars*, 462 S.W.2d 550, 552 (Tex. 1970); *Hertz Corp. v. Robineau*, 6 S.W.3d 332, 335 (Tex. App. - Austin 1999, no writ) (J. Woodfin Jones).

<sup>40</sup> **Approaches to the Deductible.** One approach to the parties deductibles dealing with deductibles or SIR is to specify the maximum amount of the deductible or SIR. Another approach is to allow the purchaser of the insurance to choose the deductible, and to allocate the deductible to the insurance purchaser, in whole or in part. For example, an owner may purchase the builder's risk policy and choose a high deductible to manage insurance premiums, and allocate the first dollars up to a limit to the contractor, and agree to pick up all dollars above the amount allocated (e.g., \$5,000 to the contractor, all dollars above \$5,000 up to the \$50,000 deductible allocated to owner).

the negligence of the other party. If this waiver is not granted, then the other party might condition doing the transaction on its obtaining property insurance covering the loss, and seeking to pass the premium cost back to the other party. For example, a contractor contracting with a self-insured owner, who does not waive recovery against the contractor, likely will pass the insurance cost back to the self-insuring owner, and will seek to limit its liability to collected insurance proceeds.

*The Self-Insured Tenant.* If an owner permits its tenant to self-insure losses to its building, in addition to the financial security concerns noted above, the lease should address the following concerns. Like an insurer, the self-insured tenant should be required to produce a "certificate of (self) insurance" to the landlord and its mortgagee specifying the type of casualty coverage (e.g., replacement cost with agreed value endorsement), the amount thereof and policy terms. The self-insurance coverage should name the mortgagee under a standard mortgagee clause providing that the mortgagee is not subject to defenses to coverage that the tenant may otherwise have with respect to payment. Of course, the self-insurance concept needs to be approved by the owner's mortgagee. The self-insured tenant will need to confirm to the owner and its mortgagee that it has waived its right of recovery (subrogation) against the landlord. If the casualty loss may result in lease termination, the lease should address disposition of "self-insurance proceeds," for example, requiring the self-insured tenant to deposit an amount equal to the insurance proceeds otherwise payable to the landlord under the terms of a property insurance policy that was to have been maintained absent self-insurance. The self-insurance provision should address rent loss coverage, while the premises are being restored.

## **11. Not All Casualty Proceeds Clauses Are Equal**

Attached in the Appendix of Forms are the casualty provisions of an office lease for a to-be-built office building (aka "first generation space"). These provisions serve as a road map for the issues that should be addressed in casualty loss provisions in leases, including for other types of leases, such as ground leases, build-to-suit leases, single tenant building leases, and leases of spaces in different type facilities, e.g., retail, warehouse and industrial facilities.

### Road Map

The following are questions and topics are addressed in the attached office lease extract:<sup>41</sup>

- What constitutes a casualty loss?
- Who decides if the damaged property is to be rebuilt?
- The party responsible to rebuild in the event of a casualty loss.
- Damage to what portions of the property trigger the election to rebuild or terminate the lease (e.g., common areas, parking; damage that materially adversely affects the tenant's use or access)?
  - What standard to be applied in determining if the degree of damage triggers an election or if rebuilding is mandatory (e.g., landlord's judgment; landlord's judgment that building cannot be operated economically as an integral unit; "substantial damage"; damage such that it will take greater than one year to rebuild if damage occurs prior to the last two years of the lease term,

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<sup>41</sup> **Annotated Office Lease.** Also see Thomas M. Whelan, *Texas Annotated Office Lease*, 35<sup>th</sup> ANNUAL ADVANCED REAL ESTATE COURSE, State Bar of Texas, 2013.

damage such that it will take greater than 60 days to rebuild if damage occurs during the last two years of the lease term)?

- Relevance of length of time involved in rebuilding (*e.g.*, greater than a year; greater than 60 days if casualty occurs during the last 24 months of the lease term).
- Period during which casualty occurs as triggering elections (*e.g.*, during last 24 months of lease term).
- Standards and process for rebuilding (*e.g.*, issues similar to those addressed in the work letter; who builds which portion of the damaged improvement; who funds each portion rebuilt; how is rebuilding coordinated with other tenants and with landlord's work; insurance; contractor approval).
- How and when is determination/estimation made of the length of time that rebuilding will take (*e.g.*, within 60 days after the date of the casualty)?
- Notice of election is to be given to other party within what period of time (*e.g.*, by landlord within 60 days of the occurrence, by tenant within 65 days of the occurrence if damage occurs during the last two years of lease term)?
- What happens if rebuilding takes longer than the estimated period?
- Effect of force majeure if rebuilding takes longer than estimate period.
- Extension of rebuilding period if the other party's conduct affects rebuilding period (*e.g.*, tenant delays).
- Conditions which must be satisfied in order for party to terminate (*e.g.*, landlord must terminate all of the other leases in the project affected by such casualty in a like manner).
- What happens if no election is made or not made within a time period?
- What happens if insurance proceeds are not sufficient to rebuild or fully rebuild?
- Under what circumstances will rent abate or partially abate?
- If rent is to partially abate, what formula is used to determine the portion abated?
- Do other expenses abate (*e.g.*, CAM, operating expense pass-through, taxes, insurance)?
- Does the rebuilding party's lender have the right to have the insurance proceeds applied to that party's loan? If so, will rebuilding still occur?

### Mortgagee's Concerns

One of the primary concerns of the lender is the right to claim insurance proceeds arising from destruction of the mortgaged property.<sup>42</sup> 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 is more than one form of endorsement for this purpose and each provides widely different protection.

### Mortgagee's Rights to Insurance Proceeds<sup>43</sup>

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. A

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<sup>42</sup> **Lender's Primary Concern.** 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](http://www.joshuastein.com).

<sup>43</sup> **Mortgagee's Rights under Fire Insurance Policy.** 13 WILLISTON ON CONTRACTS § 37:51 Mortgagee's Rights under Fire Insurance Policy (4<sup>th</sup> ed. 2010).

mortgagee does not have an insurable interest in the property in excess of its secured debt.<sup>44</sup> 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. As observed by a well-known commentator on insurance matters,

Rather than have both the borrower and lender buy separate policies of property insurance to protect their respective interests, the lender typically requires the borrower to do two things: First, the borrower covenants in the mortgage that there will be property insurance maintained for the benefit of the mortgagee; and Second, the lender requires the borrower to obtain a property policy with a loss payable clause in favor of the lender.<sup>45</sup>

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.<sup>46</sup> A standard mortgage 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. 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.<sup>47</sup> 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.<sup>48</sup>

## 12. Specific Specifications Are Better Than General

Included in this article are two approaches to writing insurance specifications, a narrative approach and an exhibit checklist approach. There are drafting advantages and disadvantages to each approach (one’s vice is the other’s virtue).

Narrative	Exhibit
General	Specific
Brief	Detailed
Paragraph Style	Checklist Style

The authors encourage the use of the exhibit checklist approach. In the authors’ experience providing a specific, detailed, checklist style set of insurance specifications facilitates delivery of insurance meeting the parties’ insurance requirements. The authors urge “Remember your audience,” which we argue is the insurance agents issuing and reviewing the insurance to be obtained.

<sup>44</sup> **Mortgagee’s Insurable Interest Limited to 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.”

<sup>45</sup> **Lender’s Interest in Policy Proceeds.** Scott B. Osborne, *Lender’s Security Interest in Casualty Policy Proceeds*, ACREL Workshop (Seattle, 1994).

<sup>46</sup> **Different Forms of Mortgage Interest Endorsements.** See the Commentary on Forms Endnote 147 - The Standard Mortgage Clause – Standard Commercial Property Policy discussing Section F.2, Additional Conditions – Mortgageholders of the ISO CP 00 10 10 12 Building and Personal Property Coverage Form, which is part of the ISO property insurance policy.

<sup>47</sup> **Bankruptcy of the Mortgagor.** *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d 949, 951 (5<sup>th</sup> 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.”

<sup>48</sup> **UCC Priorities.** 9 Anderson, UNIFORM COMMERCIAL CODE, § 9-306:15 (3rd ed. 1985).

## APPENDIX OF FORMS

### 1. Casualty Provisions with Narrative Insurance Specifications

The following insurance and indemnity provisions are adapted from lease provisions drafted by American Bar Association, Section of Real Property Probate and Trust Law, Leasing Committee, July 2009. These provisions are only samples and must be reviewed by an attorney and tailored for any particular situation. Substantive edits by the authors of this paper are indicated by underlining or ~~striketroughs~~.

**A. Landlord's Insurance.** Landlord shall take out and maintain, at its own cost and expense (subject, however to reimbursement as set forth herein below), (i) Workers' Compensation, (ii) comprehensive automobile liability insurance; (iii) general liability for bodily injury and property damage arising from Landlord's ownership, management, use and/or operation of the Common Areas and/or the Shopping Center with coverage limits equal to those Tenant is required to maintain in accordance with Section B below; and (iv) insurance covering all ~~perils causes of loss~~ insurable under a "Causes of Loss - Special Form" policy, ~~including, but not limited to, fire and such other risks as are from time to time included in standard extended coverage endorsements,~~ insuring in an amount, after completion of construction, of not less than 80% of the full insurable value, or such greater coverage as may be required by Landlord's mortgage. Insurance provided for in this Section A may be carried by inclusion within the coverage of any blanket policy or policies of insurance maintained by Landlord; provided, however, that the coverage afforded will not be reduced or diminished by reason of the use of such blanket policies of insurance. If the insurance policies maintained by Landlord with respect to the Shopping Center contain any nature of deductible feature, then Landlord shall be solely responsible for the payment of any such deductible in the event of a loss to the Leased Premises and/or the Shopping Center.<sup>49</sup>

### **B. Tenant's Insurance Payment. ...**

**C. Tenant's Insurance.** Tenant shall take out and maintain, at its own cost and expense, commercial general liability insurance coverage of \$1,000,000 ~~combined single limit,~~<sup>50</sup> which commercial general liability policy shall be on an ISO form CG 00 01, or a substitute providing equivalent coverage, and shall include (i) coverage for bodily injury and death, property damage and personal injury ~~products liability coverage,~~<sup>51</sup> and (ii) contractual liability coverage ~~insuring the obligations of Tenant under the terms of this Lease.~~ Such policy shall name Landlord and Landlord's mortgagee, ~~as their respective interests may appear,~~<sup>52</sup> as additional insureds, on an ISO form CG 20 11 01 96, or equivalent form. The liability policy shall be endorsed to include a waiver of subrogation by the insurer as to Landlord (the Landlord Parties). This insurance shall be endorsed to provide primary and not requiring contribution by any insurance maintained by the Landlord (or the Landlord Parties). It is the specific intent of the parties to this Lease that all insurance held by Landlord (or the Landlord Parties) shall be excess above the insurance required to be obtained by Tenant by this Lease. The personal injury contractual liability exclusion shall be deleted from the contractual liability coverage. The following exclusions/limitations (or their equivalents) are not permitted: (a) Contractual Liability Limitation, CG 21 39 or its equivalent; (b) Amendment of Insured Contract Definition, CG 24 26 or its equivalent; (c) Limitation of Coverage to Designated Premises or Project, CG 21 44; (d) any endorsement modifying or deleting the exception to the Employer's Liability exclusion; (e) any "insured vs. Insured" exclusion; and (f) any type of punitive, exemplary or multiplied damages exclusion. All such insurance required to be maintained by Tenant shall be with an insurance company qualified to do business in the state where the Leased Premises is located. Within 30 days following a written request therefore, Tenant shall provide Landlord

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<sup>49</sup> **Deductible Allocated to Landlord.** Note the approach taken by this provision is to place the risk of loss within the deductible solely on the Landlord and thus without pass through to the Tenants of the Shopping Center. Ok? For example, windstorm deductibles can be quite high.

<sup>50</sup> **Combined Single Limit - Antiquated Terminology.** An 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 no meaning and should generally be avoided.

<sup>51</sup> **Deletion of Products Liability Coverage.** Except in the context of liabilities arising out of construction, there is little risk to a Tenant covered by "products liability" coverage. Some rationale may be found for requiring products liability coverage if the Tenant is a restaurant.

<sup>52</sup> **ATIMA Language Not Applicable to Liability Policies.** The "as their interest may appear" language has been deleted in this reference to additional insured coverage for additional insureds under the Tenant's CGL policy as such language is solely applicable to multiple insureds under property policies.

with an ACORD certificate of all policies required herein, including an endorsement providing that such insurance shall not be canceled ~~or not renewed~~<sup>53</sup> except after 30 days' notice in writing to Landlord. Should Tenant fail to maintain such policies as hereinabove provided, Tenant will be deemed to be in default of the provisions of this Section C, and shall, within 30 days following receipt of a written notice of such default, obtain such insurance. Tenant's obligation to carry the insurance provided for above may be satisfied by inclusion of the Leased Premises within the coverage of so-called "blanket" policies of insurance carried and maintained by Tenant. Tenant shall be responsible for the safety and personal well-being of Tenant's agents, servants, employees, customers and invitees within the Leased Premises. Tenant agrees that Landlord shall not be responsible or liable to Tenant or those claiming under Tenant (including, without limitation, Tenant's agents, servants, employees, customers and invitees) for (i) injury, death or damage or loss occasioned by the acts or omissions of persons occupying any other part of the Shopping Center; or (ii) occasioned by the property of any other occupant of any part of the Shopping Center; or (iii) the acts or omissions of any other person or persons present at the Shopping Center who are not occupants of any part thereof, whether or not such persons are present with the knowledge or consent of Landlord.<sup>54</sup> If Tenant is engaged in any way in the manufacture, sale or distribution of alcoholic beverages, either for consumption of alcoholic beverages on or off the Leased Premises, Tenant will also maintain liquor liability insurance on an occurrence basis with the limits of not less than \$2,000,000 each common cause and \$3,000,000 aggregate. If written on a separate policy from the commercial general liability policy, such policy shall name Landlord and Landlord's mortgagee, ~~as their respective interests may appear~~, as additional insured. (To the extent relevant, insert the following additional insurance specifications for Tenant as set out in Form A.1: the General Insurance Requirements; Business Auto Liability, Workers' Compensation and Employer's Liability, and Environmental Liability; Property Insurance, Business Income and Extra Expense, Boiler & Machinery coverage; Other Insurance; Tenant's Contractors specifications).

D. Indemnification Obligations of Tenant. ...

E. Indemnification Obligations of Landlord. ...

F. Mutual Waiver of Subrogation. ...

## 2. Casualty Provisions with Checklist-Style Insurance Specifications

### Section 11.1. Destruction.

#### 11.1.1. Reconstruction.

If the Leased Premises are damaged by fire or other casualty, the same shall be repaired or rebuilt as speedily as practical under the circumstances at the expense of the Landlord [subject to Section 11.1.3 below], unless this Lease is terminated as provided in this Section 11.1, and during the period required for restoration, a just and proportionate part of Base Rental shall be abated until the Leased Premises are repaired or rebuilt.

#### 11.1.2. Termination Rights.

a. Landlord's Termination Rights. If the Leased Premises and/or any portion of the Project which materially adversely affects Tenant's use of or access to the Leased Premises are (i) damaged to such an extent that repairs cannot, in Landlord's judgment (after consultation, as soon as reasonably practicable after the occurrence of the related damage, with an architect and general contractor of recognized good reputation selected by Landlord), be completed within one year after the date of the casualty or (ii) damaged or destroyed as a result of a risk which is not insured under an ISO causes of loss - special form insurance policy, or (iii) damaged or destroyed during the last 24

<sup>53</sup> No Advance Notice of Non-Renewal. Insurers will not agree to give other insureds advance notice of non-renewal of a policy.

<sup>54</sup> Contractual Disclaimer – Exclusions from Landlord's Responsibility – Injuries or Damages Incurred by Occupants of the Shopping Center and Other Persons Present at the Shopping Center. This broad form contractual disclaimer appears to eliminate Landlord's liability to tenants for injuries and damage at the Shopping Center. The disclaimer is for (i) all injuries, damages or loss occasioned by the acts or omission of persons occupying any other part of the Shopping Center; (ii) occasioned by the property of any other occupant of any part of the Shopping Center; or (iii) the acts or omissions of any other person or persons present at the Shopping Center who are not occupants of any part thereof. Questions: What is left? Does the disclaimer disclaim liability for injuries or property damage to the extent caused in part by the acts or omissions, including negligence, of the Landlord and the persons as to which it would have legal responsibility? Does this disclaimer conflict with the Landlord indemnity in Insurance Specifications in Narrative Format?

months of the Lease Term or the Renewal Term if Tenant exercised or exercises (within 30 days of the date of such casualty) its option to extend, or if the Building is damaged in whole or in part (whether or not the Leased Premises are damaged), to such an extent that the Building cannot, in Landlord's judgment, be operated economically as an integral unit, and Landlord terminates all of the other leases in the Project affected by such casualty in a like manner, then but only in such events, Landlord may at its option terminate this Lease by notice in writing to the Tenant within 60 days after the date of such occurrence.

**b. Tenant's Termination Rights.** If the Leased Premises are damaged to such an extent that repairs cannot, in Landlord's judgment, be completed within one year after the date of the casualty or if the Leased Premises are substantially damaged during the last 24 months of the Lease Term or the Renewal Term if Tenant exercised or exercises (within 30 days of the date of such casualty) its option to extend, then in any of such events, Tenant may elect to terminate this Lease by notice in writing to Landlord within 65 days after the date of such casualty. If the Leased Premises are not materially restored by Landlord to the extent required of Landlord hereunder on or before the date that is one year after the date of the related casualty (as extended because of Tenant Delays or Force Majeure), then Tenant shall have the right to terminate this Lease by giving written notice thereof to Landlord on or before the earlier to occur of (i) the date that is one year after the date of the related casualty (as extended because of Tenant Delays or Force Majeure), or (ii) the date that Landlord has substantially completed the restoration of the Leased Premises, as the case may be; provided, however, that if construction or reconstruction is delayed because of changes, deletions or additions in constructions requested by Tenant or other Tenant Delays or Force Majeure, the one year period for restoration, repair or rebuilding shall be extended for the amount of such delay.

**c. Failure to Terminate.** Unless Landlord or Tenant elects to terminate this Lease as hereinabove provided, this Lease will remain in full force and effect and Landlord shall repair or rebuild such damage at its expense to the extent required in this Section as expeditiously as possible under the circumstances substantially in accordance with the Base Building Plans and the Plans and Specifications for the Leased Premises (subject to the limitations in Section 11.1.3 below), except to the extent not possible under then applicable law.

### **11.1.3. Extent of Landlord's Expense to Reconstruct.**

If Landlord should elect or be obligated pursuant to Section 11.1.1 above to repair or rebuild because of any damage or destruction, Landlord's obligation shall be limited to the original Building and the leasehold improvements in the Leased Premises (to the extent such leasehold improvements can be restored for the amount of the Construction Allowance applicable thereto) and shall not extend to any furniture, equipment, supplies or other personal property owned or leased by Tenant, its employees, contractors, invitees or licensees. If the cost of performing such repairs and restoration exceeds the actual proceeds of insurance paid or payable to Landlord on account of such casualty, or if Landlord's mortgagee or the lessor under a ground or underlying lease shall require that any insurance proceeds from a casualty loss be paid to it, and if Landlord terminates all of the other leases, Landlord may terminate this Lease by giving written notice to Tenant not later than 120 days after the date of the casualty or other occurrence.

**Section 11.2. Insurance.** The parties agree to maintain the property and liability insurance policies specified for the party to maintain in Exhibit A to this Lease.<sup>1</sup>

## **EXHIBIT A - INSURANCE SPECIFICATIONS**

### **A. General Insurance Requirements**

#### **1. Definitions.** For purposes of this Lease:

**a. Landlord Parties.** "Landlord Parties" means (a) \_\_\_\_\_ ("Landlord"), (b) the project manager, (c) any lender whose loan is secured by a lien against the Leased Premises, (d) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, and (e) any directors, officers, employees, or agents of such persons or entities.

**b. Tenant.** "Tenant" means (a) \_\_\_\_\_ and (b) subtenants of any tier.

**c. ISO.** "ISO" means Insurance Services Office.<sup>2</sup>

#### **2. 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,<sup>3</sup> and authorized to engage in the business of insurance in the State in which the Improvements are located.<sup>4</sup>

**b. 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.

**c. Delivery Deadlines.** Tenant shall provide Landlord within 10 days of Landlord's request with certified copies of all insurance policies. Renewal policies, if necessary, shall be delivered to the Landlord prior to the expiration of the previous policy.

**d. Occupancy.** Commencement of occupancy without provision of the required certificate of insurance and/or required endorsements, or without compliance with any other provision of this Lease, shall not constitute a waiver by any Landlord Party of any rights. The Landlord shall have the right, but not the obligation, of prohibiting the Tenant or any subtenant from occupying the Leased Premises until the certificate of insurance and/or required endorsements are received and approved by the Landlord.

### **3. Limits, Deductibles and Retentions.**

**a. Coverage Limits.** The limits of liability may be provided by a single policy of insurance or by a combination of primary<sup>5</sup> and excess<sup>6</sup> policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein.

**b. Deductible and Retention Limits.** No deductible<sup>7</sup> or self-insured retention<sup>8</sup> shall exceed \$\_\_\_\_\_ without prior written approval of the Landlord, except as otherwise specified herein. All deductibles and/or retentions shall be paid by, assumed by, for the account of, and at the Tenant's sole risk. The Tenant shall not be reimbursed for same.

**c. Policy Limits.** "Limits" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Tenant or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to Landlord and Landlord the limits specified below as the minimum limits are increased to the greater limits.

### **4. Forms.**

**a. 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.

**b. Approved Forms.** Any policy or endorsement forms other than a form specified in this Exhibit must be approved in advance by Landlord.

**c. Compliance with Laws.** If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to this Lease, shall be reformed to provide the maximum amount of protection to the Landlord Parties as allowed under the law.

### **5. 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. Property Insurance: ACORD™ Form 28 (2011/11) *Evidence of Commercial Property Insurance* for property coverages.<sup>9</sup>

**b. Delivery Deadlines.** Evidence to be delivered to Landlord prior to entry on Leased Premises and thereafter at least 30<sup>10</sup> 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.<sup>11</sup>

**c. Certificate Requirements.**<sup>12</sup> Certificates must:

(1) **Insured.** State the insured's name and address.<sup>13</sup>

(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 Waiver.** Specify the additional insured<sup>14</sup> 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.<sup>15</sup>

(6) **Copy of Endorsements and Policy Declaration Page.** Be accompanied by 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.<sup>16</sup>

(8) **Certificate Holder.**<sup>17</sup> Be addressed to the Landlord as the certificate holder and show Landlord's correct address. A separate certificate is to be addressed and delivered to Landlord's lender.

(9) **Producer.** State the producer of the certificate with correct address and phone number listed.<sup>18</sup>

(10) **Authorized Representative.** Be executed by a duly authorized representative of the insurers.<sup>19</sup>

## **6. Tenant Insurance Representations to Landlord Parties.**

**a. Minimum Requirements.** It is expressly understood and agreed that the insurance coverages required herein (a) represent Landlord Parties' minimum requirements and are not to be construed to void or limit the Tenant's indemnity obligations as contained in this Lease nor represent in any manner a determination of the insurance coverages the Tenant should or should not maintain for its own protection; and (b) are being, or have been, obtained by the Tenant in support of the Tenant's liability and indemnity obligations under this Lease. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Tenant, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of this Lease.

**b. Defaults.** Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, this Lease. If the Tenant shall fail to remedy such breach within five business days after notice by the Landlord, the Tenant will be liable for any and all costs, liabilities, damages and penalties resulting to the Landlord Parties from such breach, unless a written waiver of the specific insurance requirement is provided to the Tenant by the Landlord. In the event of any failure by the Tenant to comply with the provisions of this Lease, the Landlord may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to the Tenant, purchase such insurance, at the Tenant's expense, provided that the Landlord shall have no obligation to do so and if the Landlord shall do so, the Tenant shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

**c. Survival.** This Exhibit is an independent contract provision and shall survive the termination or expiration of the Lease.<sup>20</sup>

## **7. Insurance Requirements of Tenant's Subtenants.**

**a. Subtenant Coverage.** If Tenant is permitted by the Lease to sublease any space, insurance similar to that required of the Tenant shall be provided by all subtenants (or provided by the Tenant on behalf of subtenants) to cover operations performed under any sublease agreement. The Tenant shall be held responsible for any modification in these insurance requirements as they apply to subtenants. The Tenant shall maintain certificates of insurance from all subtenants containing provisions similar to those listed herein (modified to recognize that the certificate is from subtenants) enumerating, among other things, the waivers of subrogation, additional insured status, and primary liability as required herein, and make them available to the Landlord upon request.

**b. Subtenant's Waiver of Recovery; Subtenant's Waiver of Subrogation.** Tenant is fully responsible for loss and damage to its property on the site, including tools and equipment, and shall take necessary precautions to prevent damage to or vandalism, theft, burglary, pilferage and unexplained disappearance of property. Any insurance covering the Tenant's or its subtenant's property shall be the Tenant's and its subtenant's sole and complete means or recovery for any such loss. To the extent any loss is not covered by said insurance or subject to any deductible or co-insurance, the Tenant shall not be reimbursed for same. Should the Tenant or its subtenants choose to self-insure this risk, it is expressly agreed that the Tenant hereby waives, and shall cause its subtenants to waive, any claim for damage or loss to said property in favor of the Landlord Parties.

## **8. Use of the Landlord's Property.**

Tenant, its agents, employees, subtenants or suppliers shall use the Landlord's property only with express written permission of the Landlord's designated representative and in accordance with the Landlord's terms and conditions for such use. If the Tenant or any of its agents, employees, subtenants or suppliers utilize any of the Landlord's property for any purpose, including machinery, equipment or similar items owned, leased or under the control of the Landlord, the Tenant shall defend, indemnify and be liable to the Landlord Parties for any and all loss or damage which may arise from such use.

## **9. INDEMNITY, RELEASE AND WAIVER.**

**a. WAIVER OF CLAIMS.** TO THE EXTENT PERMITTED BY LAW, EACH OF TENANT AND LANDLORD (THE "RELEASING PARTY") RELEASES AND WAIVES ANY CLAIMS IT MAY HAVE AGAINST THE OTHER PARTY OR ITS OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS (THE "RELEASED PERSONS") FOR BUSINESS INTERRUPTION OR DAMAGE TO PROPERTY SUSTAINED BY THE RELEASING PARTY AS THE RESULT OF ANY ACT OR OMISSION OF THE RELEASED PERSON IN ANY WAY CONNECTED WITH ANY LOSS COVERED BY INSURANCE, WHETHER REQUIRED HEREIN OR NOT, OR WHICH SHOULD HAVE BEEN COVERED BY INSURANCE REQUIRED HEREIN, INCLUDING THE DEDUCTIBLE AND/OR UNINSURED PORTION THEREOF, MAINTAINED AND/OR REQUIRED TO BE MAINTAINED BY THE RELEASING PARTY PURSUANT TO THIS LEASE. THE WAIVER OF CLAIMS CONTAINED IN THIS SECTION 9.a (A) WILL SURVIVE THE END OF THE TERM AND (B) WILL APPLY EVEN IF THE LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PERSONS BUT WILL NOT APPLY TO THE EXTENT A LOSS OF DAMAGE IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PERSONS.

### **b. INDEMNIFICATION.**

(1) TENANT. TO THE EXTENT PERMITTED BY LAW, TENANT SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE LANDLORD PARTIES AGAINST ANY CLAIM BY ANY THIRD PARTY FOR INJURY TO ANY PERSON OR DAMAGE TO OR LOSS OF ANY PROPERTY OCCURRING IN OR AROUND THE PROJECT AND ARISING FROM THE USE OR OCCUPANCY OF THE LEASED PREMISES OR FROM ANY OTHER ACT OR OMISSION OR NEGLIGENCE OF TENANT OR SUBTENANTS OR ANY OF TENANT'S OR SUBTENANT'S OFFICERS, DIRECTORS, EMPLOYEES, CONTRACTORS OR AGENTS.

(2) LANDLORD. TO THE EXTENT PERMITTED BY LAW, LANDLORD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS TENANT AND ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS AGAINST ANY CLAIM BY ANY THIRD PARTY FOR INJURY TO ANY PERSON OR DAMAGE TO OR LOSS OF ANY PROPERTY OCCURRING IN THE PROJECT AND ARISING FROM ANY ACT OR OMISSION OR NEGLIGENCE OF ANY OF THE LANDLORD PARTIES.

(3) PROPORTIONATE RESPONSIBILITY. THE INDEMNITIES CONTAINED IN THIS SECTION 9.b ARE (A) INDEPENDENT OF TENANT'S AND LANDLORD'S INSURANCE (AS APPLICABLE), (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR

EMPLOYEE BENEFIT ACTS, AND (C) WILL SURVIVE THE END OF THE TERM. NOTWITHSTANDING ANYTHING IN THIS LEASE TO THE CONTRARY, TO THE EXTENT THE INDEMNIFIED LIABILITY, LOSS, COST, DAMAGE OR EXPENSE ARISES OUT OF THE JOINT, CONCURRENT OR COMPARATIVE NEGLIGENCE, CAUSATION, RESPONSIBILITY OR FAULT OF TENANT AND LANDLORD, WHETHER NEGLIGENCE, STRICT LIABILITY, BREACH OF WARRANTY, EXPRESS OR IMPLIED, PRODUCTS LIABILITY, BREACH OF THE TERMS OF THIS LEASE OR WILLFUL MISCONDUCT, THEN THE INDEMNIFYING PARTY'S OBLIGATION TO THE INDEMNIFIED PERSONS SHALL ONLY EXTEND TO THE PERCENTAGE OF TOTAL RESPONSIBILITY OF THE INDEMNIFYING PARTY IN CONTRIBUTING TO SUCH LIABILITY, LOSS, COST, DAMAGE OR EXPENSE OF THE INDEMNIFIED PERSONS.

**10. Self-Insurance, Large Deductibles and/or Retentions.**

**a. Continued Liability of Tenant.** If Tenant elects to self-insure or to maintain insurance required herein subject to deductibles and/or retentions exceeding \$\_\_\_\_\_, Landlord and Tenant shall maintain all rights and obligations between themselves as if Tenant maintained the insurance with a commercial insurer including any additional insured status, primary liability, waivers of rights of recovery, other insurance clauses, and any other extensions of coverage required herein. Tenant shall pay from its assets the costs, expenses, damages, claims, losses and liabilities, including attorney's fees and necessary litigation expenses at least to the extent that an insurance company would have been obligated to pay those amounts if Tenant had maintained the insurance pursuant to this Exhibit.

**b. Deductibles, Retentions and Uninsured Losses.** All deductibles, retentions, and/or uninsured amounts shall be paid by, assumed by, for the account of, and at Tenant's sole risk. Landlord shall not be responsible for payment of any deductible or self-insured retention or uninsured amount.

**c. Financial Test.** The Tenant's right to self-insure shall terminate at any time (a) Tenant's net worth, as reported in its latest annual report, or audited financial statement prepared in accordance with GAAP, drops below \$\_\_\_\_\_, (b) Tenant's Moody's rating on its long-term debt drops below investment grade, or (c) Tenant fails to maintain adequate loss reserves to fund its self-insurance obligations.

**B. Specific Insurance Requirements**

**1. Policies To Be Provided by Tenant.** Subject to review and revision by Landlord from time to time, in Landlord's good faith judgment, the following insurance shall be maintained by Tenant with limits not less than those set forth below at all times during the term of this Lease and thereafter as required:

No.	Specification	Coverages, Limits & Other Requirements						
<b>A. LIABILITY</b>								
<b>1.</b>	<b>Commercial General Liability.</b> Tenant is to maintain commercial general liability insurance ("CGL") <sup>21</sup> issued on an Occurrence Basis <sup>22</sup> meeting at least the following specifications.							
<b>1.1</b>	<b>Minimum Limits</b>	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than the following amounts: <table border="1" data-bbox="716 1465 1297 1581"> <tr> <td data-bbox="716 1465 1037 1497">\$ __,000,000</td> <td data-bbox="1037 1465 1297 1497">Per Occurrence.</td> </tr> <tr> <td data-bbox="716 1497 1037 1528">\$ __,000,000</td> <td data-bbox="1037 1497 1297 1528">General Aggregate.<sup>23</sup></td> </tr> <tr> <td data-bbox="716 1528 1037 1581">\$ __,000,000</td> <td data-bbox="1037 1528 1297 1581">Personal and Advertising Injury Limit.</td> </tr> </table>	\$ __,000,000	Per Occurrence.	\$ __,000,000	General Aggregate. <sup>23</sup>	\$ __,000,000	Personal and Advertising Injury Limit.
\$ __,000,000	Per Occurrence.							
\$ __,000,000	General Aggregate. <sup>23</sup>							
\$ __,000,000	Personal and Advertising Injury Limit.							
<b>1.2</b>	<b>General Aggregate</b>	If the CGL insurance contains a General Aggregate limit, it shall apply separately to these Premises and Property. <sup>24</sup>						
<b>1.3</b>	<b>Form</b>	This insurance is to be issued on an ISO form CG 00 01[, or a substitute providing equivalent coverage]. <sup>25</sup>						
<b>1.4</b>	<b>Insured Contracts</b>	Coverage shall apply to but not be limited to liability assumed by Tenant under the Lease (including the tort liability of another assumed in a business contract). <sup>26</sup>						
<b>1.5</b>	<b>Additional Insureds</b>	This insurance is to be endorsed with an ISO CG 20 11 [01 96] [04 13], Additional Insured Endorsement listing Landlord Parties as additional insureds. <sup>27</sup> No language						

No.	Specification	Coverages, Limits & Other Requirements
		excluding coverage for the acts or omissions of the additional insured shall be contained in the endorsement. The specification above of minimum limits does not limit the limits of coverage to be available to the Landlord Parties as additional insureds. If Tenant's insurance has limits greater than the above limits, the amount of coverage available to Landlord Parties is increased to the limits of Tenant's insurance, including limits under any umbrella or excess policies. Additional insured coverage of the Landlord Parties shall be maintained for the greater of the Term of the Lease, the holding over or possession of the Leased Premises by Tenant, or as long as Tenant is obligated to a Landlord Party for bodily injuries, property damage or other liabilities insurable by an ISO form CG 00 01 CGL policy.
1.6	<b>Primary</b>	This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance held by Landlord Parties shall be excess, secondary and non-contributory. <sup>28</sup>
1.7	<b>Waiver of Subrogation</b>	This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to provide a waiver of subrogation by insurer as to the Landlord Parties. <sup>29</sup>
1.8	<b>Deletion of Personal Injury Exclusion to Contractual Liability Coverage</b>	The personal injury contractual liability exclusion shall be deleted. <sup>30</sup>
1.9	<b>Notice</b>	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change]. <sup>31</sup>
1.10	<b>Prohibited Endorsements</b>	The following exclusions/limitations (or their equivalents) are not permitted: a. ISO CG 21 39 Contractual Liability Limitation. <sup>32</sup> b. ISO CG 24 26 Amendment Of Insured Contract Definition. <sup>33</sup> c. ISO CG 21 44 Limitation of Coverage to Designated Premises or Project. <sup>34</sup> d. Any endorsement modifying or deleting the exception to the Employer's Liability exclusion. e. Any "Insured vs. Insured" exclusion. <sup>35</sup> f. Any type of punitive, exemplary or multiplied damages exclusion.
1.11	<b>Certificate of Insurance</b>	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Tenant to Landlord.
2.	<b><u>Business Auto Liability.</u></b> <sup>36</sup> Tenant is to maintain a Business Auto Policy issued on an Occurrence Basis meeting at least the following specifications.	
2.1	<b>Minimum Limit</b>	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than \$1,000,000 per Accident.
2.2	<b>Form</b>	This insurance is to be written on the current ISO edition of ISO CA 00 01.
2.3	<b>Scope</b>	This insurance shall cover damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use of an auto (Symbol 1), including owned, hired and nonowned. <sup>37</sup>
2.4	<b>Notice</b>	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].
2.5	<b>Waiver of Subrogation</b>	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties.
3.	<b><u>Workers' Compensation and Employer's Liability.</u></b> Tenant is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.	

No.	Specification	Coverages, Limits & Other Requirements				
3.1	WC Limits	The minimum limits of this insurance shall be no less than the statutory limits. <sup>38</sup>				
3.2	EL Limits	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than \$1,000,000 each Accident <sup>39</sup> and Disease. <sup>40</sup>				
3.3	USL&H	USL&H coverage must be provided where such exposure exists. <sup>41</sup>				
3.4	Territory	Where work is to be performed must be listed under Item 3.A. on the Information Page of the policy.				
3.5	Scope	This insurance is to cover liability arising out of the Tenant's employment of workers and anyone for whom the Tenant may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance is permitted.				
3.6	Leased Employees	Where a Professional Employer Organization ("PEO") or "leased employees" are utilized, Tenant shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Landlord.				
3.7	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].				
3.8	Waiver of Subrogation	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties.				
4.	<b>Liquor Liability.</b> <sup>42</sup> Tenant is to maintain liquor liability insurance issued on an Occurrence Basis meeting at least the following specifications.					
4.1	Minimum Limits	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than <table border="1" data-bbox="706 940 1312 995"> <tr> <td>\$1,000,000</td> <td>Each Occurrence</td> </tr> <tr> <td>\$2,000,000</td> <td>Annual Aggregate</td> </tr> </table>	\$1,000,000	Each Occurrence	\$2,000,000	Annual Aggregate
\$1,000,000	Each Occurrence					
\$2,000,000	Annual Aggregate					
4.2	Scope	This insurance shall cover operation of Tenant at the Leased Premises described by the Lease.				
4.3	Defense Coverage	Coverage of defense costs is to be provided outside of the limit of liability coverage.				
4.4	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.				
4.5	Waiver of Subrogation	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties.				
5.	<b>Excess/Umbrella Liability.</b> If any of the required coverages are to be maintained by and through an excess/umbrella policy, <sup>43</sup> they are to be by a policy issued on an Occurrence Basis meeting at least the following specifications.					
5.1	Scope	This insurance shall be excess over and be no less broad than all coverages described above. The policy limits for the primary and excess/umbrella policy may be allocated between the primary and excess/umbrella as selected by the named insured. <sup>44</sup>  The specification above of minimum limits does not limit the limits of coverage to be available to the Landlord Parties as additional insureds. If Tenant's insurance has limits greater than the above limits, the amount of coverage available to Landlord Parties is increased to the limits of Tenant's insurance, including limits under any umbrella or excess policies.				
5.2	Primary	This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance held by Landlord Parties shall be excess, secondary and non-contributory.				
5.3	Drop-Down Coverage	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits.				
5.4	Defense Costs	This insurance is to include a duty to defend any insured.				
5.5	Additional Insureds	Listing the Landlord Parties as additional insureds.				

No.	Specification	Coverages, Limits & Other Requirements				
5.6	Notice	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].				
5.7	Waiver of Subrogation	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties.				
6.	<b>Environmental Liability.</b> Tenant is to maintain environmental liability insurance issued on an Occurrence Basis meeting at least the following specifications.					
6.1	Minimum Limits	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than <table border="1" style="margin-left: 40px;"> <tr> <td>\$1,000,000</td> <td>Each Occurrence</td> </tr> <tr> <td>\$2,000,000</td> <td>Annual Aggregate</td> </tr> </table>	\$1,000,000	Each Occurrence	\$2,000,000	Annual Aggregate
\$1,000,000	Each Occurrence					
\$2,000,000	Annual Aggregate					
6.2	Scope	This insurance is to cover any environmental loss to the leased premises or adjoining properties; shall include coverage for mold, fungus and related bacteria.				
6.3	Defense Costs	Coverage of defense costs is to be provided outside of the limit of liability coverage.				
6.4	Notice	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal [or material change].				
6.5	Waiver of Subrogation	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties.				

## B. PROPERTY<sup>45</sup>

1.	<b>Property Insurance on Causes of Loss Special Form.</b> Tenant is to maintain property insurance on a Causes of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as “all risk”.	
1.1	Scope of Coverage	This insurance is to be issued for 100% Replacement Cost, on an Agreed Value Basis, and in compliance with all laws, regulations or ordinances affecting such property at any time during the Lease for the excess value of the Tenant Improvements to the Leased Premises over the Construction Allowance provided by Landlord for the initial Tenant Improvements, and all equipment and other property used in connection therewith, including Tenant’s business personal property, HVAC, trade fixtures and signs from time to time in, on, adjacent to or upon the Leased Premises, [Tenant is not responsible to insure tenant improvements to the Leased Premises constructed by prior tenants], and all alterations, additions, or changes made by Tenant pursuant to the terms of this Lease and shall not be subject to coinsurance.
1.2	Form	This insurance is to be issued on an ISO CP 10 30.
1.3	Insureds	The insureds on this policy are to be Tenant and Landlord.
1.4	Endorsements or Coverages	The scope of coverage, at Landlord’s option, is to include coverage for Earthquake, Flood, Glass, Ordinance or Law, Terrorism, Theft, and Debris Removal with an increased coverage of \$____. Tenant at its election may cover loss arising out of cancellation of this Lease, including loss of its undamaged improvements and betterments.
1.5	Waiver of Subrogation	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties.

Alternative. The following specification allocates to the Tenant the responsibility for carrying property insurance for the tenant improvements.

1.	<b>Property Insurance<sup>46</sup> on Causes of Loss - Special Form.</b> Tenant is to maintain property insurance on a Causes of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as “all risk”. <sup>47</sup>	
1.1	Scope of Coverage	This insurance is to be issued for 100% Replacement Cost, <sup>48</sup> on an Agreed Value Basis, <sup>49</sup> and in compliance with all laws, regulations or ordinances affecting such property at any time during the Lease, for the Tenant’s improvements and

No.	Specification	Coverages, Limits & Other Requirements
		betterments <sup>50</sup> , including all the items included in Tenant's Work, and all equipment and other property used in connection therewith, including Tenant's business personal property, HVAC, trade fixtures and signs from time to time in, on, adjacent to or upon the Leased Premises, and all alterations, additions, or changes made by Tenant pursuant to the terms of this Lease, <sup>51</sup> and shall not be subject to coinsurance. <sup>52</sup>
1.2	Form	This insurance is to be issued on an ISO CP 10 30 [, or equivalent form]. <sup>53</sup>
1.3	Insureds	The insureds on this policy are to be Tenant and Landlord. <sup>54</sup>
1.4	Endorsements or Coverages	The scope of coverage, at Landlord's option, is to include coverage for Antennas, <sup>55</sup> Earthquake, Flood, <sup>56</sup> Glass, <sup>57</sup> Ordinance or Law, <sup>58</sup> Terrorism, <sup>59</sup> Theft, Signs, <sup>60</sup> and Debris Removal with an increased coverage of \$_____. <sup>61</sup> Tenant at its election may cover loss arising out of cancellation of this Lease, including loss of its undamaged improvements and betterments. (See ISO CP 00 60 06 95).
1.5	Waiver of Subrogation	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties. <sup>62</sup>
2.	<b>Business Income and Extra Expense.</b> <sup>63</sup> Tenant is to maintain business income and extra expense insurance meeting at least the following specifications.	
2.1	Scope	Coverage is to be provided on all operations at the Leased Premises.
2.2	Income Coverage Limit	Coverage is to be equal to no less than [12] months of income and ongoing expenses. [Coverage is to be provided in an amount of not less than 80% of Tenant's gross annual income at the Leased Premises less non-continuing expenses.] [Coverage is to be endorsed to cover losses arising from interruption of utilities outside the Leased Premises.]
2.3	Form	This insurance is to be issued on an ISO CP 00 30 10 12 Business Income (And Extra Expense Coverage Form.
2.4	Valuation Basis	Insurance is to be issued on an Agreed Value basis. <sup>64</sup>
2.5	Notice	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].
2.6	Waiver of Subrogation	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties.
3.	<b>Boiler &amp; Machinery.</b> <sup>65</sup> Tenant is to maintain boiler and machinery insurance meeting at least the following specifications.	
3.1	Scope of Coverage	Coverage is to be provided on all operations at the described Leased Premises.
3.2	Form	This insurance is to be written on a Comprehensive Form, including Business Income. <sup>66</sup>
3.3	Valuation Basis	This insurance is to be issued on a Replacement Cost, Agreed Value basis.
<b>C. OTHER INSURANCE</b> <sup>67</sup>		
Such other insurance against other insurable liabilities or hazards as Landlord may from time to time reasonably require.		

2. **Policies To Be Provided By Tenant's Contractors.** Subject to review and revision by Landlord from time to time, in Landlord's good faith judgment, the following insurance shall be maintained by Tenant's construction contractors with limits not less than those set forth below at all times during the term of this Lease and thereafter as required:

No.	Specifications	Coverages, Limits & Other Requirements
<b>A. LIABILITY</b>		



No.	Specifications	Coverages, Limits & Other Requirements								
<b>1.</b>	<b>Commercial General Liability.</b>	Tenant’s contractor is to maintain commercial general liability insurance (“CGL”) issued on an Occurrence Basis meeting at least the following specifications, but only to the extent permitted by law.								
<b>1.1</b>	<b>Minimum Limits</b>	<p>The minimum limits of coverage are subject to approval by Landlord, but not are not to be less than the following amounts:</p> <table border="1" data-bbox="708 327 1312 436"> <tr> <td data-bbox="708 327 846 352">\$ __,000,000</td> <td data-bbox="846 327 1312 352">Per Occurrence.</td> </tr> <tr> <td data-bbox="708 352 846 378">\$ __,000,000</td> <td data-bbox="846 352 1312 378">General Aggregate.</td> </tr> <tr> <td data-bbox="708 378 846 403">\$ __,000,000</td> <td data-bbox="846 378 1312 403">Products-Completed Operations Aggregate<sup>68</sup></td> </tr> <tr> <td data-bbox="708 403 846 428">\$ __,000,000</td> <td data-bbox="846 403 1312 428">Personal and Advertising Injury Limit.</td> </tr> </table>	\$ __,000,000	Per Occurrence.	\$ __,000,000	General Aggregate.	\$ __,000,000	Products-Completed Operations Aggregate <sup>68</sup>	\$ __,000,000	Personal and Advertising Injury Limit.
\$ __,000,000	Per Occurrence.									
\$ __,000,000	General Aggregate.									
\$ __,000,000	Products-Completed Operations Aggregate <sup>68</sup>									
\$ __,000,000	Personal and Advertising Injury Limit.									
<b>1.2</b>	<b>General Aggregate</b>	If the CGL insurance contains a General Aggregate Limit, it shall apply separately to these Premises and Property pursuant to an ISO CG 25 04 09 Designated Location(s) General Aggregate Limit. <sup>69</sup>								
<b>1.3</b>	<b>Post-Completion Coverage</b>	Contractor agrees to maintain Products-Completed Operations coverage with respect to “Bodily Injury” and “Property Damage” caused, in whole or in part, by Contractor’s work at the Premises and Property for a period of __ years after final completion of the construction of the Improvements. This insurance is to be endorsed with an ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement to schedule Landlord Parties for the entirety of this post-completion period. <sup>70</sup>								
<b>1.4</b>	<b>Form</b>	This insurance is to be issued on an ISO CG 00 01, and shall cover liability arising from premises, operations, Owner’s & Contractor’s Protective Liability for contractor’s liability arising out of the hire of subcontractors (independent contractors coverage), <sup>71</sup> and incidental design liability arising from the contractor’s construction means and methods. <sup>72</sup>								
<b>1.5</b>	<b>Insured Contracts</b>	Coverage shall include but not be limited to liability assumed by Tenant’s contractor under the construction contract (including the tort liability of another assumed in a business contract).								
<b>1.6</b>	<b>Additional Insureds<sup>73</sup></b>	This insurance is to be endorsed with an ISO CG 20 10 [07 04] <sup>74</sup> [04 13], <sup>75</sup> [or equivalent form], Additional Insured Endorsement listing the Landlord Parties as additional insureds. No exclusion for the acts or omissions of the additional insured. <sup>76</sup>								
<b>1.7</b>	<b>Primary</b>	This insurance shall be endorsed with an ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition endorsement for this insurance to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance held by Landlord Parties shall be excess, secondary and non-contributory.								
<b>1.8</b>	<b>Waiver of Subrogation</b>	This insurance is to be endorsed with an ISO 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 the Landlord Parties.								
<b>1.9</b>	<b>Deletion of Personal Injury Exclusion to Contractual Liability Coverage</b>	The personal injury contractual liability exclusion shall be deleted.								
<b>1.10</b>	<b>Notice</b>	This insurance is to contain a provision for 30 days’ prior written notice by insurance carrier to the Landlord required for cancellation [or material change].								
<b>1.11</b>	<b>Prohibited Endorsements</b>	<p>The following exclusions/limitations (or their equivalents) are not permitted:</p> <ul style="list-style-type: none"> <li>a. ISO CG 21 39 Contractual Liability Limitation.<sup>77</sup></li> <li>b. ISO CG 24 26 Amendment Of Insured Contract Definition.<sup>78</sup></li> <li>c. ISO CG 21 44 Limitation of Coverage to Designated Premises or Project.</li> <li>d. Any endorsement modifying or deleting the exception to the Employer’s Liability exclusion.</li> <li>e. Any “Insured vs. Insured” exclusion.</li> </ul>								

No.	Specifications	Coverages, Limits & Other Requirements
		f. Any type of punitive, exemplary or multiplied damages exclusion. h. ISO CG 22 34 04 13 Exclusion – Construction Management Errors and Omissions. i. ISO CG 22 79 04 13 Exclusion – Contractors – Professional Liability.
1.12	<b>Electronic Data Endorsement</b>	This insurance is to include an Electronic Data Liability endorsement, ISO CG 04 37 with coverage to the full limits of the policy.
1.13	<b>Certificate of Insurance</b>	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Tenant’s contractor to Landlord.
2.	<b>Business Auto Liability.</b> Tenant’s contractor is to maintain a Business Auto Policy issued on an Occurrence Basis meeting at least the following specifications.	
2.1	<b>Minimum Limits</b>	Limits of coverage are to be not less than \$1,000,000 per Accident.
2.2	<b>Form</b>	This insurance is to be issued on the current edition of the ISO CA 00 01.
2.3	<b>Scope</b>	This insurance is to cover damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use of any auto (Symbol 1), including owned, hired and nonowned.
2.4	<b>Waiver of Subrogation</b>	This insurance is to include a waiver of subrogation by insurer as to the Landlord Parties.
3.	<b>Workers’ Compensation and Employer’s Liability.</b> Tenant’s contractor is to maintain workers’ compensation and employer’s liability insurance meeting at least the following specifications.	
3.1	<b>WC Limits</b>	The minimum limits of this insurance shall be no less than the statutory limits.
3.2	<b>EL Limits</b>	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than \$1,000,000 each Accident or Disease.
3.3	<b>USL&amp;H</b>	USL&H coverage must be provided where such exposure exists.
3.4	<b>Territory</b>	Where work is to be performed must be listed under Item 3.A. on the Information Page of the policy.
3.5	<b>Scope</b>	This insurance is to cover liability arising out of the Tenant’s contractor’s employment of workers and anyone for whom the contractor may be liable for workers’ compensation claims. Workers’ compensation insurance is required, and no “alternative” forms of insurance are permitted.
3.6	<b>Leased Employees</b>	Where a Professional Employer Organization (“PEO”) or “leased employees” are utilized, Tenant’s contractor shall require its leasing company to provide Workers’ Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Landlord.
3.7	<b>Notice</b>	Contain a provision for 30 days’ prior written notice by insurance carrier to the Landlord required for cancellation [or material change].
3.8	<b>Waiver of Subrogation</b>	Include a waiver of subrogation by insurer as to the Landlord Parties.
4.	<b>Professional Liability.</b> Tenant’s contractor is to maintain Professional Liability insurance meeting at least the following specifications.	
4.1	<b>Minimum Limits</b>	Limits of coverage shall be no less than: \$1,000,000 each loss \$2,000,000 annual aggregate  If a combined Contractor’s Pollution Liability and Professional Liability policy is utilized, the limits shall be \$3,000,000 Each Loss and Aggregate.
4.2	<b>Scope</b>	Such insurance shall cover all services rendered by the Contractor and its subcontractors under the construction contract, including but not limited to design or

No.	Specifications	Coverages, Limits & Other Requirements
		design/build services.
4.3	<b>Retroactive Date</b>	Any retroactive date must be effective prior to beginning of services for the Tenant.
4.4	<b>Prohibitions</b>	<p>This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:</p> <ul style="list-style-type: none"> <li>a. bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors;</li> <li>b. habitational or residential operations;</li> <li>c. mold and/or microbial matter and/or fungus and/or biological substance; or</li> <li>d. punitive, exemplary or multiplied damages.</li> </ul> <p>A professional liability endorsement to a general liability policy is not acceptable.</p>
4.5	<b>Term</b>	Policies written on a Claims-Made basis shall be maintained for at least two years beyond termination of the construction contract. The purchase of an extended discovery period or an extended reporting period on a Claims-Made policy will not be sufficient to meet the terms of this provision.
5.	<b><u>Pollution Liability.</u></b> Contractor is to maintain pollution liability insurance meeting at least the following specifications.	
5.1	<b>Minimum Limits</b>	<p>Limits of coverage shall be no less than:</p> <p>\$1,000,000 each loss</p> <p>\$2,000,000 annual aggregate</p> <p>If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be \$3,000,000 Each Loss and Aggregate.</p>
5.2	<b>Scope</b>	<p>The policy must provide coverage for:</p> <ul style="list-style-type: none"> <li>a. the full scope of the named insured's operations (on-going and completed) as described within the scope of work;</li> <li>b. loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall;</li> <li>c. third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations;</li> <li>d. diminution of value and Natural Resources damages;</li> <li>e. contractual liability; and</li> <li>f. claims arising from owned and non-owned disposal sites utilized in the performance of the Work.</li> </ul> <p>Coverage extensions to the General Liability insurance policy without a separate insurance agreement for Contractors Pollution Liability insurance will not fulfill this requirement.</p>
5.3	<b>Additional Insured and Primary and Noncontributory</b>	The policy must insure contractual liability, name Landlord Parties as an Additional Insureds, and be primary and noncontributory to all coverage available to the Additional Insureds.
5.4	<b>Retroactive Date</b>	If coverage is provided on a Claims Made basis, coverage will at least be retroactive to the earlier of the date of the construction contract or the commencement of contractor services relation to the Work.
5.5	<b>Prohibitions</b>	<p>This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:</p> <ul style="list-style-type: none"> <li>a. Insured vs. insured actions. However exclusion for claims made between insured within the same economic family are acceptable.</li> <li>b. impaired property that has not been physically injured</li> <li>c. materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval.</li> <li>d. property damage to the work performed by the contractor</li> </ul>

No.	Specifications	Coverages, Limits & Other Requirements
		<ul style="list-style-type: none"> <li>e. faulty workmanship as it relates to clean up costs</li> <li>f. punitive, exemplary or multiplied damages</li> <li>g. work performed by subcontractors</li> <li>h. contractual liability incurred as a result of an injury to an employee of the insured.</li> </ul>
5.6	Term	Completed operations coverage shall be maintained for a minimum of 7 years after the completion of work. (The extended reporting period on a claims made based policy does not fulfill this requirement) CPL insurance policies insuring a specific job shall have completed operations coverage for at least the duration of the work plus 7 years.
<b>B. PROPERTY</b>		
1.	<b>Builder's Risk Insurance.</b> <sup>79</sup> Tenant's contractor is to maintain builder's risk insurance meeting at least the following specifications.	
1.1	Amount	Limits of coverage are to be the Initial Contract Sum, plus an amount to be acceptable to Landlord, to increase by amount of subsequent modification of the Contract Sum. Coverage shall be provided in amount equal at all times to the full replacement value <sup>80</sup> and costs of debris removal for any single occurrence. Coverage is to include Contractor's overhead and profit.
1.2	Covered Property	<p>The following property is to be insured:</p> <ul style="list-style-type: none"> <li>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.</li> <li>b. All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.</li> <li>c. All property including materials and supplies on site for installation.</li> <li>d. All property including materials and supplies at other locations but intended for use at the site.</li> <li>e. All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.</li> <li>f. Other Work at the site identified in the Lease.</li> <li>g. Other property for which an insured is liable regarding the project.</li> <li>h. Sod, trees, shrubs and plants.</li> </ul>
1.3	Deductibles	Deductibles shall not exceed an amount acceptable to Landlord. <sup>81</sup>
1.4	Insureds	<p>Insureds shall include:<sup>82</sup></p> <ul style="list-style-type: none"> <li>a. Landlord, Contractor and all Loss Payees and Mortgagees as Named Insureds.</li> <li>b. Tenant, and other tenants designated by Landlord to Contractor.</li> <li>c. Subcontractors of all tiers.<sup>83</sup></li> </ul>

No.	Specifications	Coverages, Limits & Other Requirements																																		
1.5	Form	<p>Causes of Loss – Special Form.<sup>84</sup> Coverage on this insurance is to 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 coverage shall be at least as broad as an unmodified ISO Causes of Loss – Special Form, 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, with each of the perils as added as a cause of loss, if not otherwise listed in the policy as a cause of loss.<sup>85</sup></p> <p>a. Completed Value Basis.<sup>86</sup> This insurance is to be written on a Completed-Value, Non-Reporting form basis.<sup>87</sup></p> <p>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.</p>																																		
1.6	Prohibition	No protective safeguard warranty is permitted. <sup>88</sup>																																		
1.7	Coverage and Minimum Sublimits	<table border="1"> <thead> <tr> <th data-bbox="691 669 1065 722">Coverage</th> <th data-bbox="1065 669 1437 722">Minimum Sublimit<sup>89</sup></th> </tr> </thead> <tbody> <tr> <td data-bbox="691 722 1065 764">Additional expenses due to delay in completion of project and contract penalties</td> <td data-bbox="1065 722 1437 764">Amount subject to approval by Landlord.</td> </tr> <tr> <td data-bbox="691 764 1065 806">Agreed Value</td> <td data-bbox="1065 764 1437 806">Included without sublimit.</td> </tr> <tr> <td data-bbox="691 806 1065 848">Business income/rental value</td> <td data-bbox="1065 806 1437 848">Amount subject to approval by Landlord.</td> </tr> <tr> <td data-bbox="691 848 1065 890">Collapse<sup>90</sup></td> <td data-bbox="1065 848 1437 890">Included without sublimit.</td> </tr> <tr> <td data-bbox="691 890 1065 1016">Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss</td> <td data-bbox="1065 890 1437 1016">Included without sublimit.</td> </tr> <tr> <td data-bbox="691 1016 1065 1142">Debris removal including demolition as may be made legally necessary by operation of any law, ordinance, or regulation</td> <td data-bbox="1065 1016 1437 1142">[Included without sublimit.][\$.]</td> </tr> <tr> <td data-bbox="691 1142 1065 1268">Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse</td> <td data-bbox="1065 1142 1437 1268">Included without sublimit.</td> </tr> <tr> <td data-bbox="691 1268 1065 1310">Mechanical breakdown, including hot &amp; cold testing</td> <td data-bbox="1065 1268 1437 1310">Amount subject to approval by Landlord.</td> </tr> <tr> <td data-bbox="691 1310 1065 1352">Occupancy pre-completion clause<sup>91</sup></td> <td data-bbox="1065 1310 1437 1352">To be included.</td> </tr> <tr> <td data-bbox="691 1352 1065 1394">Ordinance or law</td> <td data-bbox="1065 1352 1437 1394">Included without sublimit.</td> </tr> <tr> <td data-bbox="691 1394 1065 1436">Pollutant cleanup and removal</td> <td data-bbox="1065 1394 1437 1436">\$.</td> </tr> <tr> <td data-bbox="691 1436 1065 1478">Property in transit</td> <td data-bbox="1065 1436 1437 1478">\$.</td> </tr> <tr> <td data-bbox="691 1478 1065 1520">Preservation of property</td> <td data-bbox="1065 1478 1437 1520">Included without sublimit.</td> </tr> <tr> <td data-bbox="691 1520 1065 1562">Property off premises</td> <td data-bbox="1065 1520 1437 1562">\$.</td> </tr> <tr> <td data-bbox="691 1562 1065 1604">Replacement cost</td> <td data-bbox="1065 1562 1437 1604">To be included.</td> </tr> <tr> <td data-bbox="691 1604 1065 1646">Soft costs<sup>92</sup></td> <td data-bbox="1065 1604 1437 1646">Amount subject to approval by Landlord.</td> </tr> </tbody> </table>	Coverage	Minimum Sublimit <sup>89</sup>	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.	Collapse <sup>90</sup>	Included without sublimit.	Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss	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	Included without sublimit.	Mechanical breakdown, including hot & cold testing	Amount subject to approval by Landlord.	Occupancy pre-completion clause <sup>91</sup>	To be included.	Ordinance or law	Included without sublimit.	Pollutant cleanup and removal	\$.	Property in transit	\$.	Preservation of property	Included without sublimit.	Property off premises	\$.	Replacement cost	To be included.	Soft costs <sup>92</sup>	Amount subject to approval by Landlord.
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No.	Specifications	Coverages, Limits & Other Requirements																
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1.8	<b>Term and Termination</b> <sup>94</sup>	<p>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:</p> <ul style="list-style-type: none"> <li>a. The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;</li> <li>b. The date of final payment, as provided for in the Contract Documents; or</li> <li>c. The date on which the insurable interests in the Covered Property of all insureds other than Tenant's Contractor have ceased.</li> </ul>																
2.	<b><u>Boiler and Machinery Insurance.</u></b>	This coverage may be included in the builder's risk policy or be by a separate policy.																
3.	<b><u>Contractor's Pollution Liability.</u></b> <sup>95</sup>	Tenant's contractor is to maintain Contractor's Pollution Liability insurance issued meeting at least the following specifications.																
3.1	<b>Coverage</b>	Contractor shall provide Contractor's 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.																
3.2	<b>Limits</b>	Coverage is to be provided with a limit of not less than \$1,000,000.																
3.3	<b>Form</b>	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.																
3.4	<b>Endorsements</b>	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.																
3.5	<b>Notice</b>	This insurance is to be endorsed to give Landlord at least 30 days' advance notice of cancellation of [or material change] in coverage.																
3.6	<b>Waiver of Subrogation</b>	This insurance is to be endorsed to waive subrogation against the Landlord Parties.																
<p><b>C. OTHER INSURANCE</b><sup>96</sup> Tenant is to maintain such other insurance against other insurable liabilities or hazards as Landlord may from time to time reasonably require.</p>																		

3. **Policies To Be Provided By Landlord.** Subject to Landlord's judgment, Landlord is to provide the following insurance:

No.	Specifications	Coverages, Limits & Other Requirements												
<b>A. LIABILITY</b>														
<b>1.</b>	<b>Commercial General Liability.</b> Landlord is to maintain commercial general liability insurance (“CGL”) issued on an Occurrence Basis meeting at least the following specifications.													
<b>1.1</b>	<b>Minimum Limits</b>	<p>The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than the following amounts:</p> <table border="1" data-bbox="878 432 1263 856"> <tr> <td data-bbox="878 432 1016 474">\$ __,000,000</td> <td data-bbox="1016 432 1263 474">Per Occurrence.</td> </tr> <tr> <td data-bbox="878 474 1016 516">\$ __,000,000</td> <td data-bbox="1016 474 1263 516">General Aggregate.</td> </tr> <tr> <td data-bbox="878 516 1016 621">\$ __,000,000</td> <td data-bbox="1016 516 1263 621">Product-Completed Operations Aggregate Limit.</td> </tr> <tr> <td data-bbox="878 621 1016 726">\$ _____</td> <td data-bbox="1016 621 1263 726">Personal and Advertising Injury limit.</td> </tr> <tr> <td data-bbox="878 726 1016 789">\$ _____</td> <td data-bbox="1016 726 1263 789">Damage to Premises Rented to You Limit.</td> </tr> <tr> <td data-bbox="878 789 1016 852">\$ _____</td> <td data-bbox="1016 789 1263 852">Medical Expense Limit.</td> </tr> </table>	\$ __,000,000	Per Occurrence.	\$ __,000,000	General Aggregate.	\$ __,000,000	Product-Completed Operations Aggregate Limit.	\$ _____	Personal and Advertising Injury limit.	\$ _____	Damage to Premises Rented to You Limit.	\$ _____	Medical Expense Limit.
\$ __,000,000	Per Occurrence.													
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\$ __,000,000	Product-Completed Operations Aggregate Limit.													
\$ _____	Personal and Advertising Injury limit.													
\$ _____	Damage to Premises Rented to You Limit.													
\$ _____	Medical Expense Limit.													
<b>1.2</b>	<b>General Aggregate</b>	If the CGL insurance contains a General Aggregate limit, it shall apply separately to this Property.												
<b>1.3</b>	<b>Form</b>	This insurance is to be on the current edition of an ISO CG 00 01.												
<b>1.4</b>	<b>Waiver of Subrogation</b>	This insurance is to be endorsed with an ISO CG 24 04 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to the Landlord Parties and other persons as may be designated by Landlord.												
<b>B. PROPERTY</b>														
<b>1.</b>	<b>Property Insurance on Causes of Loss - Special Form.</b> Landlord is to maintain property insurance on a Causes of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as “all risk”. <sup>97</sup>													
<b>1.1</b>	<b>Coverage</b>	This insurance is to be issued for 100% of Replacement Cost, <sup>98</sup> on an Agreed Value basis, for the Project including all Buildings <sup>99</sup> [including the leasehold improvements] [up to the amount of the Construction Allowance for the initial Tenant Improvements] [excluding Tenant Improvements and Betterments] <sup>100</sup> and all Landlord-owned equipment and other property used in connection therewith.												
<b>1.2</b>	<b>Form</b>	This insurance is to be issued on an ISO CP 10 30[, or equivalent form].												
<b>1.3</b>	<b>Insureds</b>	This insurance is to name as insureds Landlord and such other persons as may be designated by Landlord.												
<b>1.4</b>	<b>Required Endorsements as to Coverage/Limits</b>	This insurance is to be endorsed to include coverages as shall be required by Landlord, but may include Business Income and Extra Expense; Rental Value; Glass; Ordinance or Law; Terrorism; Signs.												
<b>1.5</b>	<b>Waiver of Subrogation</b>	This insurance is to include a waiver of subrogation by insurer as to the Landlord, Tenant and other persons as may be designated by Landlord. <sup>101</sup>												

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION<sup>102</sup>**

This endorsement modifies insurance provided under the following:

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

The following is added to the **Other Insurance Condition** and supersedes any provision to the contrary:

### **Primary And Noncontributory Insurance**

This insurance is **primary** to and will not seek contribution from any **other insurance** available to an additional insured under your policy provided that:

- (1) The additional insured is a **Named Insured** under such other insurance; and

- (2) You have **agreed in writing** in a contract or agreement that this insurance would be **primary** and would not seek contribution from any other insurance available to the additional insured.

SAMPLE



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION<sup>103</sup>**

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
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, in whole or in part, by:**

1. **Your acts or omissions;**<sup>104</sup> or
  2. The acts or omissions of those acting on your behalf;
- in the performance of **your ongoing operations**<sup>105</sup> for the additional insured(s) at the location(s) designated above.

**However:**

1. The insurance afforded to such additional insured only applies **to the extent permitted by law;**<sup>106</sup> and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured **will not be broader than that which you are required by the contract or agreement to provide for such additional insured.**

**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:**

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.
- C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is **the amount of insurance:**

1. **Required by the contract or agreement;**  
or
2. **Available under the applicable Limits of Insurance shown in the Declarations;**  
**whichever is less.**

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

SAMPLE

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# **ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES<sup>107</sup>**

This endorsement modifies insurance provided under the following:  
COMMERCIAL GENERAL LIABILITY COVERAGE PART

## **SCHEDULE**

**1. Designation of Premises (Part Leased to You):<sup>108</sup>**

*[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):**

*[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.)

**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 arising out of the ownership, maintenance or use<sup>109</sup> of that part of the premises leased to you<sup>110</sup> and shown in the Schedule and subject to the following additional exclusions:

This insurance **does not apply to:**

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.

**However:**

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or

agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

**B.** With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

**Whichever is less.**

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS<sup>111</sup>

This endorsement modifies insurance provided under the following:  
**COMMERCIAL GENERAL LIABILITY COVERAGE PART**  
**PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART**

### SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations

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" or "property damage" **caused, in whole or in part, by "your work"** at the location designated and described in the Schedule of this endorsement **performed for that additional insured and included in the "products-completed operations hazard"**.

**However:**

1. The insurance afforded to such additional insured only applies **to the extent permitted by law**; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will **not be broader than that which you are required by the contract or agreement to provide for such additional insured.**

**B.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, **the most we will pay on behalf of the additional insured is the amount of insurance:**

1. **Required by the contract or agreement; or**
2. **Available under the applicable Limits of Insurance shown in the Declarations;**

**whichever is less.**

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

**2.** "Bodily injury" or "property damage" **occurring after:**

**a.** **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

**b.** 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.

**C.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

**The most we will pay on behalf of the additional insured is the amount of insurance:**

1. **Required by the contract or agreement described in Paragraph A.1.;** or
2. **Available under the applicable Limits of Insurance shown in the Declarations;**

**whichever is less.**

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **CONTRACTUAL LIABILITY LIMITATION<sup>112</sup>**

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.

SAMPLE

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF<sup>113</sup>**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion I. of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

### **2. Exclusions**

This insurance **does not apply to:**

#### **I. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and **included in the "products-completed operations hazard"**.

SAMPLE

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **AMENDMENT OF INSURED CONTRACT DEFINITION<sup>114</sup>**

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;
- 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. However, such part of a contract or agreement shall only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law.** 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.

## COMMON POLICY CONDITIONS<sup>115</sup>

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.



POLICY NUMBER:

**COMMERCIAL PROPERTY  
CP 00 90 (07/88)**

## **COMMERCIAL PROPERTY CONDITIONS<sup>116</sup>**

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.

....

**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.

POLICY NUMBER:

**COMMERCIAL PROPERTY**  
**CP 12 18 06 07**

## LOSS PAYABLE PROVISIONS<sup>117</sup>

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

<b>Premises Number:</b>		<b>Building Number:</b>		<b>Applicable Clause (Enter C., D., E., or F.):</b>	
<b>Description Of Property:</b>					
<b>Loss Payee Name:</b>					
<b>Loss Payee Address:</b>					
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. ....
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**

....

#### **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.

SAMPLE

POLICY NUMBER:

COMMERCIAL PROPERTY  
CP 12 19 06 07

## ADDITIONAL INSURED – BUILDING OWNER<sup>118</sup>

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART  
STANDARD PROPERTY POLICY

### SCHEDULE

<b>Premises Number:</b>		<b>Building Number:</b>	
<b>Building Description:</b>			
<b>Building Owner Name:</b>			
<b>Building Owner Address:</b>			
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.

**LEASEHOLD INTEREST COVERAGE FORM<sup>119</sup>**

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 F. – DEFINITIONS.

**A. COVERAGE**

We will pay for loss of Covered Leasehold Interest you sustain due to the cancellation of your lease. The cancellation must result from direct physical loss of or damage to property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

**1. Covered Leasehold Interest**

Covered Leasehold Interest means the following for which an amount of "net leasehold interest" at inception is shown in the Leasehold Interest Coverage Schedule:

**a. Tenants' Lease Interest**, meaning the difference between the:

- (1) Rent you pay at the described premises; and
- (2) Rental value of the described premises that you lease.

**b. Bonus Payments**, meaning the unamortized portion of a cash bonus that will not be refunded to you. A cash bonus is money you paid to acquire your lease. It does not include:

- (1) Rent, whether or not prepaid; or
- (2) Security.

**c. Improvements and Betterments**, meaning the unamortized portion of payments made by you for improvements and betterments. It does not include the value of improvements and betterments recoverable under any other insurance, but only to the extent of such other insurance.

Improvements and betterments are fixtures, alterations, installations or additions:

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

(2) You acquired or made at your expense but cannot legally remove.

**d. Prepaid Rent**, meaning the unamortized portion of any amount of advance rent you paid that will not be refunded to you. This does not include the customary rent due at:

- (1) The beginning of each month; or
- (2) Any other rental period.

**2. Covered Causes Of Loss**

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

**B. EXCLUSIONS AND LIMITATIONS**

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

**C. LIMITS OF INSURANCE****1. Applicable to Tenants' Lease Interest**

**a.** The most we will pay for loss because of the cancellation of any one lease is your "net leasehold interest" at the time of loss.

But, if your lease is cancelled and your landlord lets you continue to use your premises under a new lease or other arrangement, the most we will pay for loss because of the cancellation of any one lease is the lesser of:

- (1) The difference between the rent you now pay and the rent you will pay under the new lease or other arrangement; or
- (2) Your "net leasehold interest" at the time of loss.

**b.** Your "net leasehold interest" decreases automatically each month. The amount of "net leasehold interest" at any time is your "gross leasehold interest" times the leasehold interest factor for the remaining months of your lease. A proportionate share applies for any period of time less than a month.

Refer to the end of this form for a table of leasehold interest factors.

## 2. Applicable to Bonus Payments, Improvements and Betterments and Prepaid Rent

- a. The most we will pay for loss because of the cancellation of any one lease is your "net leasehold interest" at the time of loss.

But, if your lease is cancelled and your landlord lets you continue to use your premises under a new lease or other arrangement, the most we will pay for loss because of the cancellation of any one lease is the lesser of:

- (1) The loss sustained by you; or
- (2) Your "net leasehold interest" at the time of loss.

- b. Your "net leasehold interest" decreases automatically each month. The amount of each decrease is your "monthly leasehold interest". A proportionate share applies for any period of time less than a month.

## D. LOSS CONDITIONS

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

### 1. Appraisal

If we and you disagree on the amount of loss, either may make written demand for an appraisal. 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 the 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.

## 2. Duties In The Event Of Loss Of Covered Leasehold Interest

- a. You must see that the following are done in the event of loss of Covered Leasehold Interest:

- (1) Notify the police if a law may have been broken.
- (2) Give us prompt notice of the direct physical 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 direct physical loss or damage occurred.
- (4) Take all reasonable steps to protect the property at the described premises from further damage by a Covered Cause of Loss. 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) 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.

- (6) 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.

- (7) 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.

### 3. Loss Payment

We will pay for covered loss within 30 days after we receive the sworn proof of loss, if:

- a. You have complied with all of the terms of this Coverage Part; and
- b.(1) We have reached agreement with you on the amount of loss; or
- (2) An appraisal award has been made.

### 4. Vacancy

#### a. Description of Terms

- (1) As used in this Vacancy Condition, with respect to the 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.
- (2) Buildings under construction or renovation are not considered vacant.

#### b. Vacancy Provisions – Subleased Premises

The following provisions apply if the building where direct physical loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs, provided you have entered into an agreement to sublease the described premises as of the time of loss or damage:

- (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 a Covered Cause of Loss not listed in (1)(a) through (1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.
- c. If you have not entered into an agreement to sublease the described premises as of the time of loss or damage, we will not pay for any loss of Covered Leasehold Interest.

### E. ADDITIONAL CONDITION

The following condition replaces the Cancellation Common Policy Condition:

#### CANCELLATION

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance 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 will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. The cancellation will be effective even if we have not made or offered a refund.
6. If this coverage is cancelled, we will calculate the earned premium by:
  - a. Computing the average of the "net leasehold interest" at the:
    - (1) Inception date, and
    - (2) Cancellation date,of this coverage.
  - b. Multiplying the rate for the period of coverage by the average "net leasehold interest".
  - c. If we cancel, we will send you a premium refund based on the difference between the:
    - (1) Premium you originally paid us; and
    - (2) Proportion of the premium calculated by multiplying the amount in paragraph a. times the rate for the period of coverage for the expired term of the policy.
  - d. If you cancel, your refund may be less than the refund calculated in paragraph c.
7. If notice is mailed, proof of mailing will be sufficient proof of notice.

**F. DEFINITIONS**

1. **"Gross Leasehold Interest"** means the difference between the:

- a. Monthly rental value of the premises you lease; and
- b. Actual monthly rent you pay including taxes, insurance, janitorial or other service that you pay for as part of the rent.

This amount is not changed:

- (1) Whether you occupy all or part of the premises; or
- (2) If you sublet the premises.

**Example:**

Rental value of your leased premises	\$5,000
Monthly rent including taxes, insurance, janitorial or other service that you pay for as part of the rent	<u>-4,000</u>
"Gross Leasehold Interest"	\$1,000

2. **"Monthly Leasehold Interest"** means the monthly portion of covered Bonus Payments, Improvements and Betterments and Prepaid Rent. To find your "monthly leasehold interest", divide your original costs of Bonus Payments, Improvements and Betterments or Prepaid Rent by the number of months left in your lease at the time of the expenditure.

**Example:**

Original cost of Bonus Payment	\$12,000
With 24 months left in the lease at time of Bonus Payment	$\div \underline{24}$
"Monthly Leasehold Interest"	\$500

3. **"Net Leasehold Interest":**

a. Applicable to Tenants' Lease Interest.

**"Net Leasehold Interest"** means the present value of your "gross leasehold interest" for each remaining month of the term of the lease at the rate of interest shown in the Leasehold Interest Coverage Schedule.

The "net leasehold interest" is the amount that, placed at the rate of interest shown in the Leasehold Interest Coverage Schedule, would be equivalent to your receiving the "Gross Leasehold Interest" for each separate month of the unexpired term of the lease.

To find your "net leasehold interest" at any time, multiply your "gross leasehold interest" by the leasehold interest factor found in the table of leasehold interest factors attached to this form.

**Example:**

(20 months left in lease, 10% effective annual rate of interest)

"Gross Leasehold Interest"	\$ 1,000
Leasehold Interest Factor	$\times \underline{18.419}$
"Net Leasehold Interest"	\$18,419

b. Applicable to Bonus Payments, Improvements and Betterments or Prepaid Rent.

**"Net Leasehold Interest"** means the unamortized amount shown in the Schedule. Your "net leasehold interest" at any time is your "monthly leasehold interest" times the number of months left in your lease.

**Example:**

"Monthly Leasehold Interest"	\$ 500
With 10 months left in lease	$\times \underline{10}$
"Net Leasehold Interest"	\$5,000



# 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.<sup>120</sup>

**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<sup>121</sup>

PHONE (A/C, No, Ext):	FAX (A/C, No):
<b>INSURER(S) AFFORDING COVERAGE</b>	
INSURER A :	NAIC #
INSURER B :	
INSURER C :	
INSURER D :	
INSURER E :	
INSURER F :	

INSURED

**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.**

INS R LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS									
	<b>GENERAL LIABILITY</b>						EACH OCCURRENCE \$ DAMAGE TO RENTED PREMISES (Ea occurrence) \$ MED EXP (Any one person) \$ PERSONAL & ADV INJURY <sup>122</sup> \$ GENERAL AGGREGATE <sup>123</sup> \$ PRODUCTS - COMP/OP AGG <sup>125</sup> \$ \$ COMBINED SINGLE LIMIT (Ea accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$ EACH OCCURRENCE \$ AGGREGATE \$ \$ WC STATUTORY LIMITS OTHER E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$									
	COMMERCIAL GENERAL LIABILITY <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%;"></td> <td style="width: 35%;">CLAIMS-MADE</td> <td style="width: 15%;"></td> <td style="width: 35%;">OCCUR</td> </tr> <tr> <td></td> <td></td> <td></td> <td></td> </tr> </table> AGGREGATE POLICY LIMIT APPLIES PER: PROJECT <sup>124</sup> LOC <b>AUTOMOBILE LIABILITY</b> <sup>126</sup> ANY AUTO <sup>127</sup> ALL OWNED SCHEDULED AUTOS NON-OWNED AUTOS AUTOS HIRED AUTOS <b>UMBRELLA LIAB</b> OCCUR <b>EXCESS LIAB</b> CLAIMS-MADE <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%;">DED</td> <td style="width: 85%;">RETENTION \$<sup>128</sup></td> </tr> </table>		CLAIMS-MADE		OCCUR					DED	RETENTION \$ <sup>128</sup>					
	CLAIMS-MADE		OCCUR													
DED	RETENTION \$ <sup>128</sup>															
	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? Y / N (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below															

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)<sup>129</sup>

**CERTIFICATE HOLDER**<sup>130</sup>

**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.**<sup>131</sup>

# 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**

PRODUCER NAME <sup>134</sup> CONTACT PERSON AND ADDRESS PHONE (A/C, No, Ext):	COMPANY NAME AND ADDRESS	NAIC NO:
FAX (A/C, No): E-MAIL ADDRESS:		
CODE: AGENCY CUSTOMER ID #:	SUB CODE: POLICY TYPE	
NAMED INSURED AND ADDRESS	LOAN NUMBER	POLICY NUMBER
EFFECTIVE DATE      EXPIRATION DATE		CONTINUED UNTIL IF CHECKED TERMINATED
ADDITIONAL NAMED INSURED(S) <sup>135</sup>		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 <sup>136</sup>	BROAD <sup>137</sup>	SPECIAL <sup>138</sup>
COMMERCIAL PROPERTY COVERAGE AMOUNT OF INSURANCE: \$				DED:
	YES	NO	N/A	
BUSINESS INCOME <sup>139</sup> RENTAL				If YES, LIMIT:      Actual Loss Sustained; # of months:
BLANKET COVERAGE				If YES, indicate value(s) reported on property identified above: \$
TERRORISM COVERAGE <sup>140</sup>				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 <sup>141</sup>				
AGREED VALUE <sup>142</sup>				
COINSURANCE <sup>143</sup>				If YES,      %
EQUIPMENT BREAKDOWN (If Applicable)				If YES, LIMIT:      DED:
ORDINANCE OR LAW <sup>144</sup> - Coverage for loss to undamaged portion of bldg				If YES, LIMIT:      DED:
- 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) <sup>145</sup>				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<sup>146</sup>**  
 SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

MORTGAGEE <sup>147</sup> LENDERS LOSS PAYABLE <sup>148</sup>	CONTRACT OF SALE	LENDER SERVICING AGENT NAME AND ADDRESS  AUTHORIZED REPRESENTATIVE <sup>149</sup>
NAME AND ADDRESS		

## Comments on Insurance Forms

<sup>1</sup> **First Generation Space Office Lease.** Section 11.1 is a casualty loss provision contained in an office building lease. See the discussion of this provision in Item 11 – *Not All Casualty Proceeds Clauses Are Equal*. The Insurance Specifications referenced in Section 11.2 below have been crafted to be a standalone exhibit attachment to a lease. These specifications were not attached to the Lease. Inserted in brackets are variable specifications. One variable shown as a bracketed spec addresses allocation of property insurance on tenant improvements to the tenant. This variable allocation is appropriate for a ground lease where the tenant has constructed the building, a single tenant building where the tenant is responsible for reconstruction, or where the tenant is leasing shell space and is responsible at its sole expense to reconstruct the tenant improvements after a casualty loss.

<sup>2</sup> **ISO.** “ISO” refers to Insurance Service Office, Inc., a public company that acts as a source of information about property/casualty insurance risk. ISO provides statistical, actuarial, underwriting, and claims information; policy language; information about specific locations; fraud-identification tools; and technical services for a broad spectrum of commercial and personal lines of insurance. The form policies and endorsements ISO produces are used in whole or in part by many insurers when preparing their form policies. 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 1986 *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 additional insured endorsement form appearing in the Appendix as ISO Form CG 20 26 04 13 Additional Insured–Designated Person or Organization:

CG	20	26	04 13
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 <i>comprehensive</i> 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 “04 13” or April 2013. November 1985 is the initial date of all ISO forms for the “CG” system. The <i>coverage</i> forms have been revised a number of times since then and currently bear an edition date of 04 13. Many of the <i>endorsement</i> forms were revised at the same time as the coverage forms and also bear a 04 13 edition date.

<sup>3</sup> **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.”

<sup>4</sup> **Admitted Insurer.** 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.

<sup>5</sup> **Primary Policy.** This specification permits the required minimum limit of liability to be insured either by a single policy or by a combination of a primary (first level) policy and an excess policy or policies. This leaves to the insured the opportunity to negotiate an efficient means of policy limit allocation. Sometimes specifications are written specifying that the primary policy shall be of a stated amount with the balance covered by the excess policy. That approach unduly limits the insured’s flexibility.

<sup>6</sup> **Excess Policy.** An “excess policy” is an insurance policy covering the insured against certain liabilities or hazards and applying only to loss or damage in excess of a stated amount or specified primary or self-insurance.

<sup>7</sup> **Deductible.** A “deductible” eliminates coverage below a certain threshold dollar amount or expressed as a percentage. A deductible clause requires the insured to bear risk in each and every loss up to the deductible limit. In theory, deductibles reduce the price of insurance by eliminating numerous small claims that are relatively inexpensive to handle and also decrease moral hazard.

<sup>8</sup> **Self-Insurance.** “Self-insurance” is a system whereby a firm sets aside an amount of its monies to provide for any losses that occur - losses that could ordinarily be covered under an insurance program. The monies that would normally be used for premium payments are added to this special fund for payment of losses incurred. Self-insurance is a means of capturing the cash flow benefits of unpaid loss reserves and also offers the possibility of reducing expenses typically incorporated within a traditional insurance program. It involves a formal decision to retain risk rather than insure it and is distinguished from noninsurance, or retention of risks through deductibles, by a formalized plan or system to pay losses as they occur.

“Self-Insured Retention (‘SIR’)” is defined as a dollar amount specified in an insurance policy (usually a liability insurance policy) that the insured elects to self-insure prior to the attachment of the limits of a liability insurance policy. An SIR is generally considerably larger than a deductible and may be utilized to moderate the costs of the purchase of insurance. SIRs generally create no obligation on the Insurer to respond to loss on the Insured’s behalf until the SIR level has been paid. SIRs typically apply to both the amount of the loss and related costs (e.g., defense costs), but some apply only to amounts payable in damages (e.g., settlements, awards, and judgments). An SIR differs from a true deductible in at least two important ways. Most importantly, a liability policy’s limit stacks on top of an SIR while the amount of a liability insurance deductible is subtracted from the policy’s limit. As contrasted with its responsibility under a deductible, the insurer is not obligated to pay the SIR amount and then seek reimbursement from the insured; the insured pays the SIR directly to the claimant. While these are the theoretical differences between SIRs and deductibles, they are not well understood, and the actual policy provisions should be reviewed to ascertain the actual operation of specific provisions.

<sup>9</sup> **ACORD Certificates - Not Reasonable To Rely Upon.** 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 (Ala. 2006).

Illinois. *National Union Fire Ins. Co. v. Glenview Park Dist.*, 594 N.E.2d 1300 (1<sup>st</sup> 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 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. In *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5<sup>th</sup> 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 Plaintiffs’ 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).

<sup>10</sup> **Timing on Providing Evidence of Insurance.** Evidence of insurance is often stated as being required to be provided within 30 days prior to the expiration of the current policy. So stating likely creates a technical breach, as coverage is rarely procurable 30 days in advance of a policy’s term end.

<sup>11</sup> **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

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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.

<sup>12</sup> **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) an 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.

<sup>13</sup> **Parties to Policy: "First Named Insured"; "Named Insured"; "An Insured"; "An Additional Insured".** Different "insured" terminology is used to define the insured in liability policies and property policies.

**Commercial General Liability Policies.** The following is terminology used in CGL Policies and their endorsements to describe various types of insured parties, each with varying rights and obligations under the CGL Policy:

**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.

**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.

**Additional Insureds.** An "additional insured" is a person other than the named insured who is protected under the terms of the contract. Usually, additional insureds are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself. The reason for including another person might be to protect the other person because of the named insured's close relationship with that person or to comply with a contractual obligation that requires the named insured to do so (e.g., owners of property leased by the named insured -landlords). 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 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.

**Property Policies.** The following is terminology used in Property Policies and their endorsements to describe various types of insured parties, each with varying rights and obligations under the Property Policy:

**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.

**Additional Insured.** Third parties may be designated by endorsement to the property policy as an *additional insured* to protect their *additional interests*.

**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.

<sup>14</sup> **Additional Insureds.** An "additional insured" is a person or organization not automatically included as an insured under an insurance policy but for who insured status is arranged, usually by endorsement. A named insured's impetus for providing additional insured status to others may be a desire to

protect the other party because of a close relationship with that party (e.g., employees or members of an insured club) or to comply with a contractual agreement requiring the named insured to do so (e.g., customers or owners of property leased by the named insured).

<sup>15</sup> **Self-Insured Retentions.** “Self-insured retention” or “SIR” is a dollar amount specified in an insurance policy (usually a liability insurance policy) that must be paid by the insured before the insurance policy will respond to a loss. SIRs typically apply to both the amount of the loss and related costs (e.g., defense costs), but some apply only to amounts payable in damages (e.g., settlements, awards, and judgments). An SIR differs from a true deductible in at least two important ways. Most importantly, a liability policy's limit stacks on top of an SIR while the amount of a liability insurance deductible is subtracted from the policy's limit. As contrasted with its responsibility under a deductible, the insurer is not obligated to pay the SIR amount and then seek reimbursement from the insured; the insured pays the SIR directly to the claimant. While these are the theoretical differences between SIRs and deductibles, they are not well understood, and the actual policy provisions should be reviewed to ascertain the actual operation of specific provisions.

<sup>16</sup> **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.

<sup>17</sup> **Status as a Certificate Holder Does Not Create Rights.** As noted below in the review of the disclaimers contained in the ACORD Certificate of Insurance, it “confers no rights upon the certificate holder” but is issued “as a matter of information only”. See for example the case, *Bender Square Partners v. Factory Mutual Insurance Co.*, 2012 WL 208347 (S. D. Tex. – Hou. Div.) holding that the landlord was not entitled to its tenant’s property insurance proceeds in a case where the lease did not provide that the landlord was an insured on the tenant’s policy and did not provide for the landlord to be a loss payee. Prior to Hurricane Ike destroying the premises, a Big Lots retail store, tenant had provided its landlord with a certificate of insurance showing that the tenant had property insurance. The landlord was the certificate holder on the certificate of insurance, but was neither shown on the certificate of insurance as an insured or loss payee. The court rejected the landlord’s argument that it was either an intended or implied third-party beneficiary of the policy. The court noted that the property policy contained the following seemingly positive provision:

Additional insured interests are automatically added to this Policy as their interest may appear when named as additional named insured, lender, mortgagee, and/or loss payee in the Certificates of Insurance on a schedule on file with the Company. Such interests become effective on the date shown in the Certificate of Insurance and will not amend, extend, or alter the terms, conditions, provisions, and limits of this Policy.

However, neither the policy nor the certificate of insurance named the landlord as an insured. Further, the court determined that the following interlineations following the liability insurance specification in the lease did not also apply to the property insurance specification:

[s]uch policies of insurance shall be issued in the name of tenant and landlord and for the mutual and joint benefit and protection of said parties; and such policies of insurance or copies thereof, shall be delivered to the landlord.

<sup>18</sup> **Producer.** The “Producer” of a certificate of insurance typically is the broker for the named insured of the policies described in the certificate.

<sup>19</sup> **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 is 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 Insurance §§ 128 Brokers – Generally; 129 Brokers – Status While and After Procuring Policy. 4 BRUNER AND O’CONNOR ON CONSTRUCTION LAW §11:171 Certificates of Insurance – Generally; COUCH ON INSURANCE §§ 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.

**Certificate Issued by “Soliciting Agent”.** In *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5<sup>th</sup> 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. – 1<sup>st</sup> 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 (7<sup>th</sup> 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.

<sup>20</sup> **Survival of Insurance Covenant After Lease Term.** The insurance covenants call for certain liability insurance coverages to be maintained after the expiration or termination of the Lease. This provision is included to further confirm that these covenants continue independently of the expiration or termination of the lease. The parties’ risk managers need to be aware of the post-lease insurance requirements and monitor compliance.

<sup>21</sup> **Commercial General Liability Insurance (CGL).** CGL insurance is termed “third party coverage” insurance as it covers liabilities incurred by the named insured to third parties and excludes injuries and damage to the insured (e.g., it excludes coverage for damage to property “owned, occupied or controlled by the named insured.” Covered liabilities or damages arise from an “occurrence” during the policy period which is not excluded by the Exclusions of the policy.

CGL Insurance provides protection to the insured for amounts the insured is legally obligated to pay that are caused by physical injury, personal injury (libel or slander), advertising injury and property damage as a result of the insured’s products, premises, or operations, and can be offered as a package policy with other coverages. CGL policies also provide coverage for the cost to defend and settle claims. 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 organization’s goods, 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.

<sup>22</sup> **Occurrence Policy vs. Claims Made Policy.** - An “**Occurrence Policy**” provides liability coverage only for injury or damage that occurs during the policy term, regardless of when a claim is actually made. A claim made in the current policy year could be charged against a prior policy period, or may not be covered, if it arises from an Occurrence prior to the effective date of the policy. A policy written on a “**Claims Made**” basis covers claims made while the policy is in effect, rather than at the time the event causing the injury or damage occurred. Thus, once a policy period has passed without a claim, if the policy is not renewed or a new policy is not issued, the insured will have no coverage for a claim filed after the policy period even if it arose prior to the end of the policy period unless “**tail**” coverage is purchased to cover claims made after the policy expires and within a specified number of years after the policy expires.

<sup>23</sup> **General Aggregate.** See ISO CG 25 04 05 09 Designated Location(s) General Aggregate Limit. “**General Aggregate**” is the maximum limit of insurance payable during any given annual policy period for all losses other than those arising under the products and completed operations hazard. “**Aggregate**” is a limit in an insurance policy stipulating the most it will pay for all covered losses sustained during a specified period of time, usually a year. Aggregates are commonly included in liability policies.

<sup>24</sup> **General Aggregate Per Project.** If the liability policy covers multiple locations, its limits may be exhausted by claims at the other locations. 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.

<sup>25</sup> “**Or Equivalent**”. If requiring a specific ISO form, specification drafters sometimes provide “or equivalent”. What does that mean? What it does not mean is “identical.” Make the insurance provider declare what in fact they do have. Get a copy and read it. Make sure it complies with your requirements.

<sup>26</sup> **Contractual Liability Coverage - An Exception To An Exclusion From Coverage.** See ISO CG 00 01 04 13 Commercial General Liability Coverage Form, Section I – Coverages, Coverage A, Par. 2 Exclusions, Par. 2.b Contractual Liability. “**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 ISO CG 24 26 04 13 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 ISO CG 21 39 Contractual Liability Limitation (form attached to this Article), which when added to the standard CGL policy by endorsement deletes “f” altogether from the definition of an insured contract; and discussion at Item 9 *Exclusions May Be Invisible*.

Coverage For Named Insured As Indemnifying Party. Contractual liability coverage 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.S.2d 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).

Named Insured Not Insured For All Contractually Assumed Liabilities. CGL policies 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 party 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 insured 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”.

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.

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.

Named Insured Not Insured For All Contractually Assumed Liabilities. 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

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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.

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 goods, 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 invasion 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.

**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 (form attached to this Article), 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.

<sup>27</sup> **Separation of Insureds.** A 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 additional 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. This severability of interests clause, as it is also known, establishes separate coverage for each insured under the policy, except as respects the policy limits. Policies containing this provision do not require a separate endorsement to effect cross-liability coverage, and ISO has no "cross-liability endorsements" in its forms portfolio because they are not needed with ISO policy forms. For this reason, contracts should generally not require cross-liability endorsements. Most endorsements that go by that name exclude liability of one insured to another. To handle the unlikely, but possible, contingency that a policy does not include a severability of interests clause, 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. See Par. 7 Separation of Insureds to Section IV - Commercial General Liability Conditions to ISO CG 00 01 04 13 Commercial General Liability Coverage Form.

<sup>28</sup> **Primary and Noncontributing.** See the following: (1) Section IV, Paragraph 4.a Other Insurance – Primary Insurance and 4.b – Excess Insurance to the ISO CG 00 01 04 13 Commercial General Liability Coverage Form for provisions in the standard CGL policy establishing that coverage to the Named Insured under the CGL is provided on a primary basis and co-contributing with other insurance available to the Named Insured but is excess under specified circumstances, including if the Named Insured's other insurance is an additional insured provided on a primary basis; and (2) ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition.

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 noncontributing 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 form policies, both will declare themselves to be primary insurance unless some modification is effected to eliminate this dual coverage. *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.

Whether the limits of the Named Insured's umbrella or excess policy contribute prior to calling upon the additional insured's "other insurance", is a question addressed by case law in each jurisdiction. The so-called "Horizontal Exhaustion" rule applies in some jurisdictions and declares a party's excess coverage to be excess over all "primary" coverages. See *e.g., Kajima Constr. Servs. V. St. Paul Fire & Marine Ins. Co.*, 856 N.E.2d 452 (Ill. App. 2006) – court held that Illinois' horizontal exhaustion rule required the additional insured's (general contractor) CGL policy pay prior to the subcontractor's umbrella policy. Also, the courts of some jurisdictions (Alaska, Arizona, Delaware, Idaho, Indiana, Louisiana, Maine, Michigan, Missouri, Nevada, Oregon, Tennessee, Rhode Island and West Virginia) follow the so-called *Lamb-Weston* rule (named after the first case in which the rule was applied) and hold that all "other insurance" clauses are repugnant to each other. When more than one policy is triggered by a loss, all policies automatically share the loss on a pro rata basis.

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 protecting 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 protecting 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 protecting 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 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).

ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition has been introduced in 2013 by ISO to address this approach of endorsing the protecting parties policy to reiterate that it provides "primary" coverage and "will not seek contribution from any other insurance available to an additional insured"; but Provision (2) of this endorsement requires that the written agreement of the Additional Insured (the protected party) and the Named Insured (the protecting party) must provide that the Named Insured's insurance is primary and will not seek contribution from the additional insured's other insurance. Requiring in the written agreement between the Named Insured and the Additional Insured that ISO CG 20 01 endorsement be added to the Named Insured's policy may not achieve the Additional Insured's objective if the written agreement itself does not specify that the additional insured coverage on the Named Insured's policy is "primary and noncontributory" plus contain language defining what is meant by primary and noncontributory.

(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. This works unless the additional insured endorsement has also been issued on a excess liability basis. Because of this possibility, option (3) is not recommended.

In April 1997 ISO revised its "other insurance" clause in its standard CGL policy form to do just that. ISO added in Paragraph 4.b(2) an exception to the declared primary coverage in Paragraph 4.a 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 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 2013 the "by attachment of an endorsement" language was deleted. The 2013 revision thus ends concern under the standard CGL policy as to whether an additional insured's own CGL policy would be primary and co-contributing with automatic additional insured coverages. Note that 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. A policy maintained by a protecting party may provide that its coverage of the additional insured is not primary but on an excess basis. In such case, endorsing the protected 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 4.b(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 affords primary and noncontributory coverage to the additional insured.

<sup>29</sup> **Waiver of Subrogation Endorsement.** There generally is no premium charged by the insurer to issue this endorsement. The endorsement waives the insurer's right or reimbursement for its paid claims as to persons scheduled in the endorsement.

<sup>30</sup> **Personal Injury Exclusion to Contractual Liability Coverage.** Unless endorsed, the standard CGL policy excludes from contractual liability coverage indemnification by the insured for "Personal Injuries".

<sup>31</sup> **Amendment of Cancellation Provisions or Coverage Change.** Insurers are now resisting giving notice of cancellation or material modification to persons other than the first Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the first Named Insured. The very purpose of getting the insurer to give this notice to persons other than the first Named Insured is to avoid having to rely on notice from the first Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

<sup>32</sup> **Contractual Liability Limitation.** See ISO CG 21 39 Contractual Liability Limitation (form attached to this Article), which when added to the standard CGL policy by endorsement deletes paragraph "F" (assumption of tort liability of another) altogether from the definition of an insured contract.

<sup>33</sup> **Amendment of Insured Contract Definition.** See the ISO CG 24 26 Amendment of Insured Contract Definition (form attached to this Article) amending the definition of "insured contract" in the CGL Policy to limit Contractual Liability Coverage to tort liability assumed by the Named Insured to bodily injury and property damage caused in whole or in part by the Named Insured.

<sup>34</sup> **Limitation of Coverage to Designated Premises or Project.** See the ISO CG 21 44 Limitation of Coverage to Designated Premises or Project.

<sup>35</sup> **Severability of Interest Clause.** A "severability of interest clause" is a policy provision clarifying that, except with respect to the coverage limits, the insurance applies to each insured as though a separate policy were issued to each. Thus, a policy containing such a clause will cover a claim made by one insured against another insured.

<sup>36</sup> **Business Auto Liability.** A "business auto policy" or "BAP" is a commercial auto policy that includes auto liability and auto physical damage coverages arising from "covered autos"; other coverages are available by endorsement. Except for auto-related businesses and motor carrier or trucking firms, the business auto policy (BAP) addresses the needs of most commercial entities as respects auto insurance. What autos are "covered autos" is identified by a designation on the BAP's Declaration page called a "symbol". There are the following 10 symbols:

Symbol 1	Any Auto
Symbol 2	Owned Autos Only
Symbol 3	Owned Private Passenger Autos Only
Symbol 4	Owned Autos Other Than Private Passenger Autos Only
Symbol 5	Owned Autos Subject to No Fault
Symbol 6	Owned Autos Subject to Compulsory UM Law
Symbol 7	Specifically Described Autos
Symbol 8	Hired Autos Only
Symbol 9	Nonowned Autos Only
Symbol 19	Mobile Equipment Subject to Motor Vehicle Insurance Law Only

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<sup>37</sup> **“Any Auto”.** 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.

<sup>38</sup> **Workers Compensation Limits Required by Law.** Leases and construction contracts frequently require that a party “maintain Workers Compensation and Employers Liability coverage *as required by law*.” Does this verbiage really require coverage? With few exceptions, Texas does not require an insured to carry Workers Compensation insurance. A statement that coverage shall be provided “as required by law” does not require that the coverage be provided.

<sup>39</sup> **Bodily Injury by Accident Limit (Workers Compensation).** The specified amount is the limit the insurer will pay under Part Two, Employers Liability, for all claims arising out of any one accident, regardless of how many employee claims or how many related claims (such as a loss of consortium suit brought by the injured worker’s spouse) arise out of the accident.

<sup>40</sup> **Bodily Injury by Disease.** “Bodily Injury by Disease, Each Employee” - A policy limit within Part Two, Employers Liability, establishing the most the insurer will pay for damages due to bodily injury by disease to any one employee. “Bodily Injury by Disease, Policy Limit” - An aggregate limit of Part Two, Employers Liability, stipulating the most the insurer will pay for employee bodily injury by disease claims during the policy period (normally a year) regardless of the number of employees who make such claims. In the event the policy is for a period longer than 1 year, the limit is reinstated for each subsequent 12-month period.

<sup>41</sup> **USL&H.** The United States Longshore and Harbor Workers' Compensation Act (USL&H) of 1927 is a federal law that provides no-fault workers compensation benefits to employees other than masters or crew members of a vessel injured in maritime employment—generally, in loading, unloading, repairing, or building a vessel. Employers can obtain coverage under a standard workers compensation policy by purchasing an USL&H coverage endorsement. The USL&H law applies to persons working on, over, or adjacent to a navigable waterway. The term “adjacent to” has been ruled to have widely variant definitions.

<sup>42</sup> **Liquor Law Liability (Dram Shop).** Liquor law liability (also called dram shop liability) is a common law liability imposed on those selling alcoholic beverages, as well as a statutory liability established in some states. The risk of liquor law liability is excluded from commercial general liability policies. For coverage, a party must specify that the other party obtain a liquor legal liability policy that specifically provides coverage for bodily injury or property damage for which the insured may become legally liable as a result of contributing to a person’s intoxication. This type of liability policy only covers insureds “*in the business of*” manufacturing, selling, distributing, serving alcoholic beverages for charge or no charge if a license is required for the activity.”

<sup>43</sup> **Umbrella and Excess Policies.** The following definitions are found in the on-line IRMI Glossary of Insurance and Management Terms <http://www.irmi.com/online/insurance-glossary/default.aspx>. “Umbrella policy”: “A policy designed to provide protection against catastrophic losses. It generally is written over various primary liability policies, such as the business auto policy (BAP), commercial general liability (CGL) policy, watercraft and aircraft liability policies, and employers liability coverage. The umbrella policy serves three purposes: it provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims; it drops down and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and it provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR).” “Excess policy”: “A policy issued to provide limits in excess of an underlying liability policy. The underlying liability policy can be, and often is, an umbrella liability policy. An excess liability policy is no broader than the underlying liability policy; its sole purpose is to provide additional limits of insurance.”

<sup>44</sup> **Allocation of Limits Between Primary and Excess/Umbrella 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.

<sup>45</sup> **Landlord and Tenant Relationship – Risk of Loss to the Shopping Center and the Leased Premises.** At common law, neither the landlord nor the tenant is obligated to repair the premises after casualty damage 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.*, a 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, the landlord bears the risk of the decline in value of the property if either it or the tenant does not restore the property.

As opposed to leaving the rebuilding obligation to common law rules, the parties customarily 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 funding of the rebuilding obligation by requiring one or the other of the parties to maintain property insurance, including setting out specifications for the property insurance.

<sup>46</sup> **Property Insurance.** ISO commercial property insurance is a form comprised of the following documents combined to make the policy: the Declarations Page (ISO form IL 00 19, or a variation); the Common Policy Conditions (IL 00 17); the Building and Personal Property Coverage Form (form attached to this Article); the Commercial Property Conditions (CP 10 90) (form attached to this Article); optional coverage endorsements: *e.g.*, Business Income (And Extra Expense) Coverage Form, the Ordinance or Law Coverage endorsement, or Debris Removal Additional Insurance endorsement; one of the 3 Causes of Loss Forms: (CP 10 10, 10 20 or 10 30); and loss payee or additional insured endorsement: *e.g.*, Loss Payable Provisions or Additional Insured – Building Owner (form attached to this Article).

<sup>47</sup> **Property Insurance – “Causes of Loss”.** Outdated terminology requiring that the policy provide “all risks” or “fire and extended coverage” is often used in contracts. “All risks” denoted property insurance covering losses arising from any fortuitous cause except those that are specifically excluded and is currently called “Special Form” or “Special Causes of Loss Form.” “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 the extended coverage endorsement is no longer

used, a better approach to requiring this coverage is 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.

**ISO Special Causes of Loss.** The most comprehensive ISO property policy is called “Special Form” or “Special Causes of Loss Form.” This is in contrast to “Named Perils Coverage” which applies only to loss arising out of causes that are listed as covered.

**Exclusion from Causes of Loss.** The following are excluded perils from Causes of Loss coverage, including from Special Causes of Loss: Law and Ordinance; Earth Movement, Governmental Action; Nuclear Hazard; Utility Service; War and Military Action; Water (see below); Fungus, Wet Rot, Dry Rot, and Bacteria, Boiler and Machinery Failure; Wear and Tear or Lack of Maintenance; Continuous Seepage or Leakage Over a Period of 154 Days or More; Dishonest Acts; Pollutants; and Faulty Design or Workmanship. Also, in special hazard areas certain causes of loss may be excluded from coverage by endorsement with specialty insurance being required to cover the hazard (e.g., windstorm).

**Water Exclusion.** The Water exclusion excludes damage caused by: (1) flood, surface water, waves, tides; (2) mudslide or mudflow; (3) water that backs up or overflows from a sewer, drain, or sump; and (4) water underground pressing on, or flowing or seeping through foundations, walls, floors, or paved surfaces, basements, doors, windows, or other openings.

**Windstorm.** An interesting example of how a windstorm exclusion may come into play is illustrated in Case Study 3 “Pick Your Insurance Broker Wisely” discussed at B-3 and 4 of A. Glickman, J. Johnson and J. Marzullo, *What Did I Just Draft? Understanding How Insurance Really Works* 2011 ICSC LAW CONFERENCE discussing the case of *Great American Ins. Co. of N.Y. v. Lowry Dev., LLC*, 576 F.3d 251 (5<sup>th</sup> Cir. 2009). This case involved a builder’s risk policy. Although the policy as originally issued did not exclude wind damage, subsequent to its issuance the issuer endorsed the policy with a windstorm exclusion and notified the developer’s broker that the original policy was to have excluded wind damage. The developer’s broker did not respond and did not notify the developer. The policy was reissued the next policy year and excluded wind damage. Of course, Hurricane Katrina demolished the project. The Fifth Circuit held that the developer’s broker was the developer’s agent with authority to handle the developer’s insurance matters and therefore notice to the broker was notice to the developer.

**Flood.** See Endnote 56 for a discussion of flood insurance.

**Difference in Conditions Insurance.** “Difference in Conditions Insurance” is the industry term for property policies purchased in addition to the Causes of Loss policy to cover perils not covered by the property policy (usually, flood, wind and earthquake).

**Coverage under Each Causes of Loss.** The following are the perils covered by each of the “Causes of Loss” Forms:

<b>PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS</b>	
<p><b>Basic Causes of loss Form (CP 10 10)</b></p> <ul style="list-style-type: none"> <li>• Fire</li> <li>• Lightning</li> <li>• Explosion</li> <li>• Windstorm or hail</li> <li>• Smoke</li> <li>• Aircraft or vehicles</li> <li>• Riot or civil commotion</li> <li>• Vandalism</li> <li>• Sprinkler leakage</li> <li>• Sinkhole collapse</li> <li>• Volcanic action</li> </ul>	<p><b>Broad Causes of Loss Form (CP 10 20)</b></p> <p>Basic causes of loss form perils, plus:</p> <ul style="list-style-type: none"> <li>• Breakage of glass</li> <li>• Falling objects</li> <li>• Weight of snow, ice, or sleet</li> <li>• Water damage from leaking appliances</li> <li>• Collapse from specified causes</li> </ul> <hr/> <p><b>Special Causes of Loss Form (CP 10 30)</b></p> <ul style="list-style-type: none"> <li>• All perils except as excluded</li> <li>• Collapse from specified causes</li> </ul>

<sup>48</sup> **Valuation Terminology – Replacement Cost or Actual Cash Value.** Whether the policy is a “Replacement Cost” policy or an “Actual Cash Value” policy, the loss paid will be limited to the policy limits.

“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 or age. 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. The policy proceeds are not paid until the property is actually repaired or replaced, and only if replacement occurs as soon as reasonably possible after the loss or damage. Notice of intent to replace must be given to the insurer within 180 days of loss. Replacement cost coverage does not prohibit recovery if the

insured rebuilds at a new location, but the coverage is limited to what it would have cost to replace the improvements at the original premises. Replacement cost coverage does not cover the added costs of construction due to changes in laws and ordinances except if the policy is endorsed with an Ordinance or Law Coverage Endorsement (See Endnote 59). In the past replacement cost coverage was an option provided by endorsement. Now it is an optional coverage built into the ISO form policy. The option coverage is selected by notation on the Declarations Page. See ISO CP DS 10 00 Declarations Page at Optional Coverages.

“Actual Cash Value” or “ACV”. The ISO policy does not define “actual cash value”. The definition of this term is left up to case law. The term has generally been defined by cases to mean 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. The term is seldom defined in the policy, but is used in property and automobile physical damage insurance and is generally considered in the industry to be the cost to repair or replace the damaged property with materials of like kind and quality, less depreciation of the damaged property. In other words, the sum of money required to pay for damages or lost property, computed on the basis of replacement value less its depreciation by obsolescence or general wear and tear (i.e., physical depreciation). This is one of several possible methods of establishing the value of insured property in order to calculate the premium and determine the amount the insurer will pay in the event of a loss. ACV coverage applies if Replacement Cost coverage is not affirmatively selected on the Declarations Page of the policy.

“Inflation guard” is an optional endorsement designed to offset potential inflation by specifying a percentage in the Declarations Page by which the coverage will increase annually as to the portion of the covered property specified.

<sup>49</sup> **Valuation Terminology – Agreed Value Endorsement.** 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.

<sup>50</sup> **Designation of Landlord as Additional Insured on Tenant’s Property Policy.** See Endnote 54 - Designation of Landlord as Additional Insured on Tenant’s Property Policy; and Endnote 101 - Tenant Betterments, Alterations and Improvements. See Insurance Spec. B.1.1 where insurance for Tenant Improvements and Betterments is placed on the landlord. Some commentators have questioned whether a tenant has an insurable interest in improvements and betterments installed at the landlord’s expense. A similar issue arises if the lease provides that the tenant is to “insure all leasehold improvements” and there are significant leasehold improvements preexisting in the leased premises. Tenant may not have an insurable interest in improvements it did not install and pay for. But see ISO CP 00 10 10 12 Building and Personal Property Coverage Form stating that coverage is provided the tenant for:

- (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;

<sup>51</sup> **Risk Allocation – Tenant’s Property Losses Allocated to Tenant’s Property Insurance.** 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.

<sup>52</sup> **Coinsurance.** “Coinsurance” is a property insurance provision that penalizes the insured’s loss recovery if the limit of insurance purchased by the insured is not at least equal to a specified percentage (commonly 80%) of the value of the insured property. A business income coverage coinsurance provision penalizes the insured’s loss recovery if the business income limit of insurance is not at least equal to a specified percentage of the business income that would have been earned during the 12-month policy period. The coinsurance provision specifies that the insured will recover no more than the following: the amount of the loss multiplied by the ratio of the amount of insurance purchased (the limit of insurance) to the amount of insurance required (the value of the property on the date of loss multiplied by the coinsurance percentage), less the deductible. Coinsurance requirements protect the insurer against an insured’s deliberate underinsurance of the Covered Property. To avoid the penalty of coinsurance, the insured is forced to insure at or above this minimum level of value and pay its premium on the insured value. See Declarations Page – If higher than 80% coinsurance is applicable, such higher percentage is to be set out in the space provided on the Declarations Page. See Endnote 64 for a discussion of “Agreed Value Basis” coverage and see Declarations Page setting out space for designating the Agreed Value of the Covered Property.

<sup>53</sup> **Property Insurance – Special Causes of Loss.** See Endnote 47 for a discussion of Causes of Loss Form property insurance policies, including Special Causes of Loss.

<sup>54</sup> **Designation of Landlord as Additional Insured on Tenant’s Property Policy.** A landlord may take on the status of a “loss payee” or sometimes an “additional insured” on a tenant’s property policy.

**Loss Payable Clause.** A “Loss Payable Clause” is an insurance provision authorizing payment in the event of loss to a person or entity (a “loss payee”) other than the named insured having an insurable interest in the covered property. See ISO CP 12 18 06 07 Loss Payable Provisions, Optional Clause F Building Owner Loss Payable Clause (form attached to this Article). 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.

**Additional Insured.** 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 sometime 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.,

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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. In November 2008 ISO issued its form CP 12 19 Additional Insured – Building Owner endorsement to designate a building owner as a “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 when it is designated as an insured.

**ATIMA.** The phrase “as their interests may appear” (an ATIMA clause) 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 proceeds 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. The ISO CP 12 19 Building Owner Additional Insured Endorsement (form attached to this Article) 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 (form attached to this Article) 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.

**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. In *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5<sup>th</sup> 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.

<sup>55</sup> **Antennas.** See Building and Personal Property Coverage Form, Paragraph A.2.q(2) Property Not Covered. Antennas (including satellite dishes) and their lead-in wiring, masts or towers are excluded from coverage under the ISO property policy, except as provided in a limited manner in the Coverage Extensions (fire, lightning, explosion, riot, civil commotion and aircraft). Coverage may be increased and extended by an ISO CP 14 50 endorsement.

<sup>56</sup> **Flood.** 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). Coverage can be obtained for these losses through flood insurance, a difference in conditions policy, or as an endorsement to a property policy.

<sup>57</sup> **Glass.** 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.

<sup>58</sup> **Ordinance or Law Coverage.** Ordinance or Law Coverage is available by endorsement to a standard property policy to insure against loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Many communities have building ordinances that require that a building that has been damaged to a specified extent (typically, 50 percent) be demolished and rebuilt in accordance with current building codes rather than simply repaired. Unendorsed, standard property insurance forms do not cover the loss of the undamaged portion of the building, the cost of demolishing that undamaged portion of the building, or the increased cost of rebuilding the entire structure in accordance with current building codes. 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.

<sup>59</sup> **Terrorism.** Before 9/11/01 most property damage policies included coverage for terrorism. After 9/11/01 most were rewritten to exclude or significantly limit coverage for future acts of terrorism. Under the Terrorism Risk Insurance Program Reauthorization Act of 2007 (“TRIPRA”), an insured loss is one resulting from an “Act of Terrorism” that is covered by primary or excess property insurance. Definition of an “Act of Terrorism”, which must be certified as such by the Secretary of the Treasury in concurrence with the Secretary of State and U.S. Attorney General is:

- (i) A violent act or an act dangerous to human life, property or infrastructure;
- (ii) That resulted in damage within the U.S. or outside the U.S. (in the case of an air carrier or outside the U.S. in the case of an air carrier or vessel or a U.S. mission); and
- (iii) Was committed by an individual or individuals, as part of an effort to coerce the civilian population of the U.S. or to influence the policy or affect the conduct of the U.S. Government by coercion.

No act can be certified as an Act of Terrorism (i) if it is committed in the course of a war, or (ii) if property insurance losses resulting from the act do not exceed \$5 million in the aggregate. Excluded are chemical, nuclear, biological, and radiological events unless and until a study of the availability of insurance coverage for losses caused by terrorist attacks involving such materials is completed and recommendations regarding actions to expand the coverage to include these events are made. In exchange for the obligation to provide terrorism coverage, TRIPRA provides some financial relief to insurance companies paying claims exceeding a certain dollar value (\$50 million in 2006, which was increased to \$100 million in 2007). After a deductible for the insurer of 20% of the insurer’s prior year’s direct earned premiums, the Federal Government will pay 85% of the insured losses in



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excess of the deductible. Subject to an overall \$100 billion cap (combined Federal and industry shared insured losses), which must be disclosed to policyholders, TRIPRA provides for recoupment of any losses paid by the Federal government during 2011 by 9/30/12 and on or after 1/1/12 through policyholder surcharges by 9/30/17. Thus, once the loss is certified as an act of terrorism and the insurance companies and named insured pay the deductibles and losses, the federal government pays the excess up to the cap, but policyholder surcharges will repay the Federal government for the losses it pays. See David H. Fishman, *When Your Insurance Policy is the Disaster!* (THE ACREL PAPERS Spring 2006), pp. 7-8, and IRMI.com - Terrorism Risk Insurance Program Reauthorization Act.

<sup>60</sup> **Signs.** 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.

<sup>61</sup> **Debris Removal.** See the ISO CP 00 10 10 12 Building and Personal Property Coverage Form ¶A.4.a Coverage – Additional Coverages – Debris Removal. The ISO 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 10 12 Debris Removal Additional Limit of Insurance endorsement.

<sup>62</sup> **Contractual Waivers of Claims; Contractual Waivers of Insurer’s Subrogation Rights.** “Waiver of claims” 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. Leases 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 recovering its insurance proceeds against the negligent party.

**Lease Silent on Waiver of Insurer’s Right of Subrogation.** 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.

**Insurer’s Right of Subrogation.** Upon payment by the landlord’s insurer for an insured property loss, the landlord’s insurer is subrogated to the landlord’s rights and claims against its tenant 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 landlord’s insurers were not precluded from obtaining a subrogated cause of action to recoup its policy proceeds 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 of which was built into the rent) was to exculpate the tenant for its own negligence.

**Majority Rule.** 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 is to address this risk in the lease. See FRIEDMAN ON LEASES (5<sup>th</sup> 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).

**Minority Rule.** Texas follows the minority rule. *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956); FRIEDMAN ON LEASES (5<sup>th</sup> 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.

**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 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. The assigning tenant, First Tape, therefore, was able to retain the protection of the waiver of subrogation clause even after it had assigned its lease.

**No Standard Property Policy.** 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. 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. See the ISO CP 00 09 07 88 Commercial Property Conditions ¶ I. Transfer of Rights of Recovery Against Others To Us (form attached to this Article).

**Rationale for a Waiver of Insurer’s Right of Subrogation.** 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. 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

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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. 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. 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. 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.

Tenant's FF & E. 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).

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.

<sup>63</sup> **Business Income and Additional Expense.** This form of insurance (ISO CP 00 30) covers two types of loss: (1) loss of business income/earnings - covers losses suffered by a business as a result of not being able to use property damaged by a covered cause of loss under a property insurance policy during the time required to repair or replace it (formerly called "business interruption insurance") and/or (2) extraordinary additional expenses ("Extra Expense Coverage") incurred due to a necessary suspension of operations during a period of restoration caused by direct physical loss of or damage to property at the premises described in the policy. This coverage is available with no co-insurance or monthly limitation. Frequently recovery is limited to the length of time required to rebuild or repair the damaged property, plus an additional 30 days for recovering business that may have been lost to competitors (typically limited to an aggregate of 120 days unless policy is endorsed to provide for extended time period coverage). Business income insurance may be purchased without the Extra Expense Coverage (ISO Form CP 00 32) and extra expense coverage can be purchased without business income insurance (ISO Form CP 00 50). Extra Expense Coverage covers expenses in excess of normal operating expenses incurred by a business that remains in operation following a direct damage property loss. Extra Expense Coverage is appropriate for service businesses whose property is not essentially income-producing (attorneys, banks, insurance agencies, and doctors' offices), and for businesses that would find it imperative to continue operating regardless of cost (newspapers, dairies).

"Business Income Rental Value" is included under both forms of business income forms (ISO CP 00 32 and CP 00 30) if the attached declaration so provides. 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 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.

<sup>64</sup> **Agreed Value Basis.** "Agreed Value Basis" is coverage under a property insurance policy whereby the coinsurance clause is suspended until a specified expiration date. Insurers usually require a statement of property values signed by the insured as a condition of activating or including an agreed value provision in a commercial property policy.

<sup>65</sup> **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.

<sup>66</sup> **Business Income.** If true boiler exposure exists, explosion of a boiler will level a building. Machinery coverage pays for a sudden and accidental, mechanical or electrical breakdown of covered property. Such a breakdown could cause significant disruption of certain tenant occupancies, such as retail. The business income exposure is excluded by property coverage.

<sup>67</sup> **Other Insurance.** For example, the following specification is to be added if there is a hazardous waste hauler:

**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.

Other insurance can include such issues as flood, earthquake, earthquake sprinkler leakage, volcanic eruption, terrorism, sinkhole collapse, etc.

<sup>68</sup> **Products-Completed Operations.** “Products-Completed Operations” coverage is a major general liability sub-line which provides coverage for an Insured against claims arising out of products sold, manufactured, handled or distributed, or operations which are complete. Claims are covered only after a product has been sold and possession relinquished, or operations have been completed or abandoned by the Named Insured. The coverage applies only to claims for bodily injury and/or property damage and not for the Insured’s failure to complete a job or operation on time.

The following is an endorsement to a contractor controlled insurance program on a recently completed office tower that provided post-completion coverage to the contractor:

This endorsement, effective 12:01 A.M. 03/31/2012

Forms a part of Policy GL \_\_\_\_

Issued to (\_\_\_\_)

By AMERICAN HOME ASSURANCE COMPANY

**COMPLETED OPERATIONS EXTENSION  
CONTROLLED INSURANCE PROGRAM (MULTIPLE PROJECTS)**

*This Endorsement modifies insurance provided under the following:*

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

**SCHEDULE:**

All (\_\_\_\_) Projects with construction values \$15,000,000 and above.

Coverage of the “products-completed operations hazard” is extended for the Projects described in the above Schedule for a period of TEN (10) years or the Statute of Repose, whichever is less (“Extended Completed Operations Period”). The Extended Completed Operations Period will commence when that portion of the project is put to its intended use, or a temporary or permanent certificate of occupancy is issued. The Extended Completed Operations limit of insurance is \$4,000,000 per project and in the aggregate for all projects listed above, which includes the term of the Extended Completed Operations Period.

All terms and conditions remain unchanged.

<sup>69</sup> **General Aggregate Per Premises or Project.** See the ISO CG 25 04 05 09 Designated Location(s) General Aggregate Limit.

<sup>70</sup> **Post-Completion Coverage.** Contractor should be required to maintain the required CGL policy in effect for up to the maximum time limit as to which a cause of action could be maintained against contractor and the landlord parties for risks covered by the required form of CGL policy. “Completed operations” coverage only covers occurrences during the policy term. Thus on an occurrence policy, for “completed operations” coverage to continue, the Contractor must obtain a “completed operations extension endorsement” purchasing continuation of completed operations coverage after the original policy term. The insurer may be unwilling to issue a completed operations extension endorsement on the original policy after its term without there being also issued a current term CGL policy for the periods covered by the completed operations extension endorsement. The length of time the contractor should be required to maintain Post-Completion Coverage can be, depending on the risk tolerance of the landlord, between two years (a typical state’s tort statute of limitations) and ten years (a typical state’s statute of repose).

<sup>71</sup> **Owner’s and Contractor’s Protective Liability Policy (“OCP Policy”).** An OCP Policy covers bodily injury and property damage liability arising out of an independent contractor’s operations for another party. Although the contractor purchases the policy, the Named Insured is the party for whom it is performing operations. The OCP Policy also responds to liability arising out of the acts or omissions of the insured in connection with the general supervision of the contractor’s operations.

<sup>72</sup> **Incidental Design Liability.** The list of prohibited endorsements includes the ISO CG 22 34 04 13 Exclusion – Construction Management Errors and Omissions and the ISO CG 22 79 04 13 Exclusion – Contractors – Professional Liability. These endorsements are designed to deflect from the CGL policy liabilities perhaps more properly covered by a professional liability policy. However, a contractor’s service likely includes an element of professional services, including incidental design services. Before accepting the additions of these exclusions, consideration should be given to requiring the contractor to carry professional liability insurance or tailoring the exclusions to exclude known professional liability services being provided by the contractor in its scope of its work. The ISO CG 22 79 states that scope of “professional services” excluded by the endorsement “do not include services within construction means, methods, techniques, sequences and procedures employed by (the contractor) in connection with (its) operations in (its) capacity as a construction contractor.” Even though the ISO endorsement sets out this understanding of what is and is not excluded by the endorsement, the bounds of the exception are not bright lines. The limits of a CGL policy are generally greater than a professional liability policy and the time to submit claims is longer because CGL policies are generally occurrence-based, unlike professional liability policies.

<sup>73</sup> **Additional Insureds on Contractor’s CGL Policy.** Care should be taken in reviewing the additional insured coverage proffered on behalf of the tenant’s contractor. Agents may insist that the additional insured coverage requirement is met by the blanket automatic additional insured provisions in a blanket additional insured endorsement to the contractor’s policy. The standard contractor’s CGL policy endorsed with an ISO CG 71 57 09 10 Additional Insured – Owners, Lessees Or Contractors Automatic Status When Required In Construction Contract Primary And Non-Contributory provides

**Additional Insured – Owners, Lessees Or Contractors Automatic Status When Required In Construction Contract  
Primary And Non-Contributory**

**A. Section II - Who is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when *you and such person or organization have agreed* in a written contract that such person or organization be added as an additional insured on your policy.

(Bold italics emphasis added.)

Since the landlord does not have a contract with the contractor, this language does not extend additional insured coverage to the landlord. In *Westfield Insurance Co. v. FCL Builders, Inc.*, 948 N.E.2d 115, 350 Ill. Dec. 46 (Ill. App. Ct. – First Dist., 2<sup>nd</sup> Div. 2011) an Illinois appellate court faced an analogous situation. A second tier subcontractor’s commercial general liability (CGL) insurer brought a declaratory judgment action that it was not obligated to defend or indemnify a general contractor (FCL Builders, Inc.), in a tort action brought by an injured employee of a second tier subcontractor (JAK). FCL contracted with Suburban Ironworks, Inc., which in turn subcontracted with JAK. JAK erected steel on the job site. Unfortunately, about a month into the job, JAK’s employee was severely injured when he fell off of a steel beam. The employee filed a tort suit against FCL and Suburban, alleging the breach of various duties of care regarding job site safety that they allegedly owed to the employee. FCL had been furnished with a certificate of insurance issued by JAK’s insurance agent that listed FCL as an additional insured under JAK’s policy with Westfield. The appellate court held that the general contractor was not an additional insured under the CGL policy purchased by the second tier subcontractor. The Westfield CGL additional insured policy contained an endorsement that amended the definition of “insured” under the CGL policy to include as additional insureds “any person or organization for whom you are performing operations when you and such a person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy”. The court held

Even assuming, without deciding, that JAK was “performing operations” for FCL within the meaning of the policy, there is no evidence in the record that JAK had agreed in writing with FCL for FCL to be an additional insured. The policy explicitly and unambiguously requires a direct, written agreement to that effect in order to cover anyone other than JAK under the policy. Because no such written agreement ever existed between FCL and JAK, FCL cannot be an additional insured under the policy and Westfield is not obligated to furnish FCL with a defense or indemnification .... The plain and ordinary meaning of the term “such person or organization” in this provision is that it refers back to the same person or organization for whom JAK is performing operations, which was mentioned earlier in the same provision, and it does not encompass any other entity....Notably, the provision does not refer to *any* person or organization. By repeatedly using the term “such” instead of “any,” the provision necessarily requires that, in order to qualify as an additional insured, an entity must enter into a direct written agreement with JAK listing them as an additional insured.

*Id.* at 118-119. *But cf. Ryan Companies US, Inc. v. Secura Insurance Co.*, 2011 WL 2940985 which declined to follow the *FCL* case, concluding that there was an agreement other than the policy showing that the parties intended by some implication that the general contractor in *Ryan* be an additional insured.

<sup>74</sup> **Additional Insureds – ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** The July 2004 version of this CGL endorsement, ISO CG 20 10 07 04, which is the revision immediately preceding the most recent version of April 2013, “includes as an additional insured the person or organization shown in the Schedule, but only with respect to liability *caused in whole or in part by [the Named Insured’s] acts or omissions*; or the acts or omission of those acting on [the Named Insured’s] behalf in the performance of *on-going* operations.” The July 204 endorsement revision (1) carries forward the major change introduced by the October 2001 revision to this endorsement, the CG 20 10 10 01, that eliminated from the scope of additional insured coverage liabilities arising out of *completed operations*; and (2) changes from the previously used language “*arising out of the [Named Insured’s ongoing operations]*” to the “*caused in whole or in part by [the named insured’s acts or omissions acts or omissions]*”, thus eliminating coverage for the additional insured’s sole negligence.

<sup>75</sup> **Additional Insureds – ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** See ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person Or Organization. This, the most recent revision to the CG 20 10 Additional Insured endorsement, introduces as additional limitation of coverage the following: “the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.” and “the most we will pay on behalf of the additional insured is the amount of insurance: 1. Required by the contract or agreement; or 2. Available under the applicable Limits of Insurance shown in the Declarations.” Thus, in order to avoid the minimum limit becoming the maximum limit of coverage, the insurance specifications will need to clearly specify that the specification of the minimum limit does not result in capping the limit but that any additional limits provided by the policy will be fully available to respond to protect the additional insured.

<sup>76</sup> **Additional Insured Coverage in the Construction Context – Anti-Indemnity Statutes.** Most state anti-indemnity statutes apply exclusively in the construction context. Some states, have adopted statutes voiding as against public policy any indemnity by one person of another person’s negligence in the context of construction and additionally voiding any insured coverage to the extent it provides insurance coverage the scope of which is prohibited for an indemnity agreement. Care should be taken in drafting insurance specifications applicable to tenants and their contractors to avoid violating such prohibitions and to require additional insured endorsements in states that have adopted anti-indemnity or anti-additional insured endorsement law.

<sup>77</sup> **Contractual Liability Limitation.** See ISO CG 21 39 Contractual Liability Limitation, which when added to the standard CGL policy by endorsement deletes paragraph “f” (assumption of tort liability of another) altogether from the definition of an insured contract.

<sup>78</sup> **Amendment of Insured Contract Definition.** See Endnote 26 for a discussion of Contractual Liability Coverage of an “insured contract” under a CGL Policy. See the ISO CG 24 26 Amendment of Insured Contract Definition (form attached to this Article) amending the definition of “insured

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contract” in the CGL Policy to limit Contractual Liability Coverage to tort liability assumed by the Named Insured to bodily injury and property damage caused in whole or in part by the Named Insured.

<sup>79</sup> **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 needed 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).

#### Common Errors and Problems

Early Occupancy. Most projects have someone that occupies to some limited degree before substantial completion. Any degree of occupancy could invalidate the coverage if the policy isn’t properly worded or endorsed.

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 an 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.

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. Builder’s risk policies will not insure the building envelope unless specifically added. When added, some builder’s risk policies insure the envelope only on an actual cash value, or depreciated, basis.

Coverage for Architect’s Fees, Owner Supplied Materials, Debris Removal, Full Limit Coverage of Flood and Earthquakes, and Elimination of Ordinance or Law 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 Ordinance or Law 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.

Delay Damages. See BRUNER AND O’CONNOR ON CONSTRUCTION LAW §§ 11:116 Builder’s risk soft cost coverage; Delayed completion and force majeure insurance. 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. 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.

<sup>80</sup> **Replacement Cost.** Builder’s risk can be provided on either an Actual Cash Value basis or a Replacement Cost basis. Normally, there is little to no difference between ACV and Replacement Cost on a newly constructed structure but the potential exists that an adjuster could allege physical depreciation, especially when covering long-term construction projects. Replacement Cost is the preferred valuation method.

<sup>81</sup> **Deductibles.** Builder’s risk policies frequently include multiple deductibles. One may apply to most causes of loss, another to wind, yet another to flood, another to earthquake, and another to indirect (delayed completion) costs. A common requirement might be for a \$10,000 deductible, but a wind deductible of 1% of the value in place (or even worse, the total insurable value) at the covered property location at the time of loss applies subject to a \$100,000 minimum, a flood deductible equal to the maximum amount of coverage available from the national Flood Insurance Program, an earthquake deductible (depending on the location of the insured property) of 5% of the value in place at the covered property location at the time of loss applies subject to a \$500,000 minimum, and a delayed completion deductible of 15 days.

<sup>82</sup> **Builder’s Risk – 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 21<sup>st</sup> floor.

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<sup>83</sup> **Insureds – Subcontractors.** While the authors believe that subcontractors should be named insureds on the builder’s risk policy along with the owner and contractor, some owners or general contractors decline to do so in order to protect their construction insurance program from loss that could be passed back onto the subcontractor. This stance contradicts the fundamental purposes of builder’s risk insurance, which is first-party coverage and therefore not fault based. Although the general rule is that an insurer cannot sue its insured, some courts have made an exception in builder’s risk policies where the words “as their interest may appear” follow designation of one of multiple insureds. In *OPI Int’l, Inc. v. Gan Minster Ins. Co.*, 1996 U.S. Dist. LEXIS 22959, 20-21 (S.D. Tex. 1996), the court stated:

An insurer retains the right to subrogate against a subcontractor even where a subcontractor is an insured for a limited purpose, to the limited extent of his own property in the project or “as his interests may appear” in the project. The subcontractor is not protected from his negligence which causes loss to other property beyond his interest and covered by the policy.... The waiver of subrogation rights in the policy only applies to assureds “whose interests are covered by the policy,” which was limited in the definition of “other assureds” to contractors and subcontractors with whom [Named Insureds] have entered into agreements or contracts “in connection with the subject matters of Insurance, as their interests may appear.” This waiver does not protect [Plaintiff], as a subcontractor, for claims arising from its negligence in causing damage to property owned by the general contractor, unrelated to [Plaintiff’s] contract work.

**Installation Floaters.** An “installation floater” usually covers only the work performed by a single contractor, providing protection on that contractor’s work as it is being installed, in contrast to builder’s risk which covers the project. It is most often utilized by subcontractors who are performing work where there is no builder’s risk coverage in place. Even where builder’s risk coverage is provided, however, an installation floater is recommended. Should a subcontractor be subrogated against by the builder’s risk carrier, the subcontractor’s liability insurance will not be responsive for the portion of the subrogated claim that arises out of the subcontractor’s own work. Properly designed, an installation floater should be responsive to this exposure. Additionally, should the builder’s risk have a large deductible, a well-designed installation floater will provide protection to the subcontractor for the difference between the builder’s risk deductible and that of the installation floater.

<sup>84</sup> **Special Form.** See Endnotes 47 Property Insurance – “Causes of Loss” and 48 Valuation Terminology – Replacement Cost or Actual Cash Value. Most builder’s risk policies are provided on an “all risk” basis. Of course, no policy truly covers all risks of loss. Like other insurance policies, builder’s risk policies are subject to a variety of conditions, limitations, exclusions, and deductibles. This form does, however, cover all causes of loss not excluded in the policy. This has the advantage of transferring to the insurance company the burden to prove that a cause of loss was specifically excluded by the policy in order for them to deny coverage.

<sup>85</sup> **Typical Exclusions.** An unendorsed builder’s risk policy includes a long list of excluded causes of loss, potentially but not limited to:  
Exclusions Regarding Causes of Loss:

- Asbestos removal or other loss arising out of the presence of asbestos
- Changes required by ordinance or law
- Collapse
- Consequential loss, damage, or expenses of any kind
- Contaminants or pollutants
- Cost of making good any faulty or defective workmanship, supplies, or materials, or fault, defect, error, deficiency or omission in design, plan or specification
- Damage by rain, snow, sleet or ice to personal property in the open
- Delay, loss of use, loss of market, fines, penalties, and other consequential losses
- Demolition, increased cost of construction, repair, debris removal or loss of use necessitated by enforcement of law or ordinance regulating asbestos
- Earthquake, volcanic activity, and other earth movement
- Electrical or magnetic injury to or errors and omission in creating, processing or copying electronic records
- Erosion
- Flood, mudslide, sewer backup, and seepage of water
- Freezing
- Fungus, mold and bacteria
- Hostile or warlike actions in time of peace or war
- Infestation, disease, or damage caused by insects, vermin, rodents or animals
- Insurrection, rebellion, revolution, civil war, or commotion
- Loss or damage covered under any written or implied guarantee or warranty by any manufacturer or supplier
- Seizure or destruction of property by governmental authority
- Subsidence, shrinking, settling, cracking and expansion
- Terrorism
- Testing – both hot (introduction of feed stock, catalyst or similar media for processing and handling or commencement of supply to a system) and cold (hydrostatic, pneumatic, electrical, hydraulic or mechanical)
- Unexplained disappearance or shortage
- Wear and tear, gradual deterioration, inherent vice, latent defect, corrosion, rust, dampness or dryness of the atmosphere
- Weight of ice and snow

Exclusions Regarding Types of Property:

- Accounts, bills, currency, money and securities
- Contractor’s tools, machinery, plant and equipment
- Existing property
- Land
- Landscaping

- Maps, plans, blueprints, drawings
- Property away from the project site
- Property in transit
- Prototype, developmental, used machinery or equipment
- Radio or television antennas, including lead-in wiring, masts and towers
- Signs
- Transmission and distribution lines upon energization at the completion of testing
- Vehicles or equipment licensed for highway use, rolling stock, aircraft or watercraft
- Water, animals, standing timber and growing crops
- Waterborne property

<sup>86</sup> **Completed Value Basis.** Builder’s risk is most commonly issued on a “completed value” as opposed to a “reporting” form. A completed value form policy is issued for a specific construction project with the coverage limits and premium based on the expected value of the project as completed. The insured under a completed value basis form does not run the risk of under or misreporting and the associated contractual penalties that are involved with a reporting form basis policy. A completed value basis policy limit is based on the anticipated completed value of the project. Its premium is roughly 50% of the normal builder’s risk rate in recognition of the fact that the average value exposed to loss during the project is approximately one-half of the completed value of the project.

<sup>87</sup> **Non-Reporting Form.** A “reporting form” policy is a single policy covering multiple projects. It is generally less costly than the multiple completed value form policies. A reporting form allows a developer to administer one insurance form as opposed to multiple completed value forms. The insured adds projects to a reporting form as it undertakes new projects. Under a reporting form, the insured is required to file periodic reports of the value of the covered projects. A reporting form increases the insured amount as the value of construction increases. A report is filed with the insurance company, usually on a monthly basis, updating values. Coverage and limit issues can arise if the reports are inaccurate, late or nonexistent. See *American Dream Homes, Inc. v. Insurance Co. of America*, 693 A.2d 517 (N.J. Super. Ct. App. Div. 1997) - the court upheld the insurer’s denial of coverage of a project as to which the contractor late filed its monthly report.

<sup>88</sup> **Prohibition of Protective Safeguard Warranty.** “Protective safeguard warranties” are conditions precedent to coverage sometimes built into a builder’s risk policy to assure the insurance company of certain protections being provided at the job site. Their inclusion is justified by the insurer on grounds of reduced premium. However, a violation of a protective safeguard warranty voids coverage, potentially even if the loss is not tied to the violated protective safeguard warranty. Typical protective safeguard warranties address the following: emergency response protocols; fencing surrounding the project (e.g., site must be fenced with a cyclone fence at least 6 foot high which must be locked during non-working hours); project lighting during night hours; site surveillance must be maintained by a licensed and bonded watchperson during non-construction hours; and water for fire suppression must be stored on site, or a working fire hydrant must be within 1,000 feet of the structure being constructed. See David S. Gordon, *Insurance Redux: Reprise and Update on the Protective Safeguards Endorsement* ACREL NEWS Vol. 30, No. 1 pp. 10 – 12 (April 2012).

<sup>89</sup> **Minimum Sublimit.** The coverage of a builder’s risk policy may be extended to cover various risks with each risk carrying a “sublimit” (limit less than the policy amount) or no sublimit. The insureds should consider eliminating as many sublimits as financially and practicably possible.

<sup>90</sup> **Collapse Additional Coverage Endorsement.** The list of the causes of loss covered by the builder’s risk policy should be examined. Many causes of loss are not included and have to be added by endorsement, e.g., many policies exclude collapse and require a Collapses Additional Coverage Endorsement to extend coverage to this cause of loss. See the following cases for discussions of this cause of loss and coverage issues: *Malbco Holdings, LLC. v. Amco Ins. Co.*, 629 F.Supp. 2d 1195 (D. Or. 2009); *Hennessy v. Mutual of Enumclaw Ins. Co.*, 206 P.3d 1184 (Or. Ct. App. 2009) and *130 Slade Condominium Ass’n, Inc. v. Millers Capital Ins. Co.*, 2008 WL 2331048 (D. Md. 2008).

<sup>91</sup> **Occupancy pre-completion clause.** If the property will be occupied, or arguably occupied (e.g., a tenant building out its premises), the builder’s risk policy should be reviewed to confirm that pre-completion occupancy is permitted and under what conditions. It may be necessary, to have the policy endorsed to permit pre-completion occupancy.

<sup>92</sup> **Soft Costs Coverage Added to Builder’s Risk Policy.** See Endnote 79 - No Standard Builder’s Risk Policy for a discussion of delay damages and builder’s risk policy endorsements. 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. These are time element exposures, similar in many respects to business interruption exposures on a completed project, in that the extent of the loss is impacted by the length of the delay. Soft cost coverage responds to additional expenses made necessary by the delay in completion. Coverage is widely variable and it is incumbent upon the insured to describe what is needed. A thorough understanding of the project, contract documents, financing terms, materials and supply agreements, leasing agreements and construction regulations is needed. Coverage is provided on an actual loss sustained basis (i.e., the insured can recover only for the actual loss of income or the actual additional expenses incurred regardless of the limit of coverage purchased). The period of indemnity usually begins a specified number of days after the date when construction is actually completed. The maximum time period commonly ranges up to 12 months. 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. The following is a manuscripted soft cost endorsement to a builder’s risk policy:

## ADDITIONAL EXPENSE – SOFT COST COVERAGE

This endorsement modifies insurance under the following:

### BUILDERS' RISK COVERAGE FORM

A. The following is added to Additional Coverages:

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.

#### Coverage and Limits of Insurance

**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.

<sup>93</sup> **Waivers of Subrogation on a Builder's Risk Policy.** Subrogation can impact coverage and frustrate the objective of avoiding liability disputes between contractors, subcontractors and the owner. In *St. Paul Fire and Marine Ins. Co. v. Universal Bldg. Supply*, 409 F.3d 73, 84 (2d. Cir. 2005), the court said:

A waiver of subrogation is useful because it avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits and yet protects the contracting parties from loss by bringing all property damage under the all risks builder's risk property insurance. ... These "waiver of subrogation" provisions are intended to cut down the amount of litigation that might otherwise arise due to the existence of an insured loss.

Builder's risk policies include a provision entitled "Transfer of Rights of Recovery Against Others to Us" or similar wording. The most common language is:

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after the loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us.

Note that in this example, the insured is prohibited from relinquishing its rights after a loss. Beware: some builder's risk policies prohibit the insured from relinquishing its rights at any time. An endorsement to the builder's risk policy may be necessary to delete a pre-loss prohibition on the waiver of subrogation in the construction contract.

<sup>94</sup> **When Does Coverage Begin and End?** Coverage should be purchased for more time than the construction is anticipated to take. It may be difficult and/or expensive to obtain an extension if coverage expires when the project is nearing completion. If, on the other hand, completion is accomplished prior to expiration, most builder's risk policy permit a pro-rata cancellation. Most builder's risk policies state that coverage ceases upon the first to occur of a variety of circumstances. A significant problem arises when one of those circumstances is occupancy. The typical builder's risk policy does not include an occupancy loading. That said, no definition of "occupancy" is provided. Preferably, the provision governing when coverage ceases should not include a reference to occupancy or there should be a specific grant for occupancy.



<sup>95</sup> **Contractor’s Pollution Liability.** See the ISO CG 00 01 04 13 Commercial General Liability Coverage Form, Section I, Coverage A, Par. 2.f – Exclusions – Pollution. Par. 2.f is known as the “absolute pollution exclusion” and excludes environmental pollution claims from the CGL policy’s coverage. See *Porterfield v. Audubon Indem. Co.*, 856 So.2d 789, 793 (Ala. 2002) for a discussion of the history of CGL policy’s absolute pollution exclusion.

<sup>96</sup> **Other Insurance.** The key exposures not listed above are workers compensation and professional liability. Contractor’s professional liability exposures arise out of the provision of shop drawings, “value engineering”, failure to achieve LEED goals, design/build work, or construction management.

<sup>97</sup> **Property Insurance - Causes of Loss.** See Endnote 47 for an explanation of the coverages of the three forms of ISO Causes of Loss forms.

<sup>98</sup> **Valuation Terminology – Replacement Cost.** See Endnote 48 for a definition of “Replacement Cost” coverage. Note the different approaches taken by the “at least 80% of full insurable value” in the narrative form of insurance specifications in Section A of Insurance Specifications in Narrative Format to the “100% of replacement cost” approach taken at Par. 3.B 1.1 of Insurance Specifications as Exhibit to Lease and in its Endnotes. The approach taken in the chart form insurance specifications is the result of a key tenant’s requirements to assure adequate insurance proceeds are available to rebuild the leased structure.

<sup>99</sup> **Property Covered by Property Insurance.** 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; or electronic data.

<sup>100</sup> **Tenant Betterments, Alterations and Improvements.** See Endnotes 54 - Designation of Landlord as Additional Insured on Tenant’s Property Policy, 51 Risk Allocation – Tenant’s Property Losses Allocated to Tenant’s Property Insurance; and 50 Designation of Landlord as Additional Insured on Tenant’s Property Policy. 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.

See the ISO CP 00 10 10 12 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 tenant’s ISO property insurance policy. A landlord’s ownership interest in tenant improvements and betterments are part of the Landlord’s Covered Property. ¶A.1.a(5). See the ISO CP 00 10 10 12 Building and Personal Property Coverage Form stating that coverage is provided the tenant for:

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| <p>(6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:</p> <ul style="list-style-type: none"><li>(a) Made a part of the building or structure you occupy but do not own; and</li><li>(b) You acquired or made at your expense but cannot legally remove;</li></ul> |
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Some commentators have questioned whether a tenant has an insurable interest in Improvements and betterments installed at the landlord’s expense. A similar issue arises if the lease provides that the tenant is to “insure all leasehold improvements” and there are significant leasehold improvements preexisting in the leased premises. Tenant may not have an insurable interest in improvements it did not install and pay for.

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 as 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 (5<sup>th</sup> Cir. 2010) held that in such case both the tenant’s insurer and the landlord’s insurer must share the cost.

<sup>101</sup> **Waiver of Claims; Waiver of Subrogation.** See Endnote 62 for a discussion of waivers of claims and waivers of subrogation. The tenant has an interest in setting out insurance specifications for the landlord’s insurance. Tenants should insist that the landlord’s property policy contain a waiver of subrogation. Tenants should also carve out of their indemnity risks covered by the insurance contractually required to be carried by their landlord. This

issue was raised in *Travelers Indemnity Co. of Ill. a/s/o Partnership 1995 LLP v. F 7 S London Pub., Inc.*, 270 F. Supp. 330 (E.D. N.Y. 2003) discussed in A. Glickman, J. Johnson and J. Marzullo, *What Did I Just Draft? Understanding How Insurance Really Works* 2011 ICSC LAW CONFERENCE as Case Study 4 “Casualty and Indemnification Provisions in Lease, but no Waiver of Subrogation.” In this case the landlord’s insurer sued the tenant on its broad form indemnity for a fire loss to the shopping center. The court held that although the tenant had broadly indemnified the landlord, since the cause of the fire was not determined, the court looked to the lease’s fire damage provision and held that it controlled with the result that the loss was borne by landlord and its insurer. This litigation could have been avoided had the lease expressly excluded from the tenant’s indemnity fire damage covered by the landlord’s property policy.

<sup>102</sup> **ISO CG 20 10 04 13 Primary and Noncontributory – The “Other Insurance” Condition.** See Endnote 28 - Primary and Noncontributing. ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition has been introduced in 2013 by ISO to provide an endorsement form to be added to the Named Insured’s policy (the protecting party’s policy) to reiterate that it provides “primary” coverage and that its issuer “will not seek contribution from any other insurance available to an additional insured”. Note, however, that Provision (2) of this endorsement requires that the written agreement of the additional insured (the protected party) and the Named Insured (the protecting party) must provide that the Named Insured’s insurance is primary and will not seek contribution from the additional insured’s other insurance. Requiring in the written agreement between the Named Insured and the Additional Insured that an ISO CG 20 10 endorsement be added to the Named Insured’s policy may not achieve the Additional Insured’s objectives, if the written agreement itself does not also specify that the additional insured coverage on the Named Insured’s policy is “primary and noncontributory” plus contain language defining what is meant by primary and noncontributory. Note that this new endorsement is worded to apply only where the additional insured is a Named Insured. Many of the parties that require additional insured protection are not named insureds under a CGL policy, e.g., officers, directors, and employees of a primary additional insured. Also note that this new endorsement provides that it applies only if the person or entity is named as an additional insured by an endorsement. Also, note this endorsement endorses the Named Insured’s Commercial General Liability Policy and is not an endorsement to the Named Insured’s umbrella or excess policy. This result might be avoided if the umbrella or excess policy provides that it is primary and does not require the additional insured’s policy to contribute, and the additional insured’s policy does not provide that it contributes along with other insurance above the primary contributing policies. This desired result of an additional insured is exacerbated by the standard policy’s “other insurance” language that provides the policy is “Excess over: ... (b) Any other primary insurance available to you covering liability ... for which you have been added as an additional insured.” The additional insured’s policy does not state it is excess over umbrella policies of the Named Insured on which it has been added as an additional insured.

<sup>103</sup> **ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** The ISO CG 20 10 04 13 Additional Insured Endorsement, is used to schedule an owner (a landlord), a lessee or a contractor on a named insured’s CGL policy. It is used to schedule a landlord on the tenant’s CGL policy and on a tenant’s contractor’s CGL policy to schedule a landlord on a tenant’s CGL policy.

<sup>104</sup> **ISO CG 20 10 – “Caused by Your 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 [3<sup>rd</sup> Dist.] 1999, no writ), *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. [1<sup>st</sup> Dist.] 1999, writ denied) and *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5<sup>th</sup> 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. In *W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 937 N.Y.S.2d 28 (N.Y. 2012) the New York court held that “caused by your ongoing operations performed for that insured” did not materially differ from “arising out of” and “the additional insured endorsement granting coverage does not require a negligence trigger”. The court found that the fact that an employee of a subcontractor was injured while performing the named insured’s work was sufficient to demonstrate that the injuries were “caused by” the named insured’s operations.

<sup>105</sup> **ISO CG 20 10 – “Ongoing Operations”.** This Additional Insured endorsement form was revised in 2001 by ISO to limit the time of the “acts or omissions” triggering liability to those occurring “in the performance of the ongoing operations” of the Named Insured. Previously, this Additional

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Insured endorsement applied to liabilities arising out of “your work” (language which did not address the time of the occurrence). A companion endorsement, ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations was introduced in 2001 (as subsequently modified) to cover liabilities caused, in whole or in part, by “your work” “at the location described in the Schedule” “performed for that additional insured” and “included in the ‘products-completed operations hazard’”. Restricting the endorsement to locations and operations described in the ISO CG 20 37 permits insurers the opportunity to underwrite the coverage risk.

<sup>106</sup> **2013 Revisions – Additional Limitations to the Additional Insured Endorsements.** ISO revised the Additional Insurance forms to add the following three additional limitations to their additional insured coverage:

(1) Coverage of the additional insured is provided “only to the extent provided by law”. This limitation has been added to avoid violation of state anti-indemnification and anti-additional insured laws. Many states have “anti-indemnification” laws declaring void indemnity and additional insurance requirements requiring a party to indemnify and provide additional insurance protecting another party from the other party’s negligence.

(2) Coverage of the additional insured is not broader than that which the Named Insured is required to provide the Additional Insured under their written agreement. This limitation thus imposes a limit on coverage otherwise provided in the policy.

(3) The limit of coverage is limited to the lesser of the coverage limit required in the parties’ agreement or by the policy.

<sup>107</sup> **ISO CG 20 11 Additional Insured – Managers or Lessors of Premises.** This endorsement is used when a landlord or the property manager, or both, is to be listed as an additional insured on the tenant’s liability insurance policy. A common risk transfer strategy is for a landlord to provide in its lease that its tenant indemnify and make the landlord and its property manager an additional insured on the tenant’s CGL policy. These provisions recognize that the tenant’s occupancy creates an additional liability exposure to the landlord for injuries and property damage resulting from a tenant’s activities.

<sup>108</sup> **ISO CG 20 11 Additional Insured – Managers or Lessors of Premises - Designation of Premises.** See Endnote 101 for a discussion of the importance of the description of the “premises”.

<sup>109</sup> **ISO CG 20 11 - “Arising Out of Ownership, Maintenance or Use” of Premises.** 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.” 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.

<sup>110</sup> **ISO CG 20 11 - “Arising Out of ‘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

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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 maintain 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 reached in *Minges Creek v. Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006) discussed in A. Glickman, J. Johnson and J. Marzullo, *What Did I Just Draft? Understanding How Insurance Really Works* 2011 ICSC LAW CONFERENCE B-5 and 6 as Case Study 5 "Sidewalk Slip and Fall". 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 indemnify where the cause of the damage occurred outside the leased premises.

<sup>111</sup> **ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations.** This endorsement, ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations was introduced in 2001 (as subsequently modified) to cover liabilities caused, in whole or in part, by "your work" "at the location described in the Schedule" "performed for that additional insured" and "included in the products-completed operations hazard". Restricting the endorsement to locations and operations described in the ISO CG 20 37 permits insurers the opportunity to underwrite the coverage risk. It was introduced in 2001 as a companion to ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization, which in 2001 was revised to limit its coverage to "ongoing operations" of the Named Insured at the location designated in the Schedule in the face of the form and to expressly exclude at Paragraph B injury and damages occurring after work completion. For further discussion of the importance of completed operations coverage for coverage up to the limits of the Statute of Repose, see the discussion in this Article at Item 7 *Completed Operations Coverages is Important*.

<sup>112</sup> **ISO CG 21 39 10 93 Contractual Liability Limitation.** In addition to additional insured coverage, Contractual Liability Coverage is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. ISO CG 21 39 10 93 Contractual Liability Limitation is one of the most egregious endorsements in the insurance industry. The provision of Contractual Liability Coverage includes a series of definitions of an "insured contract." The first five definitions are referred to as incidental provisions, but the sixth definition is the provision that provides for the contractual assumption of tort liability. The sixth type of "insured contract" is most frequently the basis of insurance of a Named Insured on its indemnity of third parties (e.g., indemnity for injuries to an employer's employees; indemnity for injuries to a subcontractor's employees). The CG 21 39 deletes this sixth definition in its entirety, deleting coverage for an indemnitor's indemnity of a third party for its negligence. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer, unless its indemnity falls within one of the five defined "insured contracts". Anti-Indemnity Statutes in many states preclude enforcement of indemnities as to a third party's negligence, sole or even concurrent, except in statutorily limited circumstances.

<sup>113</sup> **ISO CG 22 94 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf.** See discussion of this egregious exclusion endorsement as Item 9 *Exclusions May Be Invisible* in this Article. Liability insurers have sought to exclude from the coverage of CGL policies so-called "business risks", those risks thought generally to be under the control of the insured (contractor or subcontractor) and which are not regarded as fortuitous in nature. In crafting policy language (coverage and exclusions) insurers have struggled for decades to draft policy language that clearly and unambiguously covers "accidental" property damage but does not cover uninsurable business risks. The insurance industry has resisted insuring contractors for property damage caused by "business risks" within the contractor's control. This issue has been the subject of considerable litigation. Although the vast majority of cases involve interpretation of the same CGL policy language, there is a marked split of authority. As reviewed below, the recent focus has been on the "property damage" and "occurrence" requirements of the CGL policy, with some courts applying the legal theories of "business risk" and "economic loss" as a means to exclude coverage. In 2007 courts in Texas, Florida and Tennessee courts rejected negligence, foreseeability of damage and natural and probable consequences as grounds to exclude finding that damage to property arising out of a contractor's performance of work was an "occurrence" possibly triggering coverage under its CGL policy. See *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007); and *Travelers Indem. Co. of America v. Moore & Associates, Inc.*, 216 S.W.3d 302, 308-09 (Tenn. 2007).

<sup>114</sup> **ISO CG 24 26 Amendment of Insured Contract Definition.** See the following: (1) the discussion in this Article at Item 9 *Exclusions May Be Invisible*; (2) Endnote 26 for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy; and (3) ISO CG 24 26 Amendment of Insured Contract Definition. This endorsement amends the definition of "insured contract" to limit contractual liability coverage insuring the named insured's indemnities for the indemnified person's tort liability to bodily injury and property damage *caused in whole or in part* by the named insured (the indemnifying person). This causation language was added by ISO to eliminate from the Contractual Liability Coverage of "insured contracts" the sole negligence of the indemnified party. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer.

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<sup>115</sup> **ISO IL 00 17 11 98 Common Property Conditions.** One of the components comprising the standard property policy is the Common Property Conditions. Note that the Cancellation notice provision is worded such that the insurer's obligation to give notice to the "first Named Insured". Thus, unless the policy is endorsed to give notice to an additional insured, no notice is given to the additional insured on policy cancellation.

<sup>116</sup> **ISO CP 00 90 07 88 Commercial Property Conditions.** The Commercial Property Conditions set out conditions for maintenance of the policy, including the Named Insureds agreement to protect the insurer's right of subrogation unless it is waived by the insurer (see Par. I, 1 permitting pre-loss waiver by the Named Insured of the insurer's subrogation right and Par. I 2(c) and post-loss waiver against the Named Insured's tenant).

<sup>117</sup> **ISO CP 12 18 16 07 Loss Payable Provisions.** 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.

<sup>118</sup> **ISO CP 12 19 06 07 Additional Insured – Building Owner.** 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. 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 proceeds 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. 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.

<sup>119</sup> **ISO CP 00 60 06 95 Leasehold Interest Coverage Form.** ISO CP 00 60 06 95 Leasehold Interest Coverage Form can be added as an endorsement to a tenant's ISO form property policy to extend coverage for losses resulting from cancellation of its lease, including loss of undamaged improvements and betterments. The cause of cancellation must result from direct physical loss of or damage to property (not necessarily the property of the insured tenant) at the leased premises. Damages are based on the difference in rental rates and the loss of use of improvements.

<sup>120</sup> **ACORD 25 Certificate of Liability Insurance.** See Endnotes 9 – 12 and 16 – 19 for discussions of Certificates of Insurance.

<sup>121</sup> **Producer.** The "Producer" of a certificate of insurance typically is the broker for the named insured of the policies described in the certificate.

<sup>122</sup> **Personal and Advertising Injury.** See Endnote 21 - Personal and Advertising Injury.

<sup>123</sup> **General Aggregate.** See Endnote 23 - General Aggregate.

<sup>124</sup> **General Aggregate – Per Project.** See Endnote 24 - General Aggregate Per Project.

<sup>125</sup> **Products – Completed Operations.** See Endnote 68 - Products/Completed Operations.

<sup>126</sup> **Auto Liability.** See Endnote 36 - Business Auto Liability.

<sup>127</sup> **Auto Liability – Any Auto.** See Endnote 37 - Any Auto.

<sup>128</sup> **Retention.** See Endnote 15 for a definition of "Self-Insured Retention".

<sup>129</sup> **Description of Operations/Locations/Vehicles.** This box and an attached schedule are typically used to identify at the request of the Certificate Holder endorsements to the listed policies and persons scheduled as protected parties, e.g., additional insureds and persons as to which subrogation has been waived.

<sup>130</sup> **Certificate Holder.** See Endnote 17 - Status as a Certificate Holder Does Not Create Rights.

<sup>131</sup> **Notice - Cancellation.** See Endnotes 16 - Cancellation Notice Statement and 31 Amendment of Cancellation Provisions or Coverage Change.

<sup>132</sup> **Authorized Representative.** See Endnote 19 - Signed By An "Authorized Representative"?

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- <sup>133</sup> **ACORD Certificates.** See Endnotes 9 – 12 and 16 – 19 for discussions of Certificates of Insurance.
- <sup>134</sup> **Producer.** The “Producer” of a certificate of insurance typically is the broker for the named insured of the policies described in the certificate.
- <sup>135</sup> **Additional Named Insured(s).** The following definition of “additional named insured” is found in the on-line IRMI Glossary of Insurance and Management Terms <http://www.irmi.com/online/insurance-glossary/default.aspx>. “(1) A person or organization, other than the first named insured, identified as an insured in the policy declarations or an addendum to the policy declarations. (2) A person or organization added to a policy after the policy is written with the status of named insured. This entity would have the same rights and responsibilities as an entity named as an insured in the policy declarations (other than those rights and responsibilities reserved to the first named insured). In this sense, the term can be contrasted with additional insured, a person or organization added to a policy as an insured but not as a named insured. The term has not acquired a uniformly agreed upon meaning within the insurance industry, and use of the term in the two different senses defined above often produces confusion in requests for additional insured status between contracting parties.”
- <sup>136</sup> **Causes of Loss - Basic.** See Endnote 47 Property Insurance – “Causes of Loss”.
- <sup>137</sup> **Causes of Loss - Broad.** See Endnote 47 Property Insurance – “Causes of Loss”.
- <sup>138</sup> **Causes of Loss - Special.** See Endnote 47 Property Insurance – “Causes of Loss”.
- <sup>139</sup> **Business Income.** See Endnote 63 Business Income and Additional Expense.
- <sup>140</sup> **Terrorism Coverage.** See Endnote 59 - Terrorism.
- <sup>141</sup> **Replacement Cost.** See Endnote 48 - Valuation Terminology – Replacement Cost or Actual Cash Value.
- <sup>142</sup> **Agreed Value.** See Endnote 49 - Valuation Terminology – Agreed Value Endorsement.
- <sup>143</sup> **Coinsurance.** See Endnote 52 - Coinsurance.
- <sup>144</sup> **Ordinance or Law.** See Endnote 58 - Ordinance or Law Coverage.
- <sup>145</sup> **Flood.** See Endnote 56 - Flood.
- <sup>146</sup> **Notice - Cancellation.** See Endnote 16 - Cancellation Notice Statement.
- <sup>147</sup> **Protections of Mortgagee.** See ISO CP 12 18 06 07 Loss Payable Provisions, Par.s C. Loss Payable Clause and D. Lender’s Loss Payable Clause. 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](http://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 is more than one form of endorsement for this purpose and they each provide widely different protection. There are at least three types of mortgagee clauses which 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.

**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 (2013). 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.

**Standard Mortgage Clause.** See 4 COUCH ON INSURANCE 3d § 65:48 (2013) “Standard” or “Union” Mortgage Clause – General Rule That Mortgagee Unaffected. 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). The most significant protections afforded by the standard mortgage clause are the following:

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(1) insurance proceeds are paid to the mortgagee, not to the insured or to the mortgagee and the insured jointly (see Standard Mortgage Clause Section F.2.b in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form);

(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 (see Standard Mortgage Clause Section F.2.d in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form);

(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 (see Standard Mortgage Clause Section F.2.f(1) in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form); and

(4) the mortgagee is to be given 10 days' notice on nonrenewal (see Standard Mortgage Clause Section F.2.g in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form).

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 (2013)*. 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).

<sup>148</sup> **Lenders Loss Payable.** See Endnote 147 – Protections of Mortgage – Standard Commercial Property Policy - Section F.2 Additional Conditions – Mortgageholders. Also see ISO CP 12 18 06 07 Loss Payable Provisions, Par.s C. Loss Payable Clause and D. Lender's Loss Payable Clause (forms attached to this Article).

<sup>149</sup> **Authorized Representative.** See Endnote 19 - Signed By An "Authorized Representative"?