LANDLORDS: BEWARE OF INSURANCE CERTIFICATES

(A Trojan Horse)

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ACREL Mid-Year Leasing and Insurance Committees
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Table of Contents

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Bill Locke
Graves, Dougherty, Hearon & Moody, Austin, Texas

The following tips come from a recent experience of one of my partners. Our client, a landlord, asked my partner to review an insurance certificate tendered by its tenant. The tenant was undertaking extensive construction remodeling to put a steak house restaurant into the landlord's building.

1. ***The Insurance Specifications.*** The lease specified that tenant's contractor was to obtain and maintain commercial general liability insurance with specified limits on a per occurrence basis. It specified that the landlord was to be an additional insured and that landlord's negligence would not be excluded from coverage. The lease required the tenant to obtain from its contractor for the landlord's approval a certificate of insurance as to the contractor's insurance. The lease also called for the certificate of insurance to have attached to it a copy of the insurance policy's Declarations Page[2] and the issued endorsements that designating the landlord as additional insured and providing it 30 days' advance notice of cancellation or material change.

2. ***What the Contractor's Agent Provided.*** The contractor's insurance agent provided landlord an ACORD 25 (2009/09) certificate of insurance without the required attachments (See the attached ACORD form certificate of insurance and portion of the Declarations Page). The certificate was addressed to the landlord as the certificate holder.[3] The certificate seemingly appeared well done (except for its poor grammar). The Remarks box stated

> **DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)**
>
> The certificate holder is named as an additional insured with a 30 day notice of cancellation the general liability per the following forms that are part of the policy: CG 7157 09/10 and CG 7288 03/10.

3. ***Contractor Agent's[4] First Misrepresentation.*** Contractor's insurance agent insisted that the unfurnished endorsements provided the required additional insured coverage and notice and my partner need not hold up the contractor from getting started.

Tip 1: Don't take the agent's word for it.[5]

Tip 2: Be persistent.

After considerable pestering of the contractor's agent, my partner received a copy of the contractor's policy including the endorsements. See the attached copy of the two referenced additional insured endorsements, the CG 7157 09/10 and CG 7288 03/10. My partner pointed out to the agent that the policy provided for notice of cancellation only to be given to the "first Named Insured" (the contractor) and not to the landlord.

Tip 3: An additional insured is not the first Named Insured on the policy.[6]

4. ***First Corrective Action.*** This resulted in the issuance of an additional endorsement to the policy, a CG 02 05 12 04 Amendment of Cancellation Provisions or Coverage Change (See attached endorsement), providing for the requisite 30 days' advanced notice of cancellation or material change.

Tip 4: Yes, you can get an advanced notice endorsement.

5. ***Contractor Agent's Second Misrepresentation.*** The agent also insisted that the additional insured coverage requirement was met by the blanket automatic additional insured provisions in the referenced endorsements to the contractor's policy.

Agent's email to my partner:

> "I've just spoken with John [the contractor] and he mentioned you were unable to locate the additional insured wording in the policy. I'm forwarding the information sent out last week which highlights the additional insured. The policy affords a blanket automatic additional insured coverage when there is a written contract between the named insured and the certificate holder that requires the status." (See attached email.)

As noted in my partner's reply email (see attached email) after getting a copy of the previously unfurnished referenced endorsements (**Tip:** see Tip 1 above about not taking the agent's word for it), he points out that the referenced endorsements do not afford the requisite coverage for the landlord. The CG 71 57 09 10 Additional Insured – Owners, Lessees Or Contractors Automatic Status When Required In Construction Contract Primary And Non-Contributory provides

COMMERCIAL GENERAL LIABILITY
CG 71 57 09 10

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 addition insured on your policy.

(Bold italics emphasis added. See attached copy of endorsement.)

As noted by my partner's reply email to the agent, since the landlord does not have a contract with the contractor, this language does not extend additional insured coverage to the landlord. The CG 72 88 03 10 Contractors Enhanced Endorsement reiterates the same limitation as to Who is An Insured and provides

COMMERCIAL GENERAL LIABILITY
CG 72 88 03 10

CONTRACTORS ENHANCEMENT ENDORSEMENT

ADDITIONAL INSURED – WHEN REQUIRED IN AN AGREEMENT OR CONTRACT WITH YOU

The following is added to SECTION II – WHO IS AN INSURED

a. Who Is An Insured is amended to include ***any person***(s) or organization(s) ***with whom you have agreed*** in a valid written contract or written agreement that ***such person*** or organization be added as an additional insured on your policy during the policy period shown in the Declarations. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury".

> **b.** The person or organization added as an insured by this endorsement is an insured only to the extent you are held liable due to:
>
> **4. Owners, Lessees, or Contractors**
>
> Your ongoing operations ***performed for that additional insured***, whether the work is performed by you or on your behalf.
>
> (Bold italics emphasis added. See attached copy of endorsement.)

6. ***Second Corrective Action.*** My partner's persistence paid off with the issuance by the insurer of CG 20 26 07 04 Additional Insured – Designated Person Or Organization designating the landlord as an additional insured on the contractor's policy (see attached endorsement).[7]

> **TIP 5:** 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 endorsement and a notice of cancellation endorsement, read *Scottsdale Ins. Co. v. Mason Park Partners, LP* – landlord of the Taste of Katy Restaurant failed to obtain endorsements on its tenant's property policy designating it as an additional insured and agreeing to give it notice of policy cancellation (see attached copy of case).[8]

Endnotes

[1] **Additional ACREL Website Resources.** See the Insurance Committee's Webpage on the ACREL Website for the following additional resources: Annotated Lease Indemnity and Insurance Specifications; Additional Insured Endorsements to Liability Policies – Typical Defects and Solutions; and Insurance Glossary.

[2] **Insurance Specification – Declarations Page Plus Issued Endorsements.** You can confirm that an endorsement has been issued by reviewing the policy's Declarations Page. It will list all components of the policy, including modifications, amendments and endorsements by form number and many times also by form name. The copy of the issued endorsement usually states the policy numbered of the policy to which it is an endorsement.

[3] **Status as a Certificate Holder Does Not Create Rights.** As note 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 attached recent case, *Bender Square Partners v. Factory Mutual Insurance Co.*, 2012 WL 208347 (S. D. Tex. – Hou. Div.) (see attached copy of case) 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 a 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 interlineation 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.

[4] **Certificates of Insurance Are Not Usually Issued by the Insurer.** See discussion at 43 Am. Jur.2d (2 ed. 2010) Insurance §§ 128 Brokers – Generally; 129 Brokers – Status While and After Procuring Policy. 4 Bruner and O'Connor on Construction Law (2010) §11:171Certificates of Insurance – Generally; Couch on Insurance (3 ed. 2010) §§ 27:20 Act of Soliciting Agent – Insufficient to Justify Reformation; 45:1 Brokers Versus Agents; Definitions and Distinctions; 48:61 Soliciting and Collecting Agents; 48:62 Recording Agents; 27 Tex. Prac., Consumer Rights and Remedies § 5.5 Insurance Agents (3d ed. 2009); and Tex. Prac. Guide, Insurance Litigation § 6:4 Insurer's Vicarious Liability for Agent's Conduct – Agency – "Who are "Agents"/ What Constitutes "Acting as Agent"?; § 6:10 Insurer's Vicarious Liability for Agent's Conduct – Authority of Agent – Historical Distinction Between "Recording" and "Soliciting" Agents (2009).

a. Certificate Issued by the "Authorized Representative". ACORD Certificates or Evidences of Insurance are issued by a "***Producer***" and are signed by an "***Authorized Representative***". Neither of these terms are defined on the face of the standard ACORD form. Except for the multiple disclaimers of authority and accuracy, the ACORD Certificate of Insurance and the Evidence of Insurance are silent on the authority of the Authorized Representative to bind the listed Insurers. The ACORD Certificate of Insurance and

Evidence of Insurance do not identify whether the Producer is the agent for the Insured, the agent for the Insurer, or a dual agent for both the Insured and the Insurer.

Some courts in determining whether an ACORD form may be relied on despite the disclaimers have drawn a distinction on whether the Authorized Representative is a "broker"; a "soliciting agent"; a "recording agent"; a "dual agent"; a "special agent"; or an "insurer's agent". Other courts have held that the insurer is estopped from denying the coverage stated in the certificate or evidence of insurance, if the insurer or a person with apparent authority from the issuer issued the certificate, especially if the certificate does not contain ACORD-type disclaimers.

b. Certificate Issued by "Soliciting Agent" as the Authorized Representative. In *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002) the Fifth Circuit agreed with the district court's determination that the issuing agent (Sedgwick) was a "soliciting agent" as opposed to a "recording agent", and thus did not have actual authority to amend the policy to add Safety Lights as an additional insured. The court noted that the agency agreement between Sedgwick and Lumbermens authorized Sedgwick to solicit insurance on behalf of Lumbermens but permitted Sedgwick to bind Lumbermens only "to the extent specific authority (was) granted in the schedule(s) attached". Sedgwick had the authority to issue certificates of insurance and binders but lacked the authority to modify the policy itself. Also see for example, *Benjamin Shapiro Realty Co., LLC v. Kemper Nat'l Ins. Cos.*, 303 A.D.2d 245 (N.Y. – 1st Dept. 2003) where the court held that a tenant's insurance broker, which issued certificate of insurance to a landlord which erroneously stated that the tenant's insurance policy, naming landlord as an additional insured, contained rental coverage insurance for landlord's benefit, had no liability to landlord on ground that the broker and the landlord had no contractual relationship, privity, requisite to the imposition of liability for negligent misrepresentation.

c. Certificate Issued by "Recording Agent" as the Authorized Representative. 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.

d. Certificate Issued by Insurer's Employee as the Authorized Representative. Another court, *Horn v. Transcon Lines, Inc.*, 7 F.3d 1305 (7th Cir. 1993), faced with an insurer-issued certificate certifying to a certificate holder that the insured had business auto liability insurance, held that the certificate bound the insurer to cover an injury that occurred before the policy was issued, where the list of covered trucking companies did not include the certificate holder. The court concluded that as of the date of the accident, the certificate was the policy and the insurer could not rely on the policy's disclaimer that "the insurance afforded by the listed policy(ies) is subject to all their terms, exclusions, conditions" as there was no policy at the time of the certificate's issuance.

[5] **ACORD Certificates of Insurance Disclaim Reliance.** 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).

a. The Disclaimers. The ACORD 24, 25, 27 and 28 contain the following disclaimer negating reliance. The first disclaimer, which is in all caps and bold print, appears at the top of the form and reads:

> **THIS CERTIFICATE [*EVIDENCE OF PROPERTY INSURANCE / EVIDENCE OF COMMERCIAL PROPERTY INSURANCE*] IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER [*ADDITIONAL INTEREST NAMED BELOW*]. THIS *CERTIFICATE***

> **[*EVIDENCE OF INSURANCE*] DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THE CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER [*ADDITIONAL INTEREST*].**

An additional disclaimer appears in each of the ACORD forms following the Coverages heading and immediately before the specification of the coverages of the described insurance. This disclaimer is in all caps but is not in bold print. It reads:

> [*THIS IS TO CERTIFY THAT*] THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

The September, 2009 revision (and continued in current revision, the May 2010 revision) to the ACORD Certificate of Liability Insurance also moved from the back of the certificate to a new disclosure box on the front of the certificate immediately following the first disclosure box the following notice:

> **IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. 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).**

b. Sample of Cases Finding Reliance Unreasonable.

Alabama. *Alabama Elec. Co-Op Bailey*, 950 So.2d 280, 284 (Al. 2006).

Connecticut. *Prudential Property and Casualty Ins. Co. v. Anderson*, 922 A.2d 236 (Conn. 2007). Zurich's agent issued a certificate of insurance on behalf of its insured contractor to a homeowner listing the homeowner as an additional insured on the contractor's CGL policy, but the policy was cancelled for nonpayment of premium before issuance of the certificate and thus no insurance in fact existed either on date of the certificate's issuance or on date of loss, which occurred the next day after issuance of the certificate. Holding for Zurich based on the ACORD-disclaimers, the court stated

> Troublesome as it may be that Zurich permits its agents to issue certificates when it knows prior to the certificate's being issued that coverage was cancelled and lacks an identifiable procedure for notifying certificate holders that coverage has been cancelled, the allegations in plaintiff's complaint do not state a cause of action against Zurich.

Illinois. *National Union Fire Ins. Co. v. Glenview Park Dist.*, 594 N.E.2d 1300 (1st Dist. 1992) and judgment aff'd in part, rev'd in part, 632 N.E.2d 1039 (1994) court held the fact that certificate of liability insurance did not contain notation that the additional insured endorsement did not cover the additional insured's negligence did not obligate the insurer to cover the additional insured's negligence; the certificate was issued "for information only"; *Lezak & Levy Wholesale Meats v. Illinois Employers Ins. Co.*, 460

N.E.2d 475 (Ill. 1984) the certificate's disclaimer notice protected the insurer from claims by a meat packing company falling within the exclusion in the cold storage company's liability policy for loss caused by failure of refrigeration equipment.

New Hampshire. *Bradley Real Estate Trust v. Plummer & Rowe Ins. Agency*, 609 A.2d 1233, 1235 (N.H. 1992) court found that a certificate of insurance did not create a duty to inform an additional insured of cancellation of coverage. The court stated

> In effect, the certificate is a worthless document; it does not more than certify that insurance existed on the day the certificate was issued. We leave it to the legislature or to future bargaining of parties to rectify inequities in the notification process.

New York. In *Greater NY Mut. Ins. Co. v. White Kansas*, 776 N.Y.S.2d 257, 258 (N.Y. 2004) the court held that a broker was under no duty to an owner and contractor to provide them with additional insured coverage as was stated in the certificates of insurance, as disclaimers in the certificate made it unreasonable to rely on the certificate.

Texas. In *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002), *aff'g* 184 F.Supp.2d 591 (S.D. Tex. 2001), the client (Safety Lights) of a delivery service (U. S. Delivery) and the client's insurer (TIG) sued an insurance broker (Sedgwick James of Washington), alleging that the broker had misrepresented on an insurance certificate that Safety Lights was an additional insured on U.S. Delivery's liability insurance policy issued by Lumbermens Mutual Casualty Co. The suit arose after Wright, an independent contractor hired by U. S. Delivery, was injured delivering a steel plate to Safety Light's facility. TIG, Safety Light's liability insurer, defended the claim by Wright and sought reimbursement for the settlement and the costs of defending the suit after Lumbermens denied that Safety Lights was an additional insured on its liability policy. The certificate of insurance certified that Safety Lights was an additional insured on the Lumbermens CGL policy. The Fifth Circuit found that Sedgwick did not have authority, either actual or apparent, to make Safety Lights an additional insured on Lumbermens CGL policy. The court found that the disclaimer on the certificate of insurance (the first ACORD disclaimer discussed above) effectively negated reliance by Safety Lights on the express statement of additional insured coverage in the certificate of insurance, absent the existence of proof of Sedgwick's apparent authority to alter the terms of Lumbermens CGL policy to add Safety Lights as an additional insured. The district court held as a matter of law that Safety Lights could not have reasonably relied on the insurance certificate. The court made the following statements:

> An insured has a duty to read the insurance policy and is charged with knowledge of its provisions…. The Court concludes that (the party to be protected), claiming to be an additional "insured" under (the policy) should be held to the same obligation as a named insured to review a policy of insurance on which it seeks to rely, and its reliance solely on the agent's certificate of insurance is not reasonable under the circumstances presented by the admissible evidence. …. [T]here is no admissible evidence to suggest that (the party to be protected), had it made the request, would have been unable to obtain and read the insurance policy in issue…. Moreover, (the party to be protected), the holder of a certificate of insurance, was warned it was not entitled to rely on the certificate itself for coverage. The certificate stated to the holder that the certificate did not create coverage…. The certificate issued by (the insurance broker) prominently stated that it was "issued as a matter of information only" and did not "amend, extend or alter" coverage provided by the listed policies. Had Plaintiffs taken the reasonable step of obtaining a copy of (the policy) … Plaintiffs would have learned that there was no additional insured coverage in the policy at all. Thus, the Court finds that the Plaintiff's reliance upon (the insurance broker's) representation of (the party to be protected's) additional insured status was not reasonable. Accordingly, as a matter of law, Plaintiffs' claims for negligent and fraudulent misrepresentation fail. 184 F.Supp.2d at 603-04 (footnotes omitted).

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.

c. Cancellation Notice Statement.

The ACORD 24 Certificate of Property Insurance, ACORD 25 Certificate of Liability Insurance and ACORD 28 Evidence of Commercial Property Insurance were revised in late 2009 and early 2010 to change the Cancellation notice language to read as follows:

> **should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.**

The prior version of these certificates and evidence contained the following statement concerning advance notice to be given by the Insurer to the Additional Interest holder:

> **should any of the above described policies be canceled before the expiration date thereof, the issuing insurer will endeavor to mail ___ days written notice to the [*certificate holder named to the left/additional interest named below*], but failure to mail such notice shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.**

Similar language appeared in the ACORD Certificate of Property Insurance.

[6] **"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.

a. Commercial General Liability Policies.

1. 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***.

2. 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.

3. Additional Insureds. Under a CGL policy many types of persons or organizations may be added by endorsement as an ***additional insured***, upon approval of the insurer. Many liability insurers issue ***blanket endorsements*** specifying certain parties that are ***automatic additional insureds*** under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. Persons or organizations are routinely added to a

CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. A 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***.

b. Property Policies.

1. 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.

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

3. 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.

[7] **Analogous Case.** (Thanks to Arthur Pape for this cite). In *Westfield Insurance Co. v. FCL Builders, Inc.*, 948 N.E.2d 115, 350 Ill. Dec. 46 (Ill. App. Ct. – First Dist., 2nd 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 contract was not an additional insured under the CGL policy purchased by the second tier subcontractor. Like the blanket additional insured language my partner faced discussed in the above article, 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 contractor or agreement that such person or organization be added as an additional insured on your policy", language identical to the CG 71 57 09 10 quoted in the above article. 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 plan 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.

[8] **No Automatic Notice to Landlord of Cancellation of Tenant's Insurance.** 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.

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.

OP ID: S1

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY): 12/22/11

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER of Austin Suite Austin, TX 512- 512-	CONTACT NAME: , ACSR PHONE (A/C, No, Ext): 512- FAX (A/C, No): 512- E-MAIL ADDRESS: medwards@bbinsaustin.com PRODUCER CUSTOMER ID #: JOHNK-2
INSURED Construction Austin, TX	INSURER(S) AFFORDING COVERAGE — NAIC # INSURER A : Allied Property & Cas Ins Co INSURER B : Texas Mutual Insurance Co INSURER C : Hanover Insurance Company INSURER D : INSURER E : INSURER F :

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER: 2**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
A	GENERAL LIABILITY X COMMERCIAL GENERAL LIABILITY CLAIMS-MADE X OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: POLICY PRO-JECT LOC	X			10/22/11	10/22/12	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Ea occurrence) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMP/OP AGG Emp Ben.	$ 1,000,000 $ 100,000 $ 5,000 $ 1,000,000 $ 2,000,000 $ 2,000,000 $ 1,000,000
A	AUTOMOBILE LIABILITY X ANY AUTO ALL OWNED AUTOS SCHEDULED AUTOS HIRED AUTOS NON-OWNED AUTOS				10/22/11	10/22/12	COMBINED SINGLE LIMIT (Ea accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)	$ 1,000,000 $ $ $
A	X UMBRELLA LIAB X OCCUR EXCESS LIAB CLAIMS-MADE DEDUCTIBLE X RETENTION $				10/22/11	10/22/12	EACH OCCURRENCE AGGREGATE	$ 5,000,000 $ 5,000,000
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? Y/N (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	N/A			10/22/11	10/22/12	X WC STATU-TORY LIMITS OTH-ER E.L. EACH ACCIDENT E.L. DISEASE - EA EMPLOYEE E.L. DISEASE - POLICY LIMIT	$ 1,000,000 $ 1,000,000 $ 1,000,000
C	Builders Risk				10/22/11	10/22/12	Agg Limit	3,000,000
A	Equipment Floate				10/22/11	10/22/12	Leased Eq	30,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)
The certificate holder is named as an additional insured with a 30 day notice of cancellationon the general liability per the following forms that are part of the policy: CG7157 09/10 and CG7288 03/10

CERTIFICATE HOLDER

PO Box
Austin, TX

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

[redacted] COMPANY
[redacted]

COMMERCIAL GENERAL LIABILITY FORMS AND ENDORSEMENTS

Number: [redacted] Period: From **10/22/11** To **10/22/12**

Named Insured: [redacted] **CONSTRUCTION**

Form	Date	Title
CG0001	1207	COMMERCIAL GENERAL LIABILITY COVERAGE FORM
CG0068	0509	RECORDING AND DISTRIBUTION OF MATERIAL OR INFORMATION IN VIOLATION OF LAW EXCL
CG0103	0606	TEXAS CHANGES
CG0300	0196	DEDUCTIBLE LIABILITY INSURANCE
CG2167	1204	FUNGI OR BACTERIA EXCLUSION
CG2170	0108	CAP ON LOSSES FROM CERTIFIED ACTS OF TERRORISM
CG2279	0798	EXCLUSION - CONTRACTORS - PROFESSIONAL LIABILTY
CG2639	1207	TEXAS CHANGES - EMPLOYMENT - RELATED PRACTICES EXCLUSION
CG7120	0710	EXCLUSION - ASBESTOS, ELECTRO-MAGNETIC EMISSIONS AND LEAD - TEXAS
CG7141	1203	EMPLOYEE BENEFITS LIABILITY COVERAGE
CG7157	0910	ADDL INS - OWNERS, LESSEES OR CONTRACTORS AUTOMATIC STATUS WHEN REQUIRED IN
CG7160	0910	ADDITIONAL INSURED-OWNERS, LESSEES OR CONTRACTORS-COMPLETED OPERATIONS
CG7258	0908	EXCLUSION-OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INS PROGRAM
CG7259	0908	EXCLUSION - VIOLATION OF CONSUMER PROTECTION STATUTES
CG7288	0310	CONTRACTORS ENHANCEMENT ENDORSEMENT
GA45DO	1203	TEXAS - EMPLOYEE BENEFITS ADMINISTRATION LIABILITY COVERAGE PART
GL2199	0600	EXCLUSION - SUBSIDENCE OF LAND
IL0017	1198	COMMON POLICY CONDITIONS
IL0021	0908	NUCLEAR ENERGY LIABILITY EXCLUSION
IL0168	0908	TEXAS CHANGES - DUTIES
IL0275	0907	TEXAS CHANGES-CANCELLATION AND NONRENEWAL PROVISIONS FOR CASUALTY LINES
28	0186	BLANK ENDORSEMENT
		IMPORTANT NOTICES
IN5017	0593	IMPORTANT NOTICE FOR RENEWAL POLICIES
IN7158	0707	IMPORTANT NOTICE
IN7163	0102	TEXAS DISCLOSURE FORM
IN7224	0702	IMPORTANT NOTICE - TEXAS CONTRACTORS
IN7544	0910	NOTICE TO POLICY HOLDERS TEXAS POLICY EXCLUSIONS DISCLOSURE

[redacted]

From: [redacted]
Sent: Wednesday, January 04, 2012 4:29 PM
To: 'Maria [redacted]
Cc: John [redacted]; [redacted]
Subject: RE: John [redacted] Construction Certificate [redacted]

Thank you, but I had received this information previously, and unfortunately, as I read the language, it clearly does not provide that the Lessor is covered as an additional insured. I believe the language to which you are referring is the following:

Who Is An Insured is amended to include any person(s) or organization(s) **with whom you have agreed** in a valid written contract or written agreement that such person or organization be added as an additional insured on your policy during the policy period shown in the Declarations.

This endorsement is intended to include within the insurance coverage parties with whom the primary insured as agreed in a written contract to be an additional insured. The problem is that John [redacted] Construction has not agreed with [redacted] Company (which is the owner and landlord) that [redacted] Company be named as an additional insured. John [redacted] Construction has agreed with [redacted] Steakhouse, LP (the Tenant) that [redacted] Company be named as an additional insured. John [redacted] Construction does not have an agreement with [redacted] Company.

The provision in the endorsement that applies to Owners – copied below - further limits the damages occurring from the work performed **for** the additional insured. Again, in this situation, the work is being performed for the Tenant and not the Landlord.

4. Owners, Lessees, or Contractors
Your ongoing operations **performed for that additional insured**, whether the work is performed by you or on your behalf.

If these are not the provisions on which you relied, and there is other language in the policy or this endorsement that provides coverage to a person that is not a party to an agreement with the primary insured, please direct me to it.

I received your telephone message and would be happy to visit with you, but thought this might help in clarifying what the issue is and why I do not believe the general endorsement makes a third party an additional insured.

[redacted]

GRAVES DOUGHERTY HEARON & MOODY
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Phone: 512.480.5600
www.gdhm.com

From: Maria [redacted]
Sent: Wednesday, January 04, 2012 4:12 PM
To: [redacted] Alan

1

Cc: John [redacted]
Subject: John [redacted] Construction Certificate [redacted]

Good Afternoon [redacted]

I've just spoken with John [redacted] and he mentioned you were unable to locate the additional insured wording in the policy. I'm forwarding the information sent out last week which highlights the additional insured. The policy affords a blanket automatic additional insured coverage when there is a written contract between the named insured and the certificate holder that requires the status. Please review and contact me with questions. Thank you.

Maria [redacted]
[redacted] Account Manager
[redacted] *of Austin*
[redacted]
Austin, TX 78759
[redacted] direct
[redacted] fx
7:30 AM - 4:15 PM
[redacted]

Please remember that insurance coverage cannot be bound, changed or canceled by leaving an electronic message or voice mail message. Thank you.

From: Shelia [redacted]
Sent: Thursday, December 22, 2011 3:39 PM
To: 'Travis [redacted]
Subject: RE: Construction Contract - Insurance

Travis,

Here is a revised COI showing the endorsements that provide the additional insured along with a copy of the list of policy endorsements and the 2 specific GL endorsements referenced. The certificate holder does not have to have a

direct contract with the insured for coverage to apply. The coverage must be required by a contract that the insured is a part of (in this case, probably the owner of the property/project).

The 30 day notice of cancellation is something that has to be added to the policy. I have requested it but do not have an endorsement form to provide yet.

I had requested a $5MM builders risk quote but it appears that is not needed so I will not proceed with that.

Thank You,
Shelia [redacted] CIC, ACSR
Commercial & Marketing Leader
[redacted] Austin
[redacted]
Austin, Texas 78759
phone (512) [redacted] direct
fax (512) [redacted]
[redacted].com

Please remember that insurance coverage cannot be bound, changed or canceled by leaving an electronic message or voice mail message. Thank you.

Contractor's Policy prior to revision.

COMMERCIAL GENERAL LIABILITY
CG 71 57 09 10

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION CONTRACT PRIMARY AND NON-CONTRIBUTORY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" arising out of, 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.

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

No such person or organization is an additional insured for liability arising out of the "products-completed operations hazard".

B. **The following is added to SECTION III – LIMITS OF INSURANCE:**

The limits of insurance applicable to the additional insured are those specified in the written contract between you and the additional insured, or the limits available under this policy, whichever are less. These limits are part of and not in addition to the limits of insurance under this policy.

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

This insurance does not apply to:

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:
   a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
   b. Supervisory, inspection, architectural or engineering activities.
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.

D. With respect to the insurance afforded to these additional insureds, Condition **4. Other Insurance** of **Section IV – Commercial General Liability Conditions** is replaced by the following:

4. Other Insurance

a. Primary Insurance

This insurance is primary if you have agreed in a written contract or written agreement:

(1) That this insurance be primary. If other insurance is also primary, we will share with all that other insurance as described in c. below; or

(2) The coverage afforded by this insurance is primary and non-contributory with the additional insured's own insurance.

Contractor's policy prior to revision.

COMMERCIAL GENERAL LIABILITY
CG 72 88 03 10

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CONTRACTORS ENHANCEMENT ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

LOST KEY COVERAGE

SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, coverage is extended to include the following:

If a customer's master or grand key, excluding electronic key card, is lost while in your care, custody or control we will pay the cost of replacing the keys, including the master lock and all keys used in the same lock, the cost of adjusting locks to accept the new keys, or the cost to replace the locks, whichever is less.

Limit of Insurance - The most we will pay for "loss" arising out of any one "occurrence" is $5,000.

SECTION V DEFINITIONS is amended as follows:

The following definition applies to Lost Key Coverage:

"Loss" means unintentional physical damage or destruction to tangible property, including theft or disappearance. Tangible property does not include money or securities.

VOLUNTARY PROPERTY DAMAGE

SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, coverage is extended to include the following:

At your request, we will pay for "property damage" to property of others caused by you or while in your possession, arising out of your business operations and occurring during the policy period.

Limit of Insurance - The most we will pay for "loss" arising out of any one "occurrence" is $500.

SECTION V – DEFINITIONS is amended as follows:

The following definition applies to Voluntary Property Damage coverage:

"Loss" means unintentional damage or destruction but does not include disappearance, theft, or loss of use.

NON-OWNED WATERCRAFT

SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions is amended as follows:

g. Aircraft, Auto Or Watercraft (2) (a) is replaced with:

(a) Less than 51 feet long; and

EXPANDED PROPERTY DAMAGE COVERAGE

SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions is amended as follows:

j. Damage to Property is replaced with:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Personal property in the care, custody, or control of the insured:

1) for storage or sale at premises you own, rent or occupy; or

2) while being transported by any aircraft, "auto" or watercraft owned or operated by or rented to or loaned to any insured.

(4) "Property damage" arising out of the disappearance or loss of use of personal property.

(5) "Property damage" included in the "products-completed operations hazard."

Paragraphs **(1)** and **(3)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraph **(3)** of this exclusion does not apply to liability assumed under a sidetrack agreement.

Limit of Insurance - The most we will pay for "property damage" provided by this coverage in any one "occurrence" is $5,000.

Deductible - Our obligation to pay for a covered loss applies only to the amount of loss in excess of $250.

This insurance is excess over any other valid and collectible insurance.

DAMAGE TO PREMISES RENTED TO YOU

SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, the last paragraph of **2. Exclusions** of is replaced by the following:

If **Damage to Premises Rented to You** is not otherwise excluded, exclusions **c.** through **n.** do not apply to damage by fire, lightning, explosion, smoke or sprinkler leakage to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III**-Limits of Insurance.

SECTION III – LIMITS OF INSURANCE, paragraph 6 is replaced with:

6. Subject to **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, lightning, explosion, smoke or sprinkler leakage, while rented to you or temporarily occupied by you with permission of the owner. The limit is increased to $300,000.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS, 4. **Other Insurance, b. Excess Insurance (1) (a) (ii)** is replaced with:

(ii) That is Fire, Lightning, Explosion, Smoke or Sprinkler leakage insurance for premises rented to you or temporarily occupied by you with permission of the owner.

SUPPLEMENTARY PAYMENTS

SECTION I – COVERAGES, SUPPLEMENTARY PAYMENTS – COVERAGES A AND B is amended as follows:

1. 1. b. replaced with:

b. Up to $2,500 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

2. 1. d. replaced with:

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $500 a day because of time off from work.

NEWLY FORMED AND ACQUIRED ORGANIZATIONS

SECTION II – WHO IS AN INSURED is amended as follows:

1. 3. a. is replaced with:

a. Coverage under this provision is afforded only until the 180th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

ADDITIONAL INSURED – WHEN REQUIRED N AN AGR EMENT OR CONTRACT WITH YOU

The following is added to SECTION II – WHO IS AN INSURED

a. **Who Is An Insured** is amended to include any person(s) or organization(s) with whom you have agreed in a valid written contract or written agreement that such person or organization be added as an additional insured on your policy during the policy period shown in the Declarations. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury".

b. The person or organization added as an insured by this endorsement is an insured only to the extent you are held liable due to:

1. **Lessors of Leased Equipment**

   Maintenance, operation or use of equipment leased to you by such person or organization. This insurance does not apply to any "occurrence" which takes place after the equipment lease expires.

However, their status as additional insured under this policy ends when their lease, contract or agreement with you for such leased equipment expires.

2. **Managers or Lessors of Premises**

   The ownership, maintenance or use of that part of the premises you own, rent, lease or occupy.

   This insurance does not apply to:

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

   b. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization.

However, their status as additional insured under this policy ends when you cease to be a tenant of such premises.

3. **State or Political Subdivision - Permits**

   Operations performed by you or on your behalf for which the state or political subdivision has issued a permit.

   This insurance does not apply to:

   a. "Bodily injury" or "property damage" or "personal or advertising injury" arising out of operations performed for the state or municipality; or

   b. "Bodily injury" or "property damage" included within the "products-completed operations hazard".

However, such state or political subdivision's status as additional insured under this policy ends when the permit ends.

4. **Owners, Lessees, or Contractors**

Your ongoing operations performed for that additional insured, whether the work is performed by you or on your behalf.

The insurance does not apply to:

a. "bodily injury", "property damage", or "personal and advertising injury" arising out of the rendering of or the failure to render any professional architectural, engineering or survey services, including:

   1. The preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, survey, field orders, change orders or drawings and specifications: or

   2. Supervisory, inspection, architectural or engineering activities.

b. "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.

However, a person or organization's status as additional insured under this policy ends when your operations for that additional insured are completed.

Issued as a result of counsel's review and objection.

POLICY NUMBER: [redacted] COMMERCIAL GENERAL LIABILITY
CG 02 05 12 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TEXAS CHANGES – AMENDMENT OF CANCELLATION PROVISIONS OR COVERAGE CHANGE

This endorsement modifies insurance provided under the following:

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

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

SCHEDULE

1.	**Name:** [redacted] COMPANY (the landlord)	
2.	**Address:** PO BOX [redacted] AUSTIN TX 78768	
3.	**Number of days advance notice:**	30
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

All terms and conditions of this policy apply unless modified by this endorsement.

Issued at a request of counsel's review and objection.

POLICY NUMBER: [redacted] COMMERCIAL GENERAL LIABILITY
CG 20 26 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)
[redacted] COMPANY (the landlord) PO BOX [redacted] AUSTIN, TX 78768
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

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

A. In the performance of your ongoing operations; or

B. In connection with your premises owned by or rented to you.

All terms and conditions of this policy apply unless modified by this endorsement.

MEMORANDUM AND ORDER

KEITH P. ELLISON, District Judge.

***1** Before the Court is Factory Mutual Insurance Company D/B/A FM Global's Motion for Summary Judgment and Brief in Support ("Motion"). (Doc. No. 21.) After considering the Motion, all responses and replies thereto, and the applicable law, the Court concludes that the Motion should be GRANTED.

I. BACKGROUND

Bender Square Partners ("Bender" or "Plaintiff") seeks to recover for losses it suffered as a result of Hurricane Ike in September 2008 to property ("the Property") it had leased to PNS Stores, Inc. ("PNS Stores"). (Doc. No. 30–1, 2nd Am. Compl. ¶ 7 .) According to Bender, the amounts it seeks to recover are covered under a Commercial Property Insurance Policy ("the Policy") that Factory Mutual Insurance Company, doing business as FM Global ("FM Global") issued to Big Lots, Inc. ("Big Lots") and its subsidiaries, one of which is PNS Stores (collectively, "Defendants"). (*Id.*) Bender alleges that FM Global wrongfully refused to timely and fully pay and indemnify Bender for all losses covered under the Policy. (*Id.* ¶ 8.) As a result, Bender seeks damages and other relief for FM Global's alleged breach of the Policy, breach of the implied covenant of good faith and fair dealing, and violations of the Texas Insurance Code. (*Id.* ¶ 9 .) PNS Stores also allegedly failed to obtain insurance coverage over the Property in accordance with the terms of the lease agreement entered into between Bender and PNS Stores ("the Lease") over the Property. (*Id.* ¶ 10.) Therefore, Bender avers, PNS Stores is in default of the Lease and has breached the Lease, entitling Bender to rescission of the Lease and damages resulting from the breach. (*Id.*)

FM Global filed this Motion, arguing that Bender's claims fail as a matter of law. (Doc. No. 21, Mot. Sum. Jgmt 1.) Specifically, FM Global asserts that Bender is not an insured or an additional insured under the Policy and thus has no contractual basis to bring a claim for coverage. (*Id.*) Furthermore, FM Global avers, Bender is not entitled to proceeds from the Policy as a holder of the Policy's certificate of insurance ("the Certificate"), as the Certificate does not confer policy rights under Texas law. (*Id.*) Finally, FM Global argues that Bender is not, and was never, an intended third party beneficiary as a matter of law. (*Id* .) Therefore, FM Global insists, it is entitled to summary judgment as to all of Bender's claims against it. (*Id.*)

II. LEGAL STANDARD

To grant summary judgment, the Court must find that the pleadings and evidence show that no genuine issue of material fact exists, and therefore the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. The party moving for summary judgment must demonstrate the absence of any genuine issue of material fact; however, the party need not negate the elements of the nonmovant's case. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1997). If the moving party meets this burden, the nonmoving party must then go beyond the pleadings to find specific facts showing there is a genuine issue for trial. *Id.* "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 326 (5th Cir.2009) (quotations and footnote omitted).

***2** Factual controversies should be resolved in favor of the nonmoving party. *Liquid Air Corp.*, 37 F.3d at 1075. However, "summary judgment is appropriate in *any* case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *Id.* at 1076 (internal quotations omitted). Importantly, "[t]he nonmovant cannot satisfy his summary judgment burden with conclusional allegations, unsubstantiated assertions, or only a scintilla of evidence." *Diaz v. Superior Energy Services, LLC*, 341 Fed.Appx. 26, 28 (5th Cir.2009) (citation omitted). The Court should not, in the absence of proof, assume that the nonmoving party could or would provide the necessary facts. *Liquid Air Corp.*, 37 F.3d at 1075. As the Supreme Court has noted, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

III. ANALYSIS

PNS Stores obtained the Policy from FM Global in order to comply with section 12.2 of the Lease:

> 12.2 Tenant shall during the lease term at its sole expense maintain in full force a policy or policies of standard form fire insurance with standard extended coverage endorsement issued by one or more insurance carriers licensed to do business in the state in which the Premises are located covering the buildings and improvements on the Premises to the extent of their full replacement value exclusive of foundation and excavation costs.

(Ex. B to Mot. Summ. J., "Lease" 5.) The Policy does not identify Bender as an insured or as an additional insured:

> 1. NAMED INSURED AND MAILING ADDRESS
>
> Big Lots, Inc. and any subsidiary, associated or allied company, corporation, firm, organization and Big Lots, Inc. interest in any partnership or joint venture in which Big Lots, Inc. has management control or ownership as now constituted or hereafter is acquired, as the respective interest of each may appear; all hereafter referred to as the "Insured".
>
> 300 Phillipi Road
> Columbus, Ohio 43228
> * * *
>
> 1. ADDITIONAL INSURABLE INTERESTS / CERTIFICATES OF INSURANCE
>
> 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.

(Ex. A–1 to Mot. Summ. Jgmt, "Policy" 1, 59.) Bender admits that it is not a named insured under the Policy: "With respect to the Commercial Property Insurance Policy at issue in this suit, PNS STORES, INC. failed to obtain a policy that either named Plaintiff as a named insured, or fully complied with the terms of the Lease, thereby breaching the Lease, and damaging Plaintiff in an amount in excess of the minimum jurisdictional limits of this Court, to be proven at trial." (2nd Am. Compl.¶ 29.) Furthermore, Bender is not named as an additional insured in the Certificate. (Ex. C. to Mot. Summ. J., "Certificate" 1.) Bender also admits that it is not an additional insured or loss payee on the Policy. (Resp. to Mot. Summ. J. 8.) Bender does claim, however, that it is a named holder of the Certificate, and is an intended or implied third-party beneficiary of the Policy. (*Id.* ¶ 7; Doc. No. 24, Resp. to Mot. Summ. J. 9.)

A. Holder of a Certificate of Insurance

***3** Although Bender is the named holder of the Certificate, this status does not confer any rights to Bender under the Policy. The Certificate explicitly states:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER OTHER THAN THOSE PROVIDED IN THE POLICY. THIS CERTIFICATE DOES NOT AMEND, EXDTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES DESCRIBED HEREIN.

(Certificate 1.) "It is well-established under Texas law that when a certificate of insurance contains language stating that the certificate does not amend, extend, or alter the terms of any insurance policy mentioned in the certificate, the terms of the certificate are subordinate to the terms of the insurance policy." *TIG Ins. Co. v. Sedgwick James of Washington*, 184 F.Supp.2d 591, 596 (S.D.Tex.2001), *aff'd*, 276 F.3d 754 (5th Cir.2002). Thus, "[t]he certificate of insurance will not suffice to create insurance coverage if such coverage is precluded by the terms of the policy." *Id.* (citing *Wann v. Metropolitan Life Ins. Co.*, 41 S.W.2d 50, 52 (Tex.Civ.App.-Houston [14th Dist.] 1967, writ ref' d n.r.e.); *Granite Construction Co., Inc. v. Bituminous Ins. Co.*, 832 S.W.2d 427 (Tex.App.-Amarillo 1992, n.w.h.)). *See also* *Lexington Ins. Co. v. Autobuses Lucano Inc.*, 256 Fed.Appx. 682, 683 (5th Cir.2007) (unpublished) ("Texas law provides that the certificate of insurance does not supersede the plain language of the insurance policy."); *RNA Investments Inc. v. Employers Ins. of Wausau*, No. 05–99–01704–CV, 2000 WL 1708918, at *4

(Tex.App.-Dallas Nov.16, 2000, n.w.h.) (noting that insurance certificates do not create insurance coverage where none existed); *C & W Well Service, Inc. v. Sebasta*, No. B14–92–01010–CV, 1994 WL 95680, at *7 (Tex.App.-Houston [14th Dist.] March 24, 1994, n.w.h .) ("Here, the certificate of insurance itself did not manifest the insurance coverage afforded appellant as an insured. Rather, the certificate merely evidenced appellant's status as an insured and, by its very language, specified that the insurance coverage was that provided by, but subject to the terms, exclusions and conditions of, the named insurance policy. Thus, appellant's insurance coverage is that provided by the insurance policy itself."). Therefore, the Certificate does not confer any rights to Bender under the Policy.

B. Intended Third Party Beneficiary

To qualify as a third-party beneficiary of the Policy, Bender must prove: (1) that it was not privy to the Policy; (2) that the Policy was actually made for its benefit; and (3) that the PNS Stores and FM Global intended for Bender to benefit by the Policy. *Talman Home Federal Savings & Loan Association of Illinois v. Am. Bankers Insurance*, 924 F.2d 1347, 1350–51 (5th Cir.1991) (citing *Hellenic Invest., Inc. v. Kroger Co.*, 766 S.W.2d 861, 864 (Tex.App.1989)). "In determining intent under Texas law, this Court must begin with the presumption that parties contract for themselves; thus, it follows that a contract will not be construed as having been made for the benefit of a third person unless it clearly appears that this was the intention of the contracting parties." *Id.* (citing *Republic Nat'l Bank*, 427 S.W.2d 76, 79 (Tex.Civ.App.1968, writ ref'd n.r.e.); *Hellenic*, 766 S.W.2d at 865; *Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503–04 (Tex.1975); *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1455 (5th Cir.1987)). "The intention to contract or confer a benefit to a third party must be clearly and fully spelled out in order to show the contracting parties entered into the contract directly for the third party's benefit." *First Union Nat. Bank v. Richmont Capital Partner*, 168 S.W.3d 917, 929 (Tex.App.-Dallas 2005, no pet.) (citing *MCI Telecommunications Corp. v. Texas Utilities Elec. Co.*, 995 S.W.2d 641, 651 (Tex.1999)). "Furthermore, any intent of the contracting parties to benefit a third-party is to be derived solely from the language of the contract." *Talman*, 924 F.2d at 1350–51. "The fact that a third party might receive an incidental benefit from a contract does not give that third party a right to enforce the contract." *First Union Nat. Bank*, 168 S.W.3d at 929 (citing *MCI*, 995 S.W.2d at 651). "If there is any reasonable doubt as to the intent of the contracting parties to confer a direct benefit on the third party, then the third-party beneficiary claim must fail." *Id.* (citing *Dallas Firefighters Ass'n v. Booth Research Group, Inc.*, 156 S.W.3d 188, 192–93 (Tex.App.-Dallas 2005, pet. denied); *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 312 (Tex.App.-Dallas 2001, no pet.)). In sum, " '[u]nder Texas law, a non-party to a contract has a heavy burden when it claims third-party beneficiary status.' " *Staton Holdings, Inc. v. First Data Corp.*, No. Civ.A. 3:04–CV–2321P, 2006 WL 1343631, at *8 (N.D.Tex. May 16, 2006) (quoting *Missouri Pac. R.R. Co. v. Harbison–Fischer Mfg. Co.*, 26 F.3d 531, 540 (5th Cir.1994)).

***4** Bender does not proffer any evidence to support the inference that it is an intended third-party beneficiary to the Policy. Instead, Bender states that FM Global "has not met its burden in showing that the first-party property insurance policy at issue was *not* for the benefit of Plaintiff—the property owner." (Doc. No. 38, Sur–Reply to Reply to Mot. Summ. J. 2.) Yet Bender bears the burden of showing why it is an intended third-party beneficiary. At most, Bender offers the following: "FM Global simply relies on the general maintenance provision of the Lease Agreement to attempt to avoid the underlying question—*for whose benefit is a first-party property insurance policy if not the property owner?"* (*Id.* (emphasis in original).) Bender simply does not meet its heavy burden of showing that it is an intended third-party beneficiary. Nor does the Court find, in the record, any evidence to support such an assumption.

C. Implied Third Party Beneficiary

Bender also argues that it is an implied third-party beneficiary. It asserts that "the owner-lessor of a commercial property has standing as an intended/implied third-party beneficiary to sue the insurer directly under a first-party property insurance contract, where the lessee was required to procure and maintain said insurance pursuant to a lease agreement even though the owner-lessor is not a named or additional insured under the policy." (Resp. to Mot. Summ. J. 2.) Bender is correct that Texas courts have recognized this exception to the general rule that strangers to a policy cannot maintain a suit on that policy. *Cable Communications Network, Inc.*

v. Aetna Cas. & Surety Co., 838 S.W.2d 947, 950 (Tex.App.-Hous. [14th Dist.] 1992, no writ) ("For example, if a lessee promised the lessor that the leased property would be insured for the lessor's benefit and failed to do so, the benefits of the insurance policy taken out by the lessee on the leased property would be subject to the lien in favor of the lessor, and the lessor may then proceed directly against the insurance company to recover its share of any funds payable under the policy."); *State Farm Fire & Cas. Co. v. Leasing Enterprises*, 716 S.W.2d 553, 554 (Tex.App.-Hous. [14th Dist.] 1986, writ ref'd n.r.e.) ("Leasing Enterprises had an equitable right to be covered by the insurance policy because the lease required that Moore obtain insurance on the bulldozer with loss payable to Leasing Enterprises. Where a mortgagor or lessee is charged with the duty of obtaining insurance on property with loss payable to the mortgagee or lessor, but the policy does not contain such a provision, equity will treat the policy as having contained the loss payable provision and entitle the mortgagee or lessor to recover under the policy.").

Yet "[t]he equitable insured status is a remedy fashioned to protect a lessor where the lessee fails to comply with its obligations under the lease to obtain insurance coverage for the leased property." *Mt. Hawley Insurance Co. v. Lexington Insurance Co.*, 110 Fed. Appx. 371, 375 (5th Cir.2004) (unpublished). Therefore, the equitable remedy does not apply when there is no provision in the lease requiring the lessee to procure insurance on the lessor's behalf, or requiring the insurance to name the lessor as an insured, additional insured, or loss payee. *Id.* Section 12.2 of the Lease does not require PNS Stores to procure insurance naming Bender as a co-insured. An interlineation below section 12.1, however, does state that "[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." (Lease 5.) Bender insists that the interlineation applies to both section 12.1 *and* section 12.2. (Doc. No. 31, Resp. to PNS's Mot. Summ. J. 11–12.[FN1])

> FN1. Bender incorporated its Response to PNS's Motion for Summary Judgment in its Sur–Reply. (Sur–Reply to Reply to Mot. Summ. J. 2.)

***5** "When construing contracts and other written instruments, our primary concern is to ascertain the true intent of the parties as expressed in the instrument." *Fort Worth Transp. Authority v. Thomas*, 303 S.W.3d 850, 857 (Tex.App.-Fort Worth 2009, pet. denied) (citing *NP Anderson Cotton Exch., L.P. v. Potter*, 230 S.W.3d 457, 463 (Tex.App.-Fort Worth 2007, no pet.)). " 'We construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served' and 'will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive.' " *Id.* (quoting *Frost Nat'l Bank v. L & F Dist., Ltd.*, 165 S.W.3d 310, 312 (Tex.2005)). "Under Texas law '[i]f the written instrument is so worded that it can be given a certain or definite meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.' " *Square D Co. v. House of Power Elec., L.C.*, No. H–09–3917, 2011 WL 6091805, at *3 (S.D.Tex. Dec.7, 2011) (quoting *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex.1983)). "A contract is ambiguous if, after applying established rules of construction, its meaning is uncertain and doubtful or the writing is reasonably susceptible to more than one meaning." *Pitts & Collard, L.L.P. v. Schechter*, —— S.W.3d ——, 2011 WL 69328515, at *5 (Tex.App.-Houston 2011) (citing *Dewitt County Elec. Coop.*, 1 S.W.3d 96, 100 (Tex.1999)). The construction of an ambiguous contract is a question of fact. *Reilly v. Rangers Management, Inc. .*, 727 S.W.2d 527, 529 (Tex.1987).

"In determining whether a contract is ambiguous, courts construe and harmonize all provisions of the contract to discern the parties' intent." *Pitts & Collard, L.L.P.*, 2011 WL 69328515, at *5 (citing *Coker*, 650 S.W.2d at 393–94). "A contract is not ambiguous merely because of a simple lack of clarity, or because the parties proffer conflicting interpretations of a term." *Square D Co.*, 2011 WL 6091805, at *3 (citing *DeWitt County Electric Co-op.*, 1 S.W.3d at 100). This is because " '[t]he parties' interpretation of a contract is parol evidence, and parol evidence is not admissible to create an ambiguity.' " *Pitts & Collard, L.L.P.*, 2011 WL 6938515, at *5 (quoting *Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 465 (Tex.App.-Houston [14th Dist.] 2004, no pet.)). Thus, "[f]or parol evidence of the parties' intent to be admissible, the contract must first be ambiguous as a matter of law." *Id.* (citing *Estes v. Rep. Nat'l Bank*, 462 S.W.2d 273, 275 (Tex.1970)). "When a court determines that a contract is ambiguous, a court may

admit extraneous evidence to determine the true meaning of the instrument and may consider the parties' interpretations of the contract." *EMC Mortg. Corp. v. Davis*, 167 S.W.3d 406, 413 (Tex.App.-Austin 2005, pet. denied).

The Court concludes that the Policy is not ambiguous. The interlineation, initiated by an asterisk, starts from the end of the last sentence of section 12.1. If the parties intended for section 12.2 to also require insurance to be issued in the name of the tenant and landlord, the section would have an asterisk referring to the interlineation above, or another interlineation altogether. Were the Court to construe the interlineation as applying to section 12.2, it could also by extension apply to the sections below it, where such a provision would be inappropriate. The Policy is simply not reasonably susceptible to more than one meaning. Therefore, the Court concludes that section 12.2 did not require PNS Stores to procure a policy issued in Bender's name. As a consequence, Bender cannot be an implied third-party beneficiary.

D. Bender's Claims

***6** As Bender is not an insured, additional insured, or third-party beneficiary to the Policy, Bender cannot bring claims against FM Global for breach of contract. Similarly, Bender cannot bring claims against FM Global for breach of the duty of good faith and fair dealing because that duty concerns the relationship of insurers to their insured pursuant to an insurance contract between them. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340 (Tex.1995) ("An insurer has a duty to deal fairly and in good faith with its insured in the processing and payment of claims."); *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695 (Tex.1994) ("The duty of good faith and fair dealing emanates from the special relationship between the parties and not form the terms of the contract, therefore its breach gives rise to tort damages and not simply to contractual liability. However, the 'special relationship' exists only because the insured and the insurer are parties to a contract that is the result of unequal bargaining power, and by its nature allows unscrupulous insurers to take advantage of their insureds. Without such a contract there would be no 'special relationship' and hence, no duty of good faith and fair dealing." (internal citations and footnote omitted)); *see also McCord v. Prudential Ins. Co. of Am.*, No. 1:10–CV–413, 2011 WL 32430486, at *9 (E.D.Tex. July 1, 2011) ("The elements of a cause of action for the breach of duty of good faith and fair dealing thus necessarily require the existence of an insurance contract between the plaintiff and the defendant insurer.").

FM Global is also entitled to summary judgment as to Bender's claim under Chapter 542 of the Texas Insurance Code. Bender asserts that FM Global violated the Texas Insurance Code because it (a) failed to provide notice in writing of the acceptance or rejection of its claim within the applicable time constraints; and (b) delayed payment of the claims on the Property following receipt of all items, statements, and forms reasonably requested and required longer than the applicable time period. (2nd Am. Compl.¶ 25.) Texas Insurance Code § 542.058(a) provides: "[I]f an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060." In turn, § 542.060 only requires the insurer to pay the holder of the policy or the policy's beneficiary. *Id.* § 542.060(a) ("If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, the interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees."). As a consequence, Bender cannot bring its claims under Chapter 542 of the Texas Insurance Code against FM Global. Therefore, FM Global is entitled to summary judgment as to all of Bender's claims against it.

IV. CONCLUSION

***7** For the reasons explained above, FM Global's Motion (Doc. No. 21) is **GRANTED.**

Fed. Appx. 323, 2007 WL 2710735 (C.A.5 (Tex.)). © 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Background: Commercial tenant's insurer brought action against tenant, landlord, and tenant's insurance agent, seeking a declaratory judgment regarding rights to proceeds of tenant's commercial property and general liability insurance policy for property losses resulting from a fire at a leased restaurant. Landlord filed counterclaims against insurer, and it filed a third-party complaint against insurance agent. The United States District Court for the Southern District of Texas, David Hittner, J., granted summary judgment in favor of insurer and insurance agent on landlord's claims. Landlord appealed.

Holdings: The Court of Appeals held that:
(1) landlord was not covered under property coverage part of tenant's policy;
(2) landlord's fire losses were not covered under liability coverage part of tenant's policy;
(3) insurer was not liable for breach of the common law duty of good faith and fair dealing;
(4) insurer was not liable under the Texas Insurance Code; and
(5) insurance agent did not violate the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA).

Affirmed. Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:05-CV-1443. Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

****1** Mason Park Partners LP ("Mason Park") appeals from grants of summary judgment to Scottsdale Insurance Co. ("Scottsdale") and Katy Insurance Agency, Inc. ("Katy") on claims arising from a dispute over insurance proceeds for ***325** property losses after a fire at a leased restaurant. The insured lessee of the Taste of Katy restaurant (Parvin Shahinpour), the owner of the premises and the insured's landlord (Mason Park), and a judgment creditor (Burke Orr), all sought to be paid proceeds following the fire under a Scottsdale policy issued to Shahinpour ("the Policy"). Holding that Mason Park is not covered under the Policy, the district court granted summary judgment to Scottsdale and against Mason Park on Mason Park's breach of contract claim, and it dismissed Mason Park's extra-contractual claims against Scottsdale. Separately, the court granted summary judgment to Katy, Shahinpour's insurance agent, on Mason Park's extra-contractual claims against Katy. For the following reasons, we affirm.

1. We review the district court's grants of summary judgment de novo. *Texas Indus., Inc. v. Factory Mut. Ins. Co.*, 486 F.3d 844, 846 (5th Cir.2007). Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). In a diversity case such as this one, state substantive law applies. *Abraham v. State Farm Mut. Auto. Ins. Co.*, 465 F.3d 609, 611 (5th Cir.2006) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-80, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). All parties agree that Texas law applies here.

2. The Policy issued to Shahinpour contained two separate coverage parts: a Commercial Property Coverage Part (covering business personal property and business interruption losses) and a Commercial General Liability Coverage Part. [FN1] Mason Park contends both parts covered its property losses incurred during the fire. Under Texas contract law, "[i]f policy language is worded so that it can be given a definite or certain legal meaning, it is not ambiguous and we construe it as a matter of law." *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex.2003). The fact that the parties offer different contract interpretations does not create an ambiguity. "An ambiguity exists only if the contract language is susceptible to two or more reasonable interpretations." *Id.*

FN1. These parts of the Policy will be referred to as the "property coverage part" and the "liability coverage part."

A review of the Policy reveals that Mason Park was not covered under the property coverage part. The loss payable provision, which modified the property coverage part, originally stated that the name and address of the loss payee was "to follow." Nothing in the loss payable provision or anywhere else gave Scottsdale notice that Mason Park was the intended loss payee. The loss payable provision was properly cancelled by a change endorsement order prior to the fire. Contrary to Mason Park's argument, because Mason Park was never identified as the loss payee, Scottsdale was

under no obligation to give Mason Park notice of the cancellation. And because nothing in the property coverage part indicates that Mason Park is a loss payee, an additional insured, or otherwise has coverage, it cannot recover under the property coverage part.

****2** Mason Park's claim that its losses are covered under the Policy's liability coverage part also fails. Commercial liability***326** coverage is triggered when the insured is "legally obligated to pay damages," such as when the insured is subject to "legal liability" recognized and enforced by a court of competent jurisdiction. 7A COUCH ON INSURANCE § 103:14 (3d ed.2005); *see Data Specialties, Inc. v. Trancon. Ins. Co.*, 125 F.3d 909, 911 (5th Cir.1997). All parties agree that Mason Park was added as an additional insured under the Policy's liability coverage part. However, this coverage does not extend to the fire damage caused to Mason Park's property. The liability coverage part obligates Scottsdale to pay the insured "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damages' to which this insurance applies." It does not mandate that Scottsdale pay Mason Park to compensate for its property losses as a result of the fire. Mason Park's attempts to twist the language of the Policy to create the appearance of coverage are without merit. Because the Policy did not cover Mason Park for the damages the fire caused, the district court properly granted summary judgment to Scottsdale.

3. Mason Park also argues that the district court erred when it granted summary judgment to Scottsdale on Mason Park's claims under the Texas Insurance Code, under the Texas Deceptive Trade Practices-Consumer Protection Act (the "DTPA"), and for breach of the common law duty of good faith and fair dealing. Mason Park's evidence for these claims relates to its rejected insurance claim and Scottsdale's conduct during its investigation of the fire. We have already held that Scottsdale appropriately rejected Mason Park's insurance claim. Furthermore, the district court properly found that there is no evidence related to Scottsdale's investigation of Mason Park's claim indicating any wrongful act or bad faith. Therefore, the district court correctly rejected Mason Park's common law claim.

The district court also properly rejected Mason Park's statutory claims. Mason Park brought a claim under former Article 21.55 of the Texas Insurance Code, recodified as Section 542.055,[FN2] which relates to the prompt investigation and paying of claims. Summary judgment for Scottsdale under former Article 21.55 is appropriate because Mason Park did not have a valid claim under the Policy, and the evidence does not reveal any improper delay in investigating Mason Park's insurance claim. Mason Park's claims under the former Article 21.55 of the Texas Insurance Code and the DTPA were properly dismissed. To recover under these provisions, Texas law requires that an insured show that it is entitled to recover for a breach of the duty of good faith and fair dealing. *Crawford v. GuideOne Mut. Ins. Co.*, 420 F.Supp.2d 584, 599 (N.D.Tex.2006). Mason Park has not done that.

> FN2. *See Lundstrom v. United Svcs. Auto. Ass'n-CIC*, 192 S.W.3d 78, 83 n. 6 (Tex. App. Houston [14th Dist.] 2006, pet. denied) (detailing the history of the current Section 542.055).

4. Mason Park also brought claims against Katy under former Article 21.21 of the Texas Insurance Code and Articles 17.46 and 17.50 of the DTPA. The entirety of the relationship between Katy, Shahinpour's insurance agent, and Mason Park consists of a Certificate of Liability Insurance ("COI") that Katy provided to Mason Park and that accurately***327** reflected Shahinpour's insurance coverage and named Mason Park as a "Certificate Holder."

****3** Mason Park cannot recover on its statutory claims against Katy because it has not provided even a scintilla of evidence that Katy made a misrepresentation to it. "In the absence of some specific misrepresentation by the insurer or agent about the insurance, a policyholder's mistaken belief about the scope or availability of coverage is not generally not actionable under the DTPA." *Sledge v. Mullin*, 927 S.W.2d 89, 94 (Tex. App. Fort Worth 1996, no writ). For the same reason, a claim based solely on a mistaken belief generally fails under the Texas Insurance Code. *Moore v. Whitney-Vaky Ins. Agency*, 966 S.W.2d 690, 692-93 (Tex. App. San Antonio 1998, no writ). The COI here accurately reflected the terms of the Policy and the fact that Mason Park was only a "Certificate Holder." And there is nothing in the

COI identifying Mason Park as an additional insured under the property coverage part of the Policy. In this case, the COI clearly states that it is provided for information only and that it does not alter the terms of the Policy, which further undercuts Mason Park's claims. The district court's grant of summary judgment to Katy was proper. AFFIRMED.