

**ANNOTATED RISK MANAGEMENT PROVISIONS:
Indemnity and Liability Insurance**
(Focus on Texas Real Estate Forms Manual's Retail Lease)

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I. BASIC PRINCIPLES OF RISK MANAGEMENT PROVISIONS

A. Introduction

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is shifted in a contract are by the use of representations and warranties, insurance covenants, express assumption of liabilities, indemnity, exculpation, release and limitation of liability provisions.

Every provision of a contract is either restating the rule that would be supplied by the court in the absence of the provision or is expressly shifting a risk from one party to the other.

This Article focuses on the risk management provisions in the Retail Lease form and supporting documents of the Texas Real Estate Forms Manual. These forms are annotated by endnotes to each form. The author also has included supplements to the risk management provisions and the Insurance Addendum, which address issues identified in the endnotes.

Also, included are industry-standard commercial general liability insurance endorsement forms commonly issued in response to the insurance requirements of the Forms Manual. Each of these endorsement has been annotated by endnotes containing commentary discussing terminology, risk coverage, coverage gaps and exclusions.

B. Indemnity

1. Terminology

"**Indemnity**" means "*I agree to be liable for your wrongs.*" Indemnity is a shifting of the risk of a loss from a liable person to another. It is like insurance between the parties. Sometimes, an indemnity provision is no more than a restatement of existing duties, "*I will indemnify you for my wrongs;*" "*You will indemnify me for your wrongs.*"

"**Exculpation**" means "I am not liable to you for my wrongs." An exculpatory provision is designed to exclude, as between the parties to a contract, certain designated duties, liabilities or costs due to the occurrence or non-occurrence of events.

"**Release**" means "You are not liable to me for your wrongs." A release is an agreement in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved.

2. Requirements for Enforceability

The Texas Supreme Court has imposed certain contract drafting requirements in order for a negligent party to shift its liability to another person.

a. Fair Notice

The concept of fair notice was introduced into Texas indemnity law in 1963 by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963). The fair notice requirement focuses on the appearance and placement of the provision as opposed to its "content." The supreme court in *Spence* reasoned that

[t]he obvious purpose of this rule is to prevent injustice. A contracting party should be upon **fair notice** that under his agreement and through no fault of his own, a large and ruinous award of damages may be assessed against him solely by reason of negligence attributable to the opposite contracting party. *Id.* at 634.

b. Express Negligence

In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) adopted the "express negligence" requirement. In *Ethyl*, the court observed

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

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

c. **Overcoming the Worker's Compensation Bar**

Unless there is an enforceable written indemnity covering an employer's negligence, a landlord, tenant, or contractor, as the case may be, can find itself liable to an employer's injured employee, not only for its own portion of the negligently caused injury but also for the proportionate part attributable to the employer's negligence without the ability to claim back against the employer for contribution. The Workers' Compensation Act bars contribution actions by third parties against an employer unless the employer has executed before the injury a written indemnity agreement for injuries to its employees arising out of the employer's negligence. Texas Workers' Compensation Act, TEX. LABOR. CODE ANN. § 417.004 (Vernon 2006).

d. **Comparative Indemnity**

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did not protect an Indemnified Person either for its negligence or the Indemnifying Person's negligence for injuries caused to the Indemnifying Person's employee:

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

Id. at 708. The court termed this claim as one for **"comparative indemnity."** The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. ... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein.

e. **Strict Liability**

In 1994 the Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex.1994) expanded the express negligence doctrine to require indemnity agreements intending to cover a protected party's strict liability to expressly state that they covers such strict liability.

C. **Insurance**

There are two insurance methods to effectuate protection: (1) directly, either by purchasing a commercial general liability (**"CGL"**) policy naming the protected party as the named insured or by the protecting party causing its insurer to list the protected party as an additional insured on the protecting party's CGL policy; and (2) indirectly, by the protecting party insuring its contractually assumed liability (its indemnity).

1. **Contractually Assumed Liability Insurance: Indemnity Insurance for Indemnifying Persons**

a. **Exception to an Exclusion**

Most but not all CGL policies cover the protecting party for liability for "Bodily Injury" and "Property Damage" arising under an "insured contract" (sometimes referred to as **"contractually assumed liability insurance"**). Coverage is accomplished through the addition to the CGL Policy of an **exception to an exclusion** from coverage. Standard form CGL policies (ISO CG 00 01) provide as to "Coverage A" the following exceptions to the exclusion from coverage of contractually assumed liability.

Coverage A under standard form CGL policies is for loss arising out of "Bodily Injury" or "Property Damage." **"Bodily Injury"** is in such policies defined as "bodily injury, sickness or disease

sustained by a person, including death resulting from any of these at any time.” **“Property Damage”** in such policies is defined as “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.” The exception to exclusion from Coverage reads

This insurance does not apply to "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. **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; or
2. that the insured would have in the absence of the contract or agreement. (Emphasis added)

An **"Insured Contract"** is defined in the standard ISO CGL policy form as including

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 [2004 endorsement CG 24 26 adds *“, provided the ‘bodily injury’ or ‘property damage’ is caused, in whole or in part, by you or by those acting on your behalf”*]. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (Emphasis added)

Note that ISO has published the italicized language for inclusion in CGL policies by an endorsement CG 24 26. This introduces into the "insured contract" definition a "contributory negligence" condition equivalent to the one contained in the 2004 revisions to certain ISO's additional insured endorsements. Inclusion of this type language into a CGL policy effectively eliminates coverage for the named insured's indemnification of a third party for its sole negligence. Care therefore must be taken by

named insureds in coordinating and negotiating the terms of their CGL policies and indemnity agreements. It is possible for a named insured to be "uncovered" in such circumstances for an indemnity of another party's sole negligence. If this is coupled with an exclusion from additional insured coverage for an additional insured's sole negligence, the named insured may find itself acting as the insurer or in breach of its covenants to protect the additional insured/indemnified party!

b. Named Insured Not Insured for all Contractually Assumed Liabilities - No Coverage for Indemnified Person's Sole Negligence

Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractual assumption of liability for its indemnitee's sole negligence. ISO issued in 2004 an endorsement, CG 24 26 07 04, which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnitee. Thus, an Indemnifying Person should review its CGL policy to determine whether the policy will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence. See the discussion following the Forms Manual Insurance Addendum, which is Form C to this Article, where it is noted that the Insurance Addendum requires that the Tenant's CGL policy not be endorsed to exclude the sole negligence of the Landlord from the definition of "insured contract" and the issue that this creates .

2. Additional Insurance: Coverage for the Protected Party

a. Purpose

Another commonly employed risk transfer technique is to require the protecting party to arrange for its insurance to cover the protected party as an additional insured. An additional insured endorsement is equivalent to an insurance policy written for the additional insured. The strongest rationale for this request is the perceived fairness of making the protecting party's insurance carrier responsible for the increased exposure to loss created for the additional insured due to the protecting party's operations, work or control of the premises. Issuance of additional insured endorsements is routine and inexpensive as compared to a separate policy being issued to cover the exposure of the party to be protected. The risk of loss has been factored into the named insured's premium.

An additional insured designation seeks to achieve the following results: It provides a limited form of primary coverage for the additional insured. It may remove the possibility of subrogation against the additional insured for covered liabilities. It provides the additional insured with direct policy rights within the primary insured's policy, including separate defense cost coverage for claims involving the additional insured. It provides a "safety net" should the indemnity provision be unenforceable or otherwise be deficient. Additional insured endorsements generally do not carve out from the coverage afforded the additional insured loss due to "**Personal and Advertising Injury.**" In these circumstances, protection for the protected party's Personal and Advertising Injury is covered whereas without specific endorsement to the named insured's CGL Coverage B, the named insured's indemnity for such liabilities is not reinsured and the named insured not carving out this type of liability is uninsured as to its contractually assumed liability. Additionally, additional insured status may automatically entitle the additional insured to the named insured's excess liability or umbrella coverage because such policies frequently cover all insureds (including the additional insureds) under the primary liability policy.

There are important considerations for a protected party to remember when evaluating whether to forgo a contractual indemnity by the protecting party and to rely solely on being an additional insured on the protecting party's CGL policy. The policy may be canceled with or without the protected party's knowledge; the insurer may become insolvent; and the additional insured's coverage under the protecting party's CGL policy is subject to the policy's limits and exclusions from coverage.

b. Automatic Coverage or by Endorsement

Coverage may be accomplished (1) by endorsement of the protecting party's CGL insurance or (2) through blanket additional insured provisions in the protecting party's CGL policy, which provide automatic additional insured status for persons that a named insured is obligated by contract to provide such coverage.

c. Endorsements: ISO or Manuscripted Forms

Additional insured endorsements can be divided into two categories: endorsement forms promulgated by the Insurance Services Office, Inc. ("**ISO**") and all other endorsement forms

(referred to in the insurance industry as "**manuscript**" forms). There are four nationwide insurance advisory organizations that develop standard insurance forms. ISO is the largest national insurance advisory organization. Its forms are considered to be the industry's "standard" forms. 1 *CONTRACTUAL RISK TRANSFER Strategies for Contract Indemnity and Insurance Provisions* §XIII, p. XIII.B.2 (International Risk Management Institute, Inc. 2006).

ISO forms are identified by a two-letter prefix identifying the type of coverage, four digits identifying the form category and individual form number, and four digits identifying the edition date by month and year. For example, the CG 20 10 07 04 additional insured endorsement form is made up of "**CG**" to indicate that this is a CGL form; "**20**" indicates the category of CGL endorsement that this form belongs to, an additional insured endorsement; "**10**" is the number assigned to this particular CGL additional insured endorsement; and "**07 04**" indicates that this form is the July 2004 edition of the CG 20 10.

ISO has promulgated 33 forms of additional insured endorsements, each tailored to a different risk transfer, including CG 20 10 07 04–Additional Insured–Owners, Lessees or Contractors–Schedule Person or Organization and CG 20 26 07 04–Additional Insured–Designated Person or Organization discussed as forms to this Article.

d. Covered Matters

Additional insured endorsements furnish coverage to an additional insured for liabilities "**arising out of**" the named insured's "**work**", "**operations**", or "**premises**" or some variation of these themes.

(1) Ongoing Operations

ISO form CG 20 10 is ISO's standard endorsement for use in adding a project owner as an insured to a general contractor's CGL policy or a general contractor to a subcontractor's CGL policy (See Form G CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization). CG 20 10 provides coverage for the additional insured's liabilities arising out of the "**ongoing operations**" of the named insured. CG 20 10 has undergone changes from coverage for liabilities "*arising out of the work*" of the named insured in the November 1985 version (CG 20 10 11 85), to "*arising out of the ongoing operations*" of the named insured in the October 1993 version (CG 20 10 10 93), the March 1997 version (CG 20 10 03 97), and the October 2001 version (CG 20 10 10 01). ISO

made this change to clarify that this particular form of additional insured endorsement is intended to cover liabilities arising out of the "ongoing operations" of the named insured as opposed to liabilities arising out of operations that have been completed. The October 2001 revision added an express exclusion from coverage for liabilities "occurring after ... all work ... has been completed" to further emphasize the "ongoing" operations requirement.

(2) Completed Operations

The ISO CG 20 10 11 85 additional insured endorsement ("arising out of your work") was construed in *Pardee Constr. Co. v. Insurance Co. of the West*, 92 Cal. Rptr.2d 443 (Cal. App. 2000) to cover an additional insured contractor's liabilities arising out of the completed operations of its named insured subcontractor. In *Pardee* the CGL policy and additional insured endorsement were issued 4 years after completion of the subcontractor's work on the project in question and were held to cover injuries arising out of the earlier work of the subcontractor. Wording of the additional insured endorsement must be examined to determine if completed operations coverage is included (e.g., by not limiting coverage to "ongoing" operations or by not expressly excluding coverage for completed operations). If completed operations coverage is desired and coverage is not afforded by the proffered endorsement form, coverage may be effected either by manuscripting the endorsement to extend to completed operations or by adding the coverage by a completed operations endorsement. ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations is designed to cover completed operations liabilities, first by stating that it covers liabilities "arising out of your (the named insured's) work" and stating that the liabilities covered are those liabilities arising out of the work that are "included in the products-completed operations hazard."

(3) Premises

There are two ISO endorsements used primarily to add as an additional insured the owner of premises or land leased to the named insured. See Form E for CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises, which ISO additional insured endorsement adds designated persons as additional insureds as to designated "premises" and covers the additional insured's liability:

arising out of the ownership, maintenance or use of that part of the premises leased to you (the named insured) and **shown in the Schedule** subject to the following additional exclusions: ... Any "occurrence" which takes place after you cease to be a tenant in that premises. (and) Structural alterations, new construction or demolition operations performed by or on behalf of the (additional insured)....

An almost identical ISO endorsement is CG 20 24 11 85 Additional Insured – Owners or Other Interests from Whom Land Has Been Leased. The sole and obvious difference being "land" versus "premises." 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.

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 the named insured's (the tenant's) CGL policy was endorsed to name the 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 of endorsements 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 tenant was obligated to maintain. The additional insured endorsement form was an ISO CG 20 11 Additional Insured – Managers and Lessors of Premises (Form E). 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 nor on the roof directly

above the tenant's leased premises. See also *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; *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 *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.

Cases Finding Coverage.

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

However, the requirement that there be a causal link or connection between the accident and the leased premises does not mean that there must be any degree of physical proximity between the leased premises and the scene of the accident. The two concepts are quite different. Thus, we would expect the outcome in the *Franklin* case to have been the same had the tenant's business guest fell on the building's exterior steps even if they were

some distance from the luncheonette. This so because the negotiating for such an endorsement in a lease the landlord is simply attempting to ensure against the risk of liability generated by the business about to be conducted by the tenant, and place the cost of insuring that risk on the tenant.

Franklin Mut. Ins. v. Security Indem. Ins., 275 N. J. Super. 335, 340, 646 A.2d 443, *cert denied* 139 N. J. 185, 652 A.2d 173 (1994). Also see *ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 637 N.Y.S.2d 117 (N.Y. 1st Dept. 1996)—court required the insurer of the tenant of a garage to defend the owner of the garage in a personal injury suit even though the accident occurred on the sidewalk in front of the tenant's property. The additional insured endorsement was issued on an inapplicable form as it provided additional insured coverage as to injuries arising out of premises "leased to" the named insured. There were no leased premises as the named insured was a garage operator. The court noted that the named insured's CGL policy provided coverage to the named insured for garage operations including "the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations ...[; and] all operations necessary or incidental to a garage business." The court reasoned that "without traversing the sidewalk for access to and from the garage, there could be no use at all of the garage as a parking facility." *Id.* at 176. In *University of California Press v. G. A. Insurance Co. of New York*, 1995 U.S. Dist. Lexis 21442, 1995 WL 591307 (E.D.N.Y. 1995), the property damage and actual injury occurred within the leased premises. Books stored within the leased premises were damaged by leaking water from a sprinkler system malfunction one floor above the leased premises. The court found the language of the insurance agreement to be ambiguous and unclear as to whether

the term "arising out of" referred to where the breach took place, where the accident occurred or where the damage occurred.

Unable to reconcile that ambiguity, the court followed a basic principle of contract law and construed the ambiguity against the insurer as the policy's drafter. Thus, because the damage occurred within the leased premises, the court found in favor of coverage. The court in *Hormel Foods Corp. v. Northbrook Property & Casualty Insurance Co.*, 938 F.Supp. 555 (D. Minn. 1996), *aff'd*, No. 97-1197, 1997 U.S. App. Lexis 34146 (8th Cir. 1997) upheld coverage for an additional insured landlord which leased a hog-processing

facility to the employer (Quality Pork Products, "QPP") of a person who was killed using a machine designed and manufactured by Hormel, installed on the premises, and leased to QPP by Hormel. The Northbrook insurance policy additional insured endorsement covered losses "arising out of the ownership, maintenance or use, of the leased premiss." The court held that the machine was so intertwined with the facility's operations as to make injuries flowing from it attributable to the "ownership, maintenance, or use" of the facility. The machine was bolted to the floor walls and was "unambiguously part of the premises." How far some courts will extend additional insured coverage is illustrated by *SFH, Inc. v. Millard Refrigerated Services, Inc.*, 339 F.3d 738 (8th Cir. 2003). The warehouse lease required the lessee to carry CGL insurance and the lessor and its manager as additional insureds. Coverage was affected through a blanket additional insured endorsement covering all additional insureds required by named insured's contracts to be covered. The additional insured language was identical to the ISO CG 20 11 coverage as to "liability arising out of the ownership, maintenance or use of that part of the premises leased to you." The lessee's property was destroyed by a fire at the warehouse. It was determined that the one of the manager's employees had disabled the sprinkler system. The court found in favor of coverage, stating

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

e. Covered Liabilities

(1) Negligence

(a) Additional Insured's Vicarious Liability for Named Insured's Negligence

Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured's acts or omission. An additional's insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of

non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors* (2005); and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429 (1966). It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy. See the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured's vicarious liability for the named insured's negligence, or even to cases where the named insured is concurrently negligent with the additional insured.

(b) Additional Insured's Own Negligence.

Depending on the language of the protecting party's insurance, the protected party may be covered for its own negligence, whether or not the protecting party is negligent. As such, it supplements the protection afforded by the protecting party's indemnity.

(2) Interpretation of Additional Insurance Covenants

(a) Express Negligence Test Not Applicable to Insurance Covenant

In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), *cert. den'd*, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed. 2d 45 (1993), the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring the protected party (Getty) to be listed as an additional insured on the protecting party's (NL Industries') liability policies. In *Getty* the injuries arose out of Getty's sole negligence; the indemnity provision excluded indemnity for Getty's negligence; the insurance covenant was silent as to whether the insurance was or was not to cover injuries due to Getty's negligence; the insurance covenant in the contract provided for NL Industries to maintain commercial general liability insurance and for such insurance was to "extend to and protect Getty." The court found that there was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies (e.g., through an automatic blanket insured provision).

(b) 2004 Revision to ISO Forms

Recently, ISO issued revisions to its additional

insured endorsements, including the CG 20 26, CG 20 10 and CG 20 37 to eliminate coverage for an additional insured's sole negligence. For example, the CG 20 10 form will exclude coverage for liabilities attributable to the additional insured's sole negligence as follows:

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organizations 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 (the named insured's) acts or omissions; or
2. The acts or omissions of those acting on your behalf;

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

The 2004 revision seeks to limit the trigger for additional insured coverage to occurrences caused by the sole or partial negligence of the named insured.

(c) Manuscript Additional Insured Endorsement to Limit Coverage to Indemnified Liabilities

One approach parties have used is for the protecting party's insurer to issue a manuscripted additional insured endorsement that is limited to insurable indemnified liabilities. In *Certainfeed Corp. v. Employers Ins. of Wausau*, 939 F. Supp. 826 (D. Kan. 1996). In *Certainfeed* the additional insured endorsement issued by Wausau was a blanket automatic additional insured provision in the CGL policy it issued to its named insured contractor. This provision read as follows:

Section Two—Who Is an Insured:

5. Any person or organization ... for which you have agreed by written contract to procure liability insurance, but only for liability arising out of operations performed by you or on your behalf, provided that: ... (b) The insurance afforded to any person ... as an insured under this Paragraph 5 shall include only the insurance that is required to be provided by the terms of such agreement to procure insurance, and then only to the extent that such insurance is included within the scope of this policy.

The insurance provision of the construction contract, required the protecting party (the named insured contractor providing construction services to the plant owner) to provide insurance coverage for all “liability assumed” by the protecting party. The construction contract contained an indemnity agreement whereby the protecting party indemnified the protected party (the additional insured plant owner) for its negligence except its sole negligence. The court construed the blanket additional insured provision as covering the additional insured's liability for injuries jointly caused it and by another contractor (a construction manager) to an employee of the named insured. The court thus held that the scope of the additional insured coverage was the same as the scope of the insurance that the named insured was to procure to protect the named insured on its indemnity.

g. Liability for Failure to List Other Party as an Additional Insured

A party that breaches its contractual obligation to list the other party as an additional insured is liable for all damages that would have fallen within the protection of the additional insured endorsement. The court in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d. 119 (Tex. App.-Houston [14th Dist.] 2000, *writ denied*) found that Coastal failed to list Crown as an additional insured on Coastal's Trucker's Policy and was liable to Crown for the \$4,816,549.28 judgment obtained by an employee of Coastal that was injured on Crown's premises. The insurance covenant did not refer to an additional insured designation but required Coastal to obtain insurance “protecting” Crown. The insurance covenant in *Coastal Transport* reads as follows:

Carrier agrees to purchase at Carrier's cost ... Comprehensive General Liability Insurance including care, custody and control coverage and liability assumed with \$1,000,000 limit per occurrence for bodily injury and property damage combined. Such insurance shall ... fully extend to, defend and protect Crown.

h. Caveat

Unfortunately, although additional insured covenants are the most common risk management technique, they are also the most commonly misunderstood, even by professionals in the field—risk managers, insurance agents, lawyers and courts that are called on to interpret them. The most common error is for the party's insurance covenant to fail to specify the terms of coverage and the exclusions from coverage to be contained in the additional insured endorsement. See endnotes following Form C discussing this aspect of the Forms Manuals Insurance Addendum. For example, 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 and its 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 out contractor that the contractor shall cause its CGL insurer to list the tenant, its landlord, and the landlord's lender, management company and contractors as additional insureds. The tenant's finish-out contractor may specify in its subcontract that the subcontractors list the contractor as an additional insured on their CGL policies. In each of these cases, the person desiring protection as an additional insured has 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! This mistake has been made because there is no commonly accepted definition of what it is to be an "additional insured." When a party fails to specify more than it be listed generically as an "additional insured," it has opened the door to the other party's insurer picking a form that effectively eliminates coverage for the additional insured.

3. Protected Party's "Other Insurance"

a. **Generally All Policies Are "Primary" and "Contributory" Unless Amended**

The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under the protecting party's policy rather

than the protected party having to rely upon its own policy. By definition, a party that carries its own liability insurance and is also an additional insured under another's liability policy has multiple coverages which fall under the general heading of "**other insurance**" available to "contribute" towards satisfaction of the liability insured by both the protecting party's policy and the protected party's policy.

A protected party ought to structure the joint insurance program with the protecting party so as to cause its own CGL policy not to be primary and contributory with the additional insurance coverage provided by the protecting party's CGL policy.

Assuming both the protecting party's CGL policy and the protected party's CGL policy are standard form policies, then both parties' policies by their standard terms, if not modified, declare themselves to be "**primary**" insurance and require any "other" insurance to which the insured has access to contribute proportionately to cover the liability. This risk of overlapping coverage may be addressed in advance of the loss either by amendment to the protected party's policy or to the protecting party's policy, or both.

The following are the "other insurance" provisions in the industry-standard ISO CGL policy. These provisions are likely contained in both the protecting party's CGL policy and the protected party's CGL policy.

ISO CGL Policy:

4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then we will share with all that other insurance by the method described in c. below....

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 any endorsement. ...

c. Method of Sharing

If all the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

b. Endorsing Named Insured's Policy to be Primary Not the Solution

(1) Primary vs. Sole Contributing

Endorsing the protecting party'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. Endorsing the protecting party's policy to be primary does not address the other insurance clause contained in the named insured's policy, which unamended provides for proportionate payment based on the limits of the additional insured's primary policy ("**contributory**"). This may be addressed by endorsing the named insured's policy to be the sole contributing policy, (i.e., not requiring contribution from the additional insured's policy).

(2) Endorsing the Additional Insured's Policy to Be Excess Coverage

The protected party should verify that its own policy provides that it is excess coverage to the insurance available to it as an additional insured under the protecting party's CGL policy and that in such case it is not primary and contributing as "other insurance".

D. Releases and Exculpations

In 1993 the Texas Supreme Court in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) extended the fair notice principle and the express negligence doctrine to releases. This principle is likely to be extended to waivers, exculpations and disclaimers seeking to exclude liability for one's own negligence, being merely a release worded in a different format.

Many standard form waivers of subrogation are in the form of a release or waiver of either a landlord's or tenant's liability for its negligently caused injuries. These provisions are releases or waivers of claims and indirectly operate as a waiver of the party's insurance carrier's right of subrogation. If a waiver of subrogation is thus couched in terms of a waiver or release by one party of another party's liability for its negligence, then such provision is unenforceable unless it is written in a fashion that meets the express negligence test and drafted to satisfy the fair notice principle.

A. Forms Manual Form 11-2 Retail Lease

RETAIL LEASE

Basic Terms

Premises

Approximate square feet: _____ sq. ft.

Name of Shopping Center: _____

Street address/suite: _____

City, state, zip: Houston, TX 787__

Definitions

....

“**Common Areas**” means all facilities and areas of the Shopping Center that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Shopping Center, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

“**Injury**” means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) “personal and advertising injury” as defined in the form of liability insurance Tenant is required to maintain.¹

“**Landlord**” means Landlord and its agents, employees, invitees, licensees, or visitors.²

“**Tenant**” means Tenant and its agents, contractors, employees, invitees, licensees, or visitors.

Clauses and Covenants³

A. Tenant⁴ agrees to—

18. INDEMNIFY,⁵ DEFEND,⁶ AND HOLD LANDLORD⁷ HARMLESS FROM ANY INJURY⁸ (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY,⁹ OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING¹⁰ IN ANY PORTION OF THE PREMISES.¹¹ **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF TENANT’S INSURANCE,¹² (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS,¹³ (C) WILL SURVIVE THE END OF THE TERM,¹⁴ AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED¹⁵ IN WHOLE OR IN PART¹⁶ BY THE ORDINARY NEGLIGENCE¹⁷ OR STRICT LIABILITY¹⁸ OF LANDLORD⁷ BUT WILL NOT APPLY¹⁹ TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE²⁰ OR WILLFUL MISCONDUCT²¹ OF LANDLORD.²²**

C. Landlord agrees to—

6. INDEMNIFY,⁵ DEFEND,⁶ AND HOLD TENANT HARMLESS FROM ANY INJURY⁸ AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY,⁹ OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS OCCURRING¹⁰ IN ANY PORTION OF THE COMMON AREAS.²⁴ **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF LANDLORD’S INSURANCE,¹² (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS,¹³ (C) WILL SURVIVE THE END OF THE TERM,¹⁴ AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE²⁵ OR STRICT LIABILITY OF TENANT¹⁸ BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE²⁰ OR WILLFUL MISCONDUCT OF TENANT.**

E. Landlord and Tenant agree to the following:²⁶

3. *Insurance.* Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.²⁸

4. *Release of Claims/Subrogation.* LANDLORD AND TENANT RELEASE²⁸ EACH OTHER²⁹ AND LIENHOLDER FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITH THE SHOPPING CENTER, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE RELEASING PARTY'S PROPERTY INSURANCE³⁰ OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE³¹ OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE³² OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY.**³³

¹ "Injury." The defined term "Injury" is used in the indemnity provisions of the Lease, ¶¶ A.18 and C.6. ¶A.18 provides that "Tenant agrees to ... indemnify ... Landlord from any Injury occurring in any portion of the Premises." ¶C 8 provides that "Landlord agrees to ... indemnify ... Tenant from any Injury occurring in any portion of the Common Areas." "Injury" is defined in the Manual Lease forms as meaning 3 types of occurrences and the associated liability arising out of such occurrence: property damage, injuries to persons including their death, and "personal and advertising injury." This last form of liability incorporates by reference the definition of such term as contained in Tenant's liability insurance.

² "Landlord" and "Tenant." The terms "Landlord" and "Tenant" are used in the Basic Provisions to name the parties to the Lease and are defined in the Definitions as including a laundry list of other persons that are not parties to the Lease. The laundry list is not identical for each party to the Lease. The definition of "Tenant" additionally includes the Tenant's contractors as "Tenant." The purpose for adding a laundry list of other persons not a party to the Lease as being within the defined term "Landlord" or "Tenant" is a risk allocation purpose, both to define the Indemnified Persons (the person who are protected by the indemnity) and to define the broad scope of the indemnity (the persons whose negligence caused the Injury and for which the Indemnified Persons are to be protected by the Indemnifying person).

³ **Forms Manual's Approach to Reciprocal Indemnities in the Lease.** The Texas Real Estate Form's Manual Retail Lease contains mutual indemnities. In Lease ¶A 18 Tenant indemnifies Landlord. In Lease ¶C 6 Landlord indemnifies Tenant. Each indemnity is a broad form indemnity, indemnifying the Indemnified Person for all liabilities due to the occurrence of an Injury, even if the cause is the sole or concurrent negligence of the Indemnified Person. The Tenant's indemnity is for Injuries occurring in the Premises. The Landlord's indemnity is for Injuries occurring in the Common Areas. Each indemnity complies with the express negligence and fair notice requirements which are imposed by the court on provisions shifting liability for negligently caused injuries from one liable person to another. Therefore, each indemnity is enforceable as a means of shifting the risk of liability to the Indemnifying Person for Injuries caused in whole or in part by the sole or concurrent negligence of the Indemnified Person.

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

An indemnity provision indemnifying the Indemnified Person against his own negligence must be conspicuous enough to give the Indemnifying Person "fair notice" of its existence. The concept of "fair notice" was introduced into Texas indemnity law by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 634 (Tex. 1963). The fair notice principle focuses on the appearance and placement of the provision as opposed to its "content." In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the supreme court adopted the conspicuousness standard of § 1.201(10) of the Texas UCC, applicable to the sale of goods, and applied it to indemnities and releases in a case involving the sale of services. Section 1.201(10) of the Texas UCC provides

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

TEX. BUS. COMM. CODE § 1.201(10) (Vernon 1994). *Also see Banzhaf v. ADT Sec. Sys.*, 28 S.W.3d 180 (Tex. App.— Eastland [11th Dist.] 2000, *writ ref'd*) finding an indemnity to be conspicuous that was set forth in enlarged, all capital lettering. The lettering is dark, boldface type so that it contrasts with the lighter, smaller type of the remaining contractual paragraphs ... The indemnity provision ... is directly above the signature line. A reasonable person's attention is attracted to the indemnity provision when looking at the contract...

The indemnity provision is on the back page (of a 1 page document), but the contract itself specifically directs the reader's attention to the paragraph in which it is contained. On the front of the contract, just above the signature line for Herman's is the directive: "ATTENTION IS DIRECTED TO THE WARRANTY, LIMIT OF LIABILITY AND OTHER CONDITIONS ON REVERSE SIDE."

See Greer and Collier, *The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas After Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 SO. TEX. L. REV. 243 (1994). *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978) upheld a provision on reverse side of purchase order where front side contained reference in large red print, partly in bold, incorporating provisions on reverse side; *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990) upheld an indemnity provision contained on front of one page contract in separate paragraph; *Dresser Industries v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) struck down indemnity located on back of work order, in a series of uniformly numbered paragraphs, with no heading and with no contrasting type; *K & S Oil Well Service, Inc. v. Cabot Corp., Inc.*, 491 S.W.2d 733, 737-38 (Tex. Civ. App.—Corpus Christi 1973, writ *ref'd n.r.e.*) struck down indemnity hidden on reverse of contract in paragraph headed "warranty;" *Rourke v. Garza*, 511 S.W.2d 331, 334 (Tex. Civ. App.—Houston [1st Dist.] 1974), *aff'd* 530 S.W.2d 794 (Tex. 1975); *Safeway Scaffold Co. of Houston, Inc. v. Safeway Steel Products, Inc.*, 570 S.W.2d 225, 228 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ *ref'd n.r.e.*); *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex. App.—Houston [14th Dist.] 2000, writ *ref'd*)- indemnity not conspicuous if in same size and type as the balance of a 1 page document; *Douglas Cablevision v. SWPCO*, 992 S.W.2d 503 (Tex. App.—Texarkana 1999, writ *denied*)-indemnity provision not conspicuous if in same size and type and without a separate heading identifying the paragraph was an indemnity in a 22 paragraph, 13 page document, also court not persuaded that the conspicuousness requirement applied only to "forms." An indemnity provision was held not to meet the conspicuousness requirement in *U.S. Rentals, Inc. v. Mundy Service Corp.*, 901 S.W.2d 789 (Tex. App.—Houston [14th Dist.] 1995, writ *denied*) when it was buried on the back of a rental contract with all provisions printed in the same respective type and sizes, and the heading did not alert the reader that it created an indemnity obligation ("LIABILITY FOR DAMAGE TO EQUIPMENT, PERSONS AND PROPERTY"). The Supreme Court in *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex. 1997), found that a release was not conspicuous when it was set in a type font too small to read even though the heading was in larger font (heading was 4 point font 4 point font and the terms of the release were in smaller font); the release was outlined in a box; the heading was all caps, in bold type and read "RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT"; and above the signature line appeared the caption in all caps, bold-faced centered and underlined type the following statement "I UNDERSTAND MOTORCYCLE RACING IS DANGEROUS. YES, I HAVE READ THIS RELEASE." The court did not accept the argument that the release was conspicuous because of its small contrasting type.

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

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

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

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

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

The Texas Supreme Court in *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358 (Tex. App.—Dallas 1989), *aff'd* 817 S.W.2d 50, 56 (Tex. 1991) approved the following language as meeting the express negligence test:

14.9 Operator's Indemnification of Contractor: Operator (Diamond Shamrock n/k/a Maxus) agrees to ... indemnify ... Contractor (Moran Bros.) ... from and against all claims ... of every kind ... without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees... on account of bodily injury, death or damage to property. ...

14.13 Indemnity Obligation: Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by such parties under the terms of this Contract, including without limitation, paragraphs 14.1 ... be without limit and without regard to the cause or causes thereof ... strict liability, or the negligence of any party, whether such negligence be sole, joint or concurrent, active or passive. (Underlining added.)

In *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990), the Texas Supreme Court held the indemnity provision set out below met the express negligence test and required Christie, Inc. to indemnify Enserch for Enserch's negligent supervision of Christie, Inc.'s work as an independent contractor hired to service Enserch's pipeline. Parker, an employee of Christie, Inc., was asphyxiated when a gasket blew out causing a valve to leak natural gas into the concrete manhole vault where Parker was working. Parker's estate brought a

wrongful death action against Enserch. The court first held that Enserch owed a duty of care to the employees of Christie, Inc., even though Christie, Inc. was an independent contractor, since Enserch had retained control of the manner that Christie, Inc. was to carry out its servicing contract. Enserch had furnished a procedures book for Christie's employees which outlined the procedures to be followed while working on the pipeline, and Enserch representatives frequently visited the job site and supervised Christie's employees. The supreme court followed the exception announced in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) to the general rule of *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976). The general rule adopted in *Abalos* is that an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. However, the court in *Redinger* created an exception by holding that "one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Id.* at 418 [citing RESTATEMENT (SECOND) OF TORTS § 414 (1977)]. The court upheld the following provision as requiring Christie, Inc. to indemnify Enserch for Enserch's negligent supervision:

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

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

The Texas Supreme Court in *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358 (Tex. App.--Dallas 1989), *aff'd* 817 S.W.2d 50, 56 (Tex. 1991) approved the following language as meeting the express negligence test:

14.9 Operator's Indemnification of Contractor: Operator (Diamond Shamrock n/k/a Maxus) agrees to ... indemnify ... Contractor (Moran Bros.) ... from and against all claims ... of every kind ... without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees... on account of bodily injury, death or damage to property. ...

14.13 Indemnity Obligation: Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by such parties under the terms of this Contract, including without limitation, paragraphs 14.1 ... be without limit and without regard to the cause or causes thereof ... strict liability, or the negligence of any party, whether such negligence be sole, joint or concurrent, active or passive. (Underlining added.)

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

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

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

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

In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court held that the language of the contractual indemnity provision satisfied the express negligence test even though it did not differentiate between "degrees of negligence." Certain "magic" words like "**active**," "**passive**," "**sole**," "**joint**," or "**concurrent**" to describe the degrees of negligence

covered were not necessary. The court determined that "any negligent act or omission of ARCO" was sufficient to define the parties' intent. *Id.* at 726. Perhaps what is more important is to determine what degree of negligence is excluded from the indemnity. *e.g.*, "but not injuries due to the sole negligence of the _____ (*e.g.*, landlord)."

⁴ **"Tenant."** Perhaps it is clear from the context when "Tenant" means the party to the Lease that is the Tenant and when it means the Tenant plus the laundry list of other persons defined as being "Tenant."

⁵ **"Indemnify."** **"Indemnity"** is a shifting of the risk of a loss from a liable person to another. However, many times scrivener's use an indemnity provision when they do not know whether the Indemnified Person is a potentially liable person. Sometimes, the indemnity provisions are no more than a restatement of existing duties, "I will indemnify you for my wrongs;" "You will indemnify me for your wrongs." However, it is not necessary that the words "indemnify" or "indemnity" be used or even that the promise be in writing. 14 TEX. JUR. 3d *Contribution and Indemnification* § 14 Form (1997); 26 TEX. JUR. 2d *Statute of Frauds* § 29. William H. Locke, Jr., *Annotated Risk Management Forms – Indemnity, Additional Insureds, Waiver of Subrogation, Exculpations and Releases*, 13TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2003); and Aaron Johnston, Jr., and Charles E. Comiskey, *Lease Risk Management and Insurance Concepts*, 15TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2004).

⁶ **"Defend."** As discussed in the articles referenced in [endnote 5](#) above, care should be taken in crafting the scope of and exclusions from the liabilities indemnified, such as providing for the defense of the indemnified party by the indemnifying party ("indemnify, **defend**, and hold harmless"), settlement authority, and choice of laws applicable. The duty to defend is a separate and distinct responsibility. In *Farmers Texas Mutual County Insurance v. Griffin*, 955 S.W.2d 8, 821 (Tex. 1997), the court addressed the separate duty of an insurer to defend its insured and explained "[a]n insurer's duty to defend and duty to indemnify are distinct and separate duties. Thus, an insurer may have a duty to defend but, eventually, no duty to indemnify." The court gave an example of how the duties may diverge, "a plaintiff pleading both negligent and intentional conduct may trigger an insurer's duty to defend, but a finding that the insured acted intentionally and not negligently (*i.e.*, not within the policy's coverage) may negate the insurer's duty to indemnify." See also *Reser v. State Farm & Fire Casualty Co.*, 981 S.W.2d 260, 263 (Tex. App.—San Antonio 1998, no pet.) noting that the duty to defend is unaffected by the ultimate outcome of the case.

"8 Corners Rule." The Fifth Circuit stated the "8 Corners Rule" as follows in *Primrose Operating Co. v. National American Ins. Co.*, 382 F.3d 546, 552 (5th Cir. 2004):

Texas employs the "eight corners" or "complaint allegation" rule when determining whether an insurer has a duty to defend. *Potomac Ins. Co. v. Jayhawk Med. Acceptance Corp.*, 198 F.3d 548, 551 (5th Cir. 2000). The eight corners rule requires the finder of fact to compare only the allegations in the underlying suit—the suit against the insured—with the provisions of the insurance policy to determine if the allegations fit within the policy coverage. The duty to defend analysis is not influenced by facts ascertained before the suit, developed in the process of litigation, or by the ultimate outcome of the suit.

See also *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118 (Tex. App.—Hou. [1st Dist.] 2003, pet denied); *E & L Chipping Co.*, 962 S.W.2d 272, 274 (Tex. App.—Beaumont 1998, no pet)-if the pleadings do not allege facts that trigger the indemnity, the Indemnifying Person is not required to defend the Indemnified Person.; *Tesoro* 125. The "duty to defend" cases have primarily arisen in construing an insurer's duty as opposed to the duty of an Indemnifying Person. However, the authority of insurance cases has been recognized as being relevant in interpreting the duties of Indemnifying Persons. *English v. BGP Intern, Inc.* 174 S.W.3d 366 (Tex. App.—Hou. [14th Dist.] 2005, no pet. h.) at fn 6:

We recognize that most of the cases addressing this issue, and many of the cases we have cited, involve the duty to defend in the insurance context. However, we find little reason why the principles regarding an insurer's duty to defend should not apply with equal force to an indemnitor's contractual promise to defend its indemnity. Based on our interpretation of this provision, it appears BGP agreed to both *defend and indemnify* English in suits arising from BGP's operations when those operations began before 100 percent of the landowners had consented. Giving reasonable effect to every word used in the contract, and understanding the separate and distinct nature of the two duties, we hold that BGP agreed to defend English—separate and apart from its duty to indemnify—from suits falling within the terms outlined in the contract.

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

⁷ **"Landlord."** "Landlord" in this context likely means both the named Landlord and all of the persons defined in the Basic Provisions as being "Landlord." This provision is an indemnity of Landlord, and Landlord's agents, employees, invitees, licensees, or visitors for the negligence of Landlord and Landlord's agents, employees, invitees, licensees, or visitors causing Injury in the Premises.

⁸ **"Injury."** "Injury" is defined in the Definitions section of the Retail Lease. See discussion at [endnote 1](#). The failure of the indemnity provision to specifically cover "**personal injuries**" was held to be fatal, even though the indemnity provision otherwise would meet the express negligence test, in *Ard v. Gemini Exploration Co.*, 894 S.W.2d 11 (Tex. Civ. App.—Houston [14th Dist.] 1994, *writ denied*).

⁹ **"Claim. "Action." "Loss." "Liability." "Attorney's Fees." "Costs."** Indemnities have sometimes been classified as an "indemnity against **liability.**" *Russell v. Lemons*, 205 S.W.2d 629, 631 (Tex. Civ. App.—Amarillo 1947, *writ ref'd n.r.e.*). In the case

of a promise to indemnify against “**liability**,” a cause of action accrues to the indemnified person only when the liability has become fixed and certain, as by rendition of a judgment. Possibility that liability triggering indemnity will be incurred in pending action is a “future hypothetical event” within meaning of rule that Uniform Declaratory Judgments Acts gives court no power to pass upon hypothetical or contingent situations. *Boorhem-Fields, Inc. v. Burlington Northern Railroad Co.*, 884 S.W.2d 530 (Tex. App.--Texarkana 1994, *no writ*); § 37.001 TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 1997).

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

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

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

“**Damages.**” In drafting the classes of liabilities covered by an indemnity care should be given to the scope of covered items. For example, are “**punitive damages**” of the Indemnified Person to be covered? Are the punitive damages of an employee or an agent covered, if the employer is not liable? For a discussion of “punitive damages” see *Alamo Nat’l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981) and TEX. CIV. PRAC. & REM. CODE §§ 41.001 *et seq.* (Vernon 1997 and Supp. 2006).

“**Defense costs. Precondition - express negligence test satisfied.** In *Fisk Electric Co. v. Constructors & Assoc.s, Inc.*, 888 S.W.2d 813 (Tex. 1994), the supreme court found that the express negligence requirement for the enforcement of an indemnity agreement is not an affirmative defense to be alleged and proved by the defendant Indemnifying Person, but rather is a rule of contract construction. The court held that Fisk’s obligation to pay attorney’s fees arose out of its duty to indemnify. Absent a duty to indemnify, there is no obligation to pay attorney’s fees. The supreme court declined to carve out an exception to the express negligence rule for contracts which although they did not expressly indemnify the Indemnified Person for its own negligence, clearly, expressly or broadly covered the Indemnified Person’s defense costs. *Also see Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App.--Houston [1st Dist.] 1995, *writ denied*), holding no right to attorney’s fees absent an enforceable indemnity provision.

Attorney’s fees. The expense of defending a liability suit and in subsequently enforcing the contractual indemnity are reimbursable when the Indemnified Person recovers contractual indemnification from the Indemnifying Person. An Indemnified Person’s attorney’s fees in defending a liability suit are recoverable from the Indemnifying Person as “indemnified damages” even though not expressly mentioned in the indemnity provision. Attorney’s fees may be awarded to the Indemnified Person pursuant to TEX. CIV. PRAC. & REM. CODE § 38.001(8) (Vernon 1997) in connection with a suit against the Indemnifying Person for its breach of its contract of indemnity. *Arthur’s Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex.App.--Dallas 1999, *no writ*). The purpose of indemnification is to make the Indemnified Person whole. *Tubb v. Bartlett*, 862 S.W.2d 740, 751 (Tex. App.--El Paso 1988, *writ denied*); *Continental Steel Co. v. H. A. Lott, Inc.*, 772 S.W.2d 513, 517 (Tex. App.-Dallas 1989, *writ denied*); *Texas Const. Assoc., Inc. v. Balli*, 558 S.W.2d 513 (Tex. Civ. App.--Corpus Christi 1977, *no writ*); *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200 (Tex. Civ. App.--Houston 1959), *rev’d on other grounds*, 325 S.W.2d 126 (1959) and *vacated on other grounds*, 326 S.W.2d 915 (Tex. Civ. App.-- Houston 1959); *Barnes v. Calgon Corp.*, 872 F. Supp. 349, 353 (E.D. Tex. 1994).

Costs. However, a different rule may apply to “costs” and “expenses” beyond attorney’s fees. In *Arthur’s Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.-Dallas 1999, *no writ*) the court held that failure of the indemnity provision to expressly cover the Indemnified Person’s litigation costs prevented recovery of the following expenses incurred by its attorney: filing fees, courier fees, postage, telephone expenses, long distance charges, and fax charges. The court considered these costs to be included within the hourly billing rates and reasonable fees of the attorney, unless the indemnity contract expressly covered these items as an Indemnified Matter.

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

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

¹⁰ **“Occurring.”** The indemnity language does not expressly address the time of the occurrence. Injuries can occur after the end of the Term of a lease due to acts or omissions occurring during the Term of a lease. The indemnity does state that the indemnity survives the end of the Term of the Lease, but this may address the survivability of the indemnity as to Injuries occurring during the Term of the Lease. The timing issue is addressed by adding the words “EITHER BEFORE OR AFTER THE END OF THE TERM” after “OCCURRING IN ANY PORTION OF THE PREMISES.”

Indemnity provisions have been strictly construed to limit the time of the occurrence of the Indemnified Matters. In *Manges v. Willoughby*, 505 S.W.2d 379 (Tex. Civ. App.--San Antonio 1974, writ ref'd n.r.e.), the court construed an indemnity by a sublessee to the sublessor, which had “assumed all obligations” under the lease, as not covering damages to the leased premises which occurred prior to the sublease.

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

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

BP/Fina Agreement. Fina shall indemnify, defend and hold harmless BP ... against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets ... and accruing from and after closing.

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

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

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

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

¹¹ **“Premises.”** “Premises” is defined in the Basic Terms section of the Retail Lease. The risk allocation scheme adopted in the Texas Real Estate Forms Manual for Leases is to allocate responsibility to the Tenant for all Injuries occurring in the Premises and to allocate to the Landlord responsibility for all Injuries occurring in the Common Areas. The Retail Lease contains reciprocal indemnities with the Tenant indemnifying the Landlord for all Injuries occurring in the Premises and with the Landlord indemnifying Tenant for all Injuries occurring in the Common Areas.

¹² **Without Regard to Tenant’s Insurance.** This language is added to address those cases in which the court has sought to interpret the Indemnifying Person’s indemnity in cases of ambiguity by examining the scope of an Indemnifying Person’s insurance covenant and the risks covered thereby to determine the intended breadth of the indemnity to scope and limits of the insurance.

¹³ **Independent of Worker's Compensation Insurance.** This language notes that the indemnity is intended by the parties not to be limited by the statutory risk allocation schemes set up in the comparative negligence statutes and the Workers' Compensation Act. A contractual indemnity by the employer of the injured person is necessary to overcome the Workers' Compensation Bar so as at least to pass back to the employer the employer's percentage of responsibility (if not all of the employee's damages in excess of the statutory workers' compensation limits to the employer's liability) which might otherwise be borne by the Indemnified Person absent the indemnity. The contractual indemnity should also be drafted to pass back to the employer the costs of defense of the employee's claim.

In *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983) the Texas Supreme Court held that an employer's negligence could not be considered in a third-party negligence action brought by an employee arising out of an accidental injury covered by workers' compensation insurance. The jury had determined that the accident was attributable as follows: plant owner's negligence (Petrofina)--43%, employer's negligence (Hydrocarbon Construction)--42%, and employee's negligence (Varela)--15%. The supreme court reversed the trial court's reduction of the damage award from \$606,800 to \$243,924, or 43% of total damages. The supreme court held that the Workers' Compensation Act is an exception to the Comparative Negligence Statute [then Article 2212a, § 2(b)] and disallowed contribution from the employer. The court concluded:

We hold that Article 8306, § 3 (the Texas Workers' Compensation Act) is an exception to Article 2212a, § 2(b) (the Comparative Negligence Statute). When read together those two Articles indicate the intent of the Legislature that where the third party defendant's negligence is greater than that of the employee, the employee shall recover the total amount of damages as found by the jury diminished only in proportion to the amount of the negligence attributed to the employee.

...

Further, a defendant's claim of contribution is derivative of the plaintiff's right to recover from the joint defendant against whom contribution is sought. (citing authorities) The Workers' Compensation Act, Article 8306, § 3, precludes any right by Varela to a cause of action against Hydrocarbon for common law negligence. (omitted authority) Since Varela had no cause of action against Hydrocarbon, Petrofina had no claim for contribution from Hydrocarbon. Since Petrofina had no claim for contribution, § 2(e) of Art. 2212a has no application to this case. *Id.* at 562-63.

The enforceability of a contractual indemnity passing back to the employer a third-party's negligence over the "Worker Compensation Bar" has been upheld. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990). The Texas Workers' Compensation Act provides that a subscribing employer has no liability to reimburse or hold another person harmless for a judgment or settlement resulting from injury or death of an employee "unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability." Texas Workers' Compensation Act, TEX. LABOR CODE § 417.004 (Vernon 2006), repealing TEX. REV. CIV. STAT. ANN. Art. 8308-4.04 (Vernon 1996), formerly Art. 8306, § 3(d) (Vernon 1986). § 417.004 of the Texas Labor Code provides as follows:

In an action for damages brought by an injured employee, a legal beneficiary, or an insurance carrier against a third party liable to pay damages for the injury or death under this Chapter that results in a judgment against the third party or a settlement by the third party, the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement *unless the employer executed, before the injury or death occurred, a written agreement with a third party to assume the liability.* (Emphasis added.)

Suits brought by the indemnitee (the Indemnified Person) under an indemnity agreement against the indemnitor (the Indemnifying Person) in the context of an employer having indemnified a third party for injuries occurring to the employer's employees due in part to the negligence of the employer are commonly referred to as "third-party- over actions". The "written agreement" requirement in the Workers' Compensation Act for overcoming the "Workers' Compensation Bar" prevents oral indemnity agreements from being enforced against an employer for employee injuries.

However, as noted *infra* in the discussion of the Texas Supreme Court's holding in *Ethyl Corp. v. Daniel Const. Co.*, care has to be used in drafting a contractual indemnity to overcome both the "express negligence" test of the Texas Supreme Court and the Workers' Compensation Bar. The court in *Ethyl* held that the contractual indemnity in the contract between Ethyl (the property owner) and Daniel (the contractor/employer) requiring Daniel to indemnify Ethyl for all injuries to persons "caused by the negligence or carelessness of Contractor" was not adequate either to indemnify Ethyl against an injury to Daniel's employee caused by the concurring negligence of Ethyl (90%) and Daniel (10%) or even against the portion of the negligence attributable to Daniel.

The indemnity provision did not expressly state that it covered injuries occurring as a result of the negligence of the indemnified person (Ethyl) and as to the portion attributable to Daniel, it did not expressly state that it covered cases where Daniel was concurrently negligent. "Ethyl next contends it is entitled to comparative indemnity to the extent of Daniel's negligence which the jury found to be 10%. However, the contract in question contains no provision for contractual comparative indemnity." *Ethyl* at 708. *Also see B-F-W Const. Co., Inc. v. Garza*, 748 S.W.2d 611 (Tex. App.--Ft. Worth 1988, *no writ*).

In *Monsanto Co. v. Owens-Corning Fiberglass Corp.*, 764 S.W.2d 293 (Tex. App.--Houston [1st Dist.] 1988, *no writ*), the employee of the subcontractor (Owens-Corning) sued the contractor (Monsanto) for personal injuries suffered on the job site. The employee had already collected workers' compensation benefits from the subcontractor. The contractor filed a third party action against its subcontractor seeking contractual indemnity. The court held the following provision in the subcontract **did not meet** the express negligence standard since it did not expressly indemnify the contractor for its own negligence:

Sub)Contractor (Owens-Corning) agrees to indemnify and save Monsanto (Contractor) and its employees harmless against any and all liabilities, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses (including costs of defense, settlement and reasonable attorney's fees) which any or all of them may hereafter suffer, incur, be

responsible for or pay out ... as a result of bodily injuries ... to any person or damage ... to any property occurring to or caused in whole or in part by, (Subcontractor) (or any of his employees), any of his (Sub)Subcontractors (or any employee thereof) directly or indirectly employed or engaged by either (Subcontractor) or any of his (Sub- subcontractors). (Emphasis and parenthetical designations added by author.)

The court noted that the term "negligence" is not found in the indemnity agreement. The indemnity did not mention indemnifying against the negligence of the contractor. Also, it did not mention indemnifying against the concurrent negligence of the subcontractor (the indemnifying party). Therefore, the court noted that the agreement did not provide for contractual comparative negligence. The indemnity contract neither covered the negligence of the contractor nor the subcontractor. *Id.* at 295. The indemnity also does not expressly require the employer (Indemnifying Person) to assume liability for injuries to its employees thereby overcoming the Workers' Compensation Bar.

¹⁴ **Survives Termination of Lease.** This provision is added to assure the Indemnified Person that the contractual indemnity does not terminate like the other covenants on the end of the Lease Term. Note, however, that the indemnity does not expressly state that it covers Injuries occurring after the end of the Lease Term but attributable acts or omissions of the Indemnified Party prior to the end of the Lease Term. The indemnity should be revised to address Injuries occurring in the Premises after the Term attributable to acts or omissions of Tenant during the lease term.

¹⁵ **"Caused."** The concept of causation has been addressed by authors of indemnity provisions using a variety of terminology, such as "caused by," "arising out of," and "due to".

"Due to." The phrase "due to" has been held to require "a more direct type of causation" than the phrase "arising out of." *Utica National Ins. Co. of Texas v. American Indemnity Co.*, 141 S.W.3d 198 (Tex. 2004) held that arising out of" does not require direct or proximate causation, while the phrase "due to" requires a more direct type of causation.

"Caused by." *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5th Cir. 1993) holding the indemnitor was not obligated to defend the indemnitee against all claims and suits, or for costs incurred in defense of baseless claims, since the indemnity clause required only that the indemnitor indemnify for injuries "**caused**" by acts or omissions of the indemnitee.

"Arising out of." The phrase "**arising out of**" has been the subject of recent cases. In *General Agents v. Arredondo*, 52 S.W.3d 762 (Tex. App.-San Antonio [4th Dist.] 2001, *no writ*) the court broadly construed the exclusion for "injuries **arising out of** a contractor's and subcontractor's operations" contained in a contractor's commercial general liability policy as not being limited to injuries caused by an act of the contractor or subcontractor. The court found that "all that is required is a causal connection". The court cited the following authorities for this conclusion:

Cf. *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156-57 (Tex. 1999) ("For liability to 'arise out of' in the context of an 'additional insured' endorsement does not require that named insured's act caused accident.") Indeed, in more recent cases, the Fifth Circuit has recognized that the phrase "arising out of" is "understood to mean '**originating from, 'having its origin in, 'growing out of, or 'flowing from.'**" *American States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir. 1998)(quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951)). Thus, a "claim need only bear an 'incidental relationship' to the excluded injury for the policy's exclusion to apply." *Bailey*, 13 F.3d at 370 (quoting *Continental Cas. Co. v. Richmond*, 763 F.2d 1076, 1080-81 (9th Cir. 1985).

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

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

By signing the below statement, the seller (meaning Faulk Management as the "seller" of janitorial services) agrees to ... indemnify ... Lufkin Industries, Inc. against loss ... caused by the seller, its employees, agents or any subcontractor arising out of or in consequence of the performance of this contract.

It is the intention of the Seller and/or Contractor to indemnify Lufkin Industries, Inc. even in the event that any such claims, demands, actions or liability arises *in whole* or in part from warranties, express or implied, defects in materials, workmanship or design, condition of

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

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

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

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

"Regardless of negligence" or "including, even if". In *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990), the Texas Supreme Court held the indemnity provision set out below met the express negligence test and required Christie, Inc. to indemnify Enserch for Enserch's negligent supervision of Christie, Inc.'s work as an independent contractor hired to service Enserch's pipeline. Parker, an employee of Christie, Inc., was asphyxiated when a gasket blew out causing a valve to leak natural gas into the concrete manhole vault where Parker was working. Parker's estate brought a wrongful death action against Enserch. The court first held that Enserch owed a duty of care to the employees of Christie, Inc., even though Christie, Inc. was an independent contractor, since Enserch had retained control of the manner that Christie, Inc. was to carry out its servicing contract. Enserch had furnished a procedures book for Christie's employees which outlined the procedures to be followed while working on the pipeline, and Enserch representatives frequently visited the job site and supervised Christie's employees. The supreme court followed the exception announced in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) to the general rule of *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976). The general rule adopted in *Abalos* is that an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. However, the court in *Redinger* created an exception by holding that "one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Id.* at 418 [citing RESTATEMENT (SECOND) OF TORTS § 414 (1977)]. The court upheld the following provision as requiring Christie, Inc. to indemnify Enserch for Enserch's negligent supervision:

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

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

The Texas Supreme Court in *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358 (Tex. App.--Dallas 1989), aff'd 817 S.W.2d 50, 56 (Tex. 1991) approved the following language as meeting the express negligence test:

14.9 Operator's Indemnification of Contractor: Operator (Diamond Shamrock n/k/a Maxus) agrees to ... indemnify ... Contractor (Moran Bros.) ... from and against all claims ... of every

kind ... without limit and **without regard to** the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees... on account of bodily injury, death or damage to property. ...

14.13 Indemnity Obligation: Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by such parties under the terms of this Contract, including without limitation, paragraphs 14.1 ... be without limit and **without regard to** the cause or causes thereof ... strict liability, or the negligence of any party, whether such negligence be sole, joint or concurrent, active or passive. (Underlining added.)

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

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

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

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

¹⁶ **"In Whole or In Part." Comparative Indemnity-Indemnifying for One's Own Share of Injury Caused by the Concurrent Negligence of the Indemnified Person and the Indemnifying Person.** The "in whole ... by ... Landlord" language expressly addresses the issue as to whether the Indemnifying Person's indemnity covers an Injury caused "solely" by the negligence of the Indemnified Person. The "in part ... by ... Landlord" language expressly addresses the issue as to whether the Tenant's (the Indemnifying Person's) indemnity is only as to Injuries caused solely by the acts or omissions of the Landlord (the Indemnified Person) or also covers Injuries caused in part by other persons. However, This language may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or comparative negligence. The indemnity provisions do not expressly state that the Indemnified Person is indemnified for the liability it has due to the negligence of the Indemnifying Person. This may result in the Indemnified Person being indemnified by the Indemnifying Person for the portion of the liability attributable to the Indemnified Person's negligence but not for the portion attributable to the Indemnifying Person's negligence.

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

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

Also see, *Monsanto Co. v. Owens-Corning Fiberglass Corp.*, 764 S.W.2d 293 (Tex. App.--Houston [1st Dist.] 1988, *no writ*). The employee of the subcontractor (Owens-Corning) sued the contractor (Monsanto) for personal injuries suffered on the job site. The employee had already collected workers' compensation benefits from the subcontractor. The contractor filed a third party action against its subcontractor seeking contractual indemnity. The court held the following provision in the subcontract **did not meet** the express negligence standard since it did not expressly indemnify the contractor for its own negligence:

(Sub)Contractor (Owens-Corning) agrees to indemnify and save Monsanto (Contractor) and its employees harmless against any and all liabilities, penalties, demands, claims, causes of

action, suits, losses, damages, costs and expenses (including costs of defense, settlement and reasonable attorney's fees) which any or all of them may hereafter suffer, incur, be responsible for or pay out ... as a result of bodily injuries ... to any person or damage ... to any property occurring to or caused in whole or in part by, (Subcontractor) (or any of his employees), any of his (Sub)Subcontractors (or any employee thereof) directly or indirectly employed or engaged by either (Subcontractor) or any of his (Sub- subcontractors). (Emphasis and parenthetical designations added by author.)

The court noted that the term "negligence" is not found in the indemnity agreement. The indemnity did not mention indemnifying against the negligence of the contractor. Also, it did not mention indemnifying against the concurrent negligence of the subcontractor (the indemnifying party). Therefore, the court noted that the agreement did not provide for contractual comparative negligence. The indemnity contract neither covered the negligence of the contractor nor the subcontractor. *Id.* at 295. The indemnity also does not expressly require the employer (Indemnifying Person) to assume liability for injuries to its employees thereby overcoming the Workers' Compensation Bar.

A similar example can be created for an injury to Landlord's employee occurring in the Common Areas that is caused by the joint negligence of the Landlord and the Tenant. The injured employee is barred from suing its employer (the Landlord) by the Workers' Comp Bar and thus sues the Tenant. Tenant Calls on Landlord to defend under Lease ¶C.6.

This point may be addressed by inserting the words "OR TENANT" following "IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD" in Lease ¶A.18 and (a similar revision would be made to Lease ¶C.6 to address Landlord's indemnity). See endnote 25.

¹⁷ **"Ordinary Negligence."** In Lease ¶A.18 Tenant indemnifies Landlord against Landlord's liability for Injuries occurring in the Premises even if the Injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord. This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Tenant for "all liabilities arising out of use of the Premises", "such as the liability of the Landlord due to its negligence or strict liability or for injuries to the Tenant's employees arising out of the sole or concurrent negligence of the Landlord. It thus indemnifies "Landlord" for the "Landlord's" sole and contributory negligence. In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) adopted the "express negligence" requirement. In *Ethyl*, the court observed

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

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

¹⁸ **"Strict Liability."** In order to protect an Indemnified Person for liability incurred by it under the doctrine of strict liability (liability without fault), the indemnity provision shifting this liability to the Indemnifying Person in order to be enforceable must expressly state that the Indemnifying Person indemnifies the Indemnified Person for its strict liability. In ¶A.15 Tenant covenants to indemnify Landlord all liabilities that are imposed on Landlord for Injuries occurring in the Premises, "even if (the) Injury is caused ... by the strict liability of Landlord." The fair notice doctrine has been extended to cases involving strict liability. The Texas Supreme Court held in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) that an indemnity agreement will include indemnification for strict statutory liability only if the agreement expressly states that the Indemnifying Person is to be liable for the Indemnified Person's strict liability. The court found that fairness dictates that such an "extraordinary shifting of risk" must be clearly and specifically expressed as to non-negligence based statutory strict liability in order to be enforced. The court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) in passing recognized that indemnity provisions shifting liability arising out of strict products liability are similarly enforceable, if fair notice has been given. *Citing Rourke v. Garza*, 511 S.W.2d 331, 333 (Tex. Civ. App.--Houston [1st Dist.] 1974), *aff'd*, 530 S.W.2d 794 (Tex. 1975)--in which the indemnity clause was held not to have been worded sufficiently so as to include strict products liability; *Dorchester Gas Corp. v. American Petrofina, Inc.* 710 S.W.2d 541, 543 (Tex. 1986)--also, which held that the indemnity clause in question did not clearly require the indemnitor to indemnify the indemnitee against strict products liability. The Dallas court in *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.--Dallas 1999, *no writ*)[an alarm security products liability case where the tenant indemnified the alarm company from claims by third parties, which included the claim of the landlord] found that the following provision clearly and specifically covered the Indemnified Person's negligence, breach of warranty, and strict product liability:

When purchaser (Arthur's Garage), in the ordinary course of business, has the property of others in his custody, or the alarm system extends to protect the property of others, purchaser agrees to and shall indemnify, defend, and hold harmless seller, its employees and agents for and against all claims brought by parties other than the parties to this agreement. This provision shall apply to all claims, regardless of cause, including seller's performance or failure to perform, and including defects in products, design, installation, maintenance, operation or non-operation of the system, whether based upon negligence, active or passive, warranty, or strict product liability on the part of seller, its employees or agents, but this provision shall

not apply to claims for loss or damage solely and directly caused by an employee of seller while on purchaser's premises.

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

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

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

BP/Fina Agreement. Fina shall indemnify, defend and hold harmless BP ... against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets ... and accruing from and after closing.

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

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

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

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

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

¹⁹ "**But Will Not Apply To.**" "**Except Sole Negligence of the Indemnified Person.**" The drafter of an indemnity clause can not use the exclusion clause as a means of impliedly including within the coverage clause by implication items not excluded. In *Singleton v. Crown Central Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987), the Texas Supreme Court found that the following provision failed the express negligence standard since the provision stated what was not to be indemnified--claims resulting from the sole negligence of the premises owner--rather than expressly stating that the premises owner was to be indemnified from its own negligence.

Contractor agrees to ... indemnify ... owner from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... excepting only claims

arising out of accidents resulting from the sole negligence of owner. (Emphasis added by author.)

Linden-Alimak, Inc. v. McDonald, 745 S.W.2d 82 (Tex. App.--Ft. Worth 1988, writ denied). The Fort Worth Court of Appeals reviewed an indemnity provision in an equipment rental agreement. An employee (McDonald) of the equipment lessee (Thomas S. Byrne, Inc.) filed suit against the equipment lessor (Linden-Alimak) to recover damages for personal injuries sustained while the leased crane was being erected. The equipment lessor filed a third party action against the lessee for indemnification. The court held that the following indemnity provision in the equipment lease agreement suffered the same defect as the provision in *Crown Central Petroleum*. The court found the indemnity language to be inadequate to indemnify the equipment lessor against its concurrent negligence. The indemnity, by excluding the lessor's sole negligence, did not include a case of lessor's concurrent negligence. Situations involving lessor's concurrent negligence were not mentioned (i.e., "in part" not mentioned).

It is expressly understood and agreed that Lessor shall not be liable for damages, losses and injuries of any kind whatsoever, whether to persons or property, or for any other loss arising from the operation, handling, use of, transportation of, or in any way connected with the said equipment or any part thereof from whatsoever cause arising, except direct damages, losses or injuries caused by Lessor's sole negligence. Lessee shall indemnify and save Lessor harmless from any and all claims, demands, liabilities, judgments, actions or causes of action of any nature whatsoever (except if caused by Lessor's sole negligence) arising out of the selection, possession, leasing, operation, control, use, maintenance, repair, adjustment or return of the equipment. (Emphasis added by author.)

The Texarkana Court of Appeals in *Texas Utilities Electric Co. v. Babcock & Wilcox*, 893 S.W.2d 739 (Tex. App.--Texarkana 1995, no writ) found that neither of the following indemnity provisions expressly covered the Indemnified Person's (Texas Utilities') concurrent negligence in causing injuries to an employee of Flour Daniel, a contractor employed by Texas Utilities.

[Babcock & Wilcox agree to indemnify Texas Utilities for claims against Texas Utilities for damages arising from] personal injury or death or damage to property of Company's [Babcock's] agents, servants and employees, as well as the agents, servants, and employees of Company's [Babcock's] subcontractor, whether or not arising from sole or concurrent negligence or fault of Purchaser [TU].

[Babcock & Wilcox] shall defend ... indemnify ... Purchaser [TU] and its ... agents ... from and against any and all claims ... of every kind and character whatsoever arising in favor of any person or entity (other than the agents, servants, and employees or [sic] [of?] Company [Babcock] or of Company's subcontractor, as provided in the paragraph immediately above), including ... claims ... on account of personal injuries or death, or damage to property arising out of or incident to the work performed hereunder with the only exception being that, as to claims arising in favor of persons or entities other than for injury, death, or damage to the agents, servants, and employees of Company [Babcock] or Company's subcontractor, Purchaser [TU] shall not be entitled to indemnification for claims, demands, expenses, judgments, and causes of action resulting from Purchaser's [TU] sole negligence.

The first indemnity does not cover injuries to employees of a contractor of Texas Utilities. The second indemnity does not cover Texas Utilities' concurrent negligence. The exception for Texas Utilities' sole negligence from the broad indemnity is not equivalent to an express inclusion of Texas Utilities' concurrent negligence.

Similar language ("regardless of whether or not such claim ... is **caused in part by a party indemnified hereunder**") does not meet the express negligence test: *Monsanto Co. v. Owens-Corning Fiberglass Corp.*, 764 S.W.2d 293 (Tex. App.--Houston [1st Dist.] 1988, no writ); *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App.--Houston [1st Dist.] 1995, writ denied).

"Except indemnified person's liability". In *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609 (Tex. 1950), 23 A.L.R.2d 1114 (1950), the court refused to extend the lessee's indemnity covering injuries to persons occurring on the leased premises from any cause to include liabilities arising out of defects in the premises where the indemnity contained an exception for "any liability which lessor would be liable." *Also accord Port Royal*.

²⁰ **"Gross Negligence."** Gross negligence is more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1997 and Supp. 2006). The test for gross negligence contains both an objective and a subjective component. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 21, 22 (Tex. 1994). Objectively, the defendant's conduct must involve an extreme degree of risk, which is a function of both the magnitude and the probability of the anticipated injury to the plaintiff. *Also see Wal-Mart Stores, Inc. v. Alexander*, 878 S.W.2d 322, 325-26 (Tex. 1993). Subjectively, there must be evidence that the defendant had actual, subject awareness of the risk involved, but nevertheless was consciously indifferent to the extreme risk. The defendant knew about the peril, but its acts or omissions demonstrated that it did not care. *Moriel*, at 21; *Alexander* at 326; *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1998). *Also see Universal Services Co., Inc. v. UNG*, 904 S.W.2d 638 (Tex. 1995) for a case arising under the common law definition of "gross negligence." The fact that a defendant exercises "some care" does not insulate the defendant from gross negligence liability. *See Moriel*, 879 S.W.2d at 20 (discussing cases before *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 921-22 (Tex. 1981) that erroneously focused on "entire want of care" part of the gross negligence definition in reasoning that "some care" defeated a gross negligence finding. In 1995 the Legislature substituted "malice" for gross negligence as the prerequisite for punitive damages. However, the Legislature also defined "malice" with a definition mirroring the definition of "gross negligence" in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994). TEX. CIV. PRAC. & REM. CODE § 41.001(7) (Vernon 1997 and Supp. 2006).

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

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

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

²¹ **"Willful Misconduct."** The court in *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 232-33 (Tex. App.--Houston [1st Dist.] 1994, writ denied) interpreted an exclusion from a contractor's indemnity contained in a construction contract between a commercial landlord and its contractor for "any claim arising out of the sole and gross negligence or willful misconduct of Owner (the commercial landlord, the Indemnified Person)" as including as an exclusion the landlord's "**knowing**" violation of the warranty of commercial habitability and/or "knowing deceptive trade practice" in its lease with the injured tenant. This case involved a shoe store that was put out of business in the landlord's shopping center by repeated flooding arising out of the action of a backhoe operator of a subcontractor of landlord's construction contractor. The case involved dual theories of recovery, the negligence of the contractor and the knowing deceptive trade practice and breach of warranty of the landlord. The backhoe operator accidentally broke a sewer line, and covered it up after he discovered his error instead of reporting the accident. The tenant reported to the landlord that water was seeping from a leak in the slab outside of its premises. The landlord, who was unaware of the backhoe operator's actions, repeatedly reassured the tenant after each of several floods, that it had corrected the problem when, in fact, it knew it had not. The court held that the intent of the parties by excluding gross negligence, also must have intended to exclude knowing conduct of the landlord, which is a "more culpable standard than gross negligence." The court noted that to hold otherwise would be to hold that the intent of the parties was that the indemnitees would not be entitled to indemnity for an act done with the mental state at the low end of the "continuum" of culpable mental states, but *would* be so entitled for an act done with a mental state that is higher on the scale, *i.e.*, an act that is *more* culpable than another for which they indisputably are not entitled to indemnity. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984).

The issue of the enforceability of an indemnity for an intentional tort (Tenneco's misappropriation and improper use of confidential information obtained in bidding process) was raised in *Tenneco Oil Co. v. Gulsby Engineering, Inc.*, 846 S.W.2d 599 (Tex. App.--Houston [14th Dist.] 1993, writ denied). However, the court of appeals was able to sustain the trial court's summary judgment in favor of Tenneco on the grounds that the indemnity provision in the contract with Gulsby Engineering specifically covered patent infringement suits, and therefore included Tenneco's and Gulsby's joint and several liability for having infringed the unsuccessful bidder's patent.

²² **"Of Landlord."** Presumably, the term "Landlord" in this exclusionary provision has the same meaning as "Landlord" in the first sentence of the indemnity. Tenant indemnifies "Landlord" for Injuries occurring in the Premises even if caused in whole or in part by Landlord's ordinary negligence, but this indemnity "will not apply to the extent an Injury is caused by the gross negligence of Landlord. The term "Landlord" is defined in the in the Definitions as being "Landlord and Landlord's agents, employees, invitees, licensees, or visitors."

²³ **Reciprocal Indemnity by Landlord.** The reciprocal indemnity by Landlord of Tenant in ¶C.6 mirrors the indemnity of the Tenant of the Landlord in ¶A15. Landlord indemnifies Tenant against Tenant's liability for Injuries occurring in the Common Areas even if the Injury is caused in whole or in part by the ordinary negligence or strict liability of Tenant. This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Landlord for "all liabilities arising out of use of the Common Areas", "such as the liability of the Tenant due to its negligence or strict liability or for injuries to the Landlord's employees arising out of the sole or concurrent negligence of the Tenant. It thus indemnifies "Tenant" for the "Tenant's" sole and contributory negligence. The concepts and issues discussed in footnotes 4 - 21 to Tenant's Indemnity apply to the terms employed in Landlord's indemnity of Tenant in ¶ C.6.

²⁴ **"Common Areas."** "Common Areas" is defined in the Basic Terms section of the Retail Lease. The risk allocation scheme adopted in the Texas Real Estate Forms Manual for Leases is to allocate responsibility to the Tenant for all Injuries occurring in the Premises and to allocate to the Landlord responsibility for all Injuries occurring in the Common Areas. The Retail Lease contains reciprocal indemnities with the Tenant indemnifying the Landlord for all Injuries occurring in the Premises and with the Landlord indemnifying Tenant for all Injuries occurring in the Common Areas.

²⁵ **Comparative Indemnity-Indemnifying for One's Own Share of Injury Caused by the Concurrent Negligence of the Indemnified Person and the Indemnifying Person.** See discussion at endnote 16 as to the author's concern that this language may not be adequate to indemnify the Tenant for the Landlord's comparative negligence for injuries occurring in the Common Areas concurrently caused by the concurrent negligence of Landlord and Tenant. This concern may be addressed by inserting the words "OR LANDLORD" following "IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT" in Lease ¶C.6.

²⁶ **Omission of Other Standard Releases and Waivers from Forms Manual.** The lease forms in the Forms Manual do not contain other typical forms of releases and waivers common to landlord-oriented lease forms (for example, limiting landlord's liability for breaches of the lease to its equity in the Building; disclaimers of liability for interruption in Essential Services). Note that any provision of the lease that encompasses a release, waiver, disclaimer or exculpation for a party's negligence must comply with the requirements of the express negligence test in order to be enforceable as to such negligence. Most such provisions in common usage are not drafted in a fashion that comply with the express negligence test!

²⁷ **Role of Insurance Addendum.** The Real Estate Form Manual's Lease forms rely on an Insurance Addendum to detail the insurance coverages required to be maintained by the parties. Manual Ch. 18 contains general explanations of the various insurance terms used and choices in the Addendum (for example, "comprehensive general liability" versus "commercial general liability", "business owners' policy", "employer's liability insurance", "excess liability insurance", "umbrella") and a short commentary on portions of common additional insured endorsement forms applicable to the leases (for example, ISO Additional Insured Endorsement Forms CG 20 10 07 04 - Owners, Lessees or Contractors, CG 20 11 01 96 Managers or Lessors of Premises, and CG 20 26 07 04 - Designated Person or Organization). These ISO Additional Insured Endorsement Forms are not contained in the Manual but two of ISO Additional Insured Endorsements are set forth in full in this Article as Forms E - G. Following each of these ISO Additional Insured Endorsement Forms is Author's Commentary on the Endorsement.

(Insurance Addendum ¶ A.1). The Insurance Addendum at Insurance Addendum ¶ A.1 contains a "check the box" choice between a commercial general liability policy (occurrence basis) or business owner's policy and a "check the box" choice of the following designations and various lines of coverage added by endorsement to the standard coverage of the selected liability form: designated location general aggregate limit, workers' compensation, employer's liability, business automobile liability, excess liability or umbrella liability (occurrence basis).

(Insurance Addendum A. 2). The Insurance Addendum provides at Insurance Addendum ¶ A.2a that the liability policy is to be endorsed to name the Landlord and its Lienholder as "additional insureds" and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract;" at Addendum ¶ A.2b that the additional insured endorsement must not exclude coverage for the sole or contributory ordinary negligence of Landlord or Lienholder; at Insurance Addendum ¶ A.2c that the property insurance must contain waivers of subrogation of claims against Landlord and Lienholder; and at Addendum ¶ A.2d that Tenant is to deliver to Landlord copies of the certificate of insurance and copies of any additional insured and waiver of subrogation endorsements.

(Insurance Addendum ¶ A.3). The Insurance Addendum at Insurance Addendum ¶ A.3 contains the further requirement that Landlord's approval is required with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates; the amounts of any deductibles; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.

²⁸ **"Release of Claims."** The waiver of subrogation provision (Lease ¶ E. 4) is both a release of claims between the parties as to property damages by reason of fire or the elements and a covenant to notify the insurance issuers of the release and to have the insurance companies endorse, if necessary, the policies so as to prevent invalidation of the policies because of the release. The waiver of subrogation provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test. The release is written in conspicuous type and meets the requirements of the fair notice test. The Insurance Addendum supplements this contractual waiver of the property insurance carrier's right of subrogation only as to the Tenant's property insurance. Insurance Addendum ¶ E.2c provides that the Tenant's property insurance policies must contain waivers of subrogation of claims against Landlord and Tenant. The Insurance Addendum does not contain a reciprocal provision requiring that the Landlord's property insurance policies contain a waiver of subrogation claims against Tenant.

²⁹ **"Each Other."** Use of the phrases "each other" and the "releasing party's property insurance" indicate that the terms "Landlord" and "Tenant" are the named parties to the lease as opposed to the additional persons listed in the Definitions section as being the "Landlord" or the "Tenant". If so, does the "releasing party" release the other party's "agents, contractors, employees, invitees, licensees, or visitors" if the property damage or loss of business or revenues is caused in whole or in part by their negligence?

Texas courts strictly construe releases and will not extend them to unnamed persons. In *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971), the court held that a release discharges only those tortfeasors that it specifically names or otherwise specifically indemnifies. The Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) approved the decisions in *McMillen*, and in *Lloyd v. Ray*, 606 S.W.2d 545, 547 (Tex. Civ. App.—San Antonio 1980, *writ ref'd n.r.e.*) and *Duke v. Brookshire Grocery Co.*, 568 S.W.2d 470, 472 (Tex. Civ. App.—Texarkana 1978, *no writ*) holding that the mere naming of a general class of tortfeasors in a release does not discharge the liability of each member of that class. A tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortuous event is not in doubt.

Also see *Angus Chemical Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138 (Tex. 1997) where the court held that the release by an injured party of a tortfeasor does not release the tortfeasor's insurer; *Illinois Nat. Ins. Co. v. Preez*, 794 S.W.2d 373 (Tex. App.—Corpus Christi 1990, *writ den'd*).

³⁰ **Limited to Property Damages.** See discussion of pre-loss waiver of subrogation provisions in leases at endnote 14 to the discussion of Form C Manual Form 11-34 Insurance Addendum to Lease and the discussion of Form L ISO Commercial Insurance Conditions Form CP 00 90. Note the release is only as to claims or liabilities for damage that are covered by the releasing party's property insurance (or that would have been covered by the required insurance if the party fails to maintain the property coverage required by the lease). The parties are not releasing each other for the (b) and (c) portion of "Injuries" as defined in the Definitions. Also, there is no companion contractual waiver of the liability insurance carrier's right of subrogation against the party causing the non-property damage Injury.

³¹ **Release as to Insurable Damages.** Should the waiver extend to specified risks or only to the extent of the proceeds actually recovered from the insurer? If the waiver is only as to the insurance proceeds, then the parties are exposed for the deductible or losses in excess of the other party's insurance coverage.

³² **Fair Notice and Express Negligence Requirements.** The waiver of subrogation provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test. The release is written in conspicuous type and meets the requirements of the fair notice test.

In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the following provisions contained in work orders of Dresser and Houston Fishing Tools Company were examined by the Texas Supreme Court:

Dresser Provision:

There are obviously many conditions in and about the well of which we can have no knowledge and over which we can have no control. Therefore, we (Dresser) accept this service order only on condition that we do not guarantee any particular result from services to be performed hereunder. Except where damage or injury caused by gross or willful negligence on our part, (Page) shall indemnify (Dresser) and hold (Dresser) free and harmless from all claims for personal injuries, including death and damage, including subsurface damage or injury to the well and damages attributable to pollution or contamination and cost of control and removal thereof, alleged to have been caused by our operations under this service order, including claims alleging that injuries or damages were caused by (Dresser's) negligence, whether such claims are made by (Page), were caused by (Dresser's) negligence, whether such claims are made by (Page), by (Page's) employees, or by third parties. (Emphasis added by author.)

Houston Fishing Tools Provision:

(A) (Houston Fishing Tools) shall not be liable to (Page) on any theory of legal liability against which (Houston Fishing Tools) may legally contract for any injury or damage to persons ... or to property (whether subsurface or not, including reservoir loss) and any losses arising out of such damage where such damage is sustained in connection with, arising out of, or resulting from the service or material used in the service.

(D) The theories of liability referred to in (paragraph (A) ... include, but are not limited to, breach of express or implied warranty and the sole or concurrent negligence of (Houston Fishing Tools). (Emphasis added by author.)

Page Petroleum drilled a well located in Colorado County to a depth of 11,000 feet and contracted with Dresser to conduct log tests. Houston Fishing Tools was called in to "fish" out Dresser's equipment that became stuck in the well bore. While Houston Fishing Tools was attempting to dislodge the equipment, it lost several thousand feet of wireline and drill pipe down the hole which could not be retrieved. Page attempted to clear the hole by performing a side procedure. This side procedure was not successful; therefore, Page plugged and abandoned the well and was forced to drill a new well. Page then brought suit against Dresser and Houston Fishing Tools alleging negligence and seeking compensation for damages to the original well. Both Dresser and Houston Fishing Tools defended the suit based on the contractual provisions recited above. The jury attributed liability 50% to Page, 40% to Houston Fishing Tools and 10% to Dresser. The court of appeals construed the Dresser provision as an "indemnity" and therefore could not exculpate Dresser from its own negligence. Since the Dresser provision was an indemnity, the court held that reference to Page indemnifying Dresser from claims by Page (see underlined language in Dresser provision) was clearly inadvertent and repugnant to the intent of the parties. Once the court of appeals determined the clause to be an indemnity, it found that as an indemnity it could not be an exculpation or release operating to extinguish a claim between the parties to a suit.

Conversely, the court of appeals found that the Houston Fishing Tools provision was a "release" which exculpated Houston Fishing Tools from liability to Page.

The supreme court held that compliance with the fair notice requirements is a question of law for the court, overruling *Goodyear Tire & Rubber Co. v. Jefferson Const. Co.*, 565 S.W.2d 916 (Tex. 1978). The supreme court then found that the Dresser and the Houston Fishing Tools provisions were both not conspicuous as a matter of law.

Indemnity, Releases, Exculpations: Effect the Same. Following the reasoning of the dissent in the court of appeals' decision, the supreme court found that, whether the provision was couched as an indemnity, a release or an exculpation provision, the effect was the same, to transfer the risk of liability for one's own negligence. The court stated its reasoning as follows:

As Justice Vance stated in his dissenting opinion in the court of appeals, these agreements, whether labeled as indemnity agreements, releases, exculpatory agreements, or waivers, all operate to transfer risk. ... Although we recognized that most contractual provisions operate to transfer risk, these particular agreements are used to exculpate a party from the consequence of its own negligence. Because indemnification of a party for its own negligence is an extraordinary shifting of risk, this Court has developed fair notice requirements which apply to these types of agreements. The fair notice requirements include the express negligence doctrine and the conspicuous requirement. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990). ... the conspicuous requirement mandates "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." *Ling & Co. v. Trinity Sav. & Loan Ass'n*, 482 S.W.2d 841, 843 (Tex. 1972).

...

[w]e can discern no reason to fail to afford the fair notice protections to a party entering into a release when the protections have been held to apply to indemnity agreements and both have the same effect. ... This is especially true because of the difficulty often inherent in distinguishing between these two similar provisions. *Id.* 508.

Adoption of UCC Standard. The supreme court in *Dresser Industries, Inc. v. Page Petroleum, Inc.* adopted the "conspicuous" standard set forth in § 1.201(10) of the Texas UCC applicable to contracts for the sale of goods in this case dealing with the sale of services. The court held that the UCC standard would be applicable both to indemnity and releases that relieve a party, in advance, of responsibility for its own negligence. Section 1.201(10) provides

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

TEX. BUS. COMM. CODE ANN. § 1.201(10) (Vernon 1994 and Supp. 2006).

In both the Dresser and the Houston Fishing Tool contracts, the provisions are located on the back of a work order in a series of numbered paragraphs without headings or contrasting type. Furthermore, the contracts were found to be not so short that every term in the contracts must be considered conspicuous.

For the same policy reasons that the supreme court in *Dresser* extended the conspicuous requirement to releases, it held that the companion express negligence doctrine also was to be applied to releases.

... we hold that the fair notice requirements of conspicuousness and the express negligence doctrine apply to both indemnity agreements and to releases in the circumstances before us; thus, we disapprove of the *Whitson* opinion. [referring to *Whitson v. Goodbodys, Inc.*, 773 S.W.2d 381, 383 (Tex. App.--Dallas 1989, writ denied)].

Dresser Industries, Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 509 (Tex. 1993); *Doe v. Smithkline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.--Austin 1993, writ granted).

³³ **Exclusion from Release of Damages Caused by Gross Negligence of Released Party.** Note that the releasing party is not releasing its claim against the released party for property damage "to the extent the damage or loss is caused by the gross negligence ... of the released party." This exclusion is incorporated into the release even though the releasing party's insurance covers this risk; and thus this release does not waive the releasing party's right of subrogation against the released party in this case.

B. Supplement to Risk Management Provisions**Supplement to Risk Management Provisions**

Lease

Date: March 1, 2007

Landlord: Shopping Center Owner, L.P.

Tenant: Retail Tenant, L.L.C.

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

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

1. **Affiliates.** “**Affiliates**” means with respect to any person or entity, each stockholder, subsidiary, officer, director, member, partner, heir, executor, personal representative, and affiliates.
2. **Attorney Fees.** “**Attorney Fees**” include the Indemnified Person’s attorneys’ fees and expenses incurred by attorneys, such as postage, courier expenses, long distance charges, travel expenses, and copying costs (whether incurred by an attorney as part of its overhead or to third party services), incurred in the defense of a Claim or Action and to collect on the indemnity of the Indemnifying Person.
3. **Claim or Action.** “**Claim**” or “**Action**” means any and all claims, actions, causes of action, suit or proceeding (whether in tort or contract, law or equity, or otherwise) against an Indemnified Person with respect to which an Indemnifying Person or an Indemnified Person may have liability or incur a loss.
4. **Court or Other Costs.** “**Court or Other Costs**” include costs of investigation and expert witnesses; filing fees.
5. **Indemnified Persons.** “**Indemnified Persons**” means (a) in the case of the indemnity by Tenant the following persons: Landlord and its Affiliates, agents, its management company, Lienholder, employees, invitees, licensees, or visitors and (b) in the case of the indemnity by Landlord the following persons: Tenant and its Affiliates, agents, employees, invitees, licensees, or visitors.
6. **Indemnifying Person.** “**Indemnifying Person**” means (a) in the case of the indemnity by Tenant the following persons: Tenant and its successors and assigns and (b) in the case of the indemnity by Landlord the following persons: Landlord and its successors and assigns.
7. **Injury.** “**Injury**” includes (a) harm to or death of an employee of either an Indemnifying Person or an Indemnified Person; and (b) bodily injury.
8. **Loss, Liability or Expense.** “**Loss**,” “**Liability**” or “**Expense**” includes losses, liabilities, damages (including actual, consequential and punitive), expenses (including consultant and expert fees), charges, assessments, fines, penalties, liens, judgments, settlements, and Litigation Expenses (as herein defined).
9. **Litigation Expenses.** “**Litigation Expenses**” include Attorney’s Fees and Court or Other Costs.

10. **Occurrence.** “**Occurrence**” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.² Occurrences include accidents that happen after the end of the Term of the lease but are caused by acts or omissions during the Term of the lease.

B. INDEMNITY.

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

THE INDEMNITY CONTAINED IN THIS PARAGRAPH (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.³

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

THE INDEMNITY CONTAINED IN THIS PARAGRAPH (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT OR LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.³

3. **ENVIRONMENTAL LAW COMPLIANCE; INDEMNITY.** Notwithstanding anything in the lease to the contrary, there is hereby excepted from the mutual indemnities provided by ¶¶A.18 and C.6, indemnification for Environmental Liabilities. Indemnification for Environmental Liabilities is separately addressed in the Environmental Liability and Indemnification Addendum to this lease.⁴

C. Management of Claims.

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

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

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

b. **Selection of Counsel.** Promptly after sending the notice, the Indemnifying Person shall choose and employ independent legal counsel of reputable standing. After sending the notice, the Indemnifying Person is entitled to contest, pay, settle or compromise the Claim or Action as it determines, subject to the provisions of ¶C.6 of this supplement.

3. **Indemnifying Person’s Declining Defense.** An Indemnifying Person may refuse to provide a defense of the Claim or Action, if it reasonably believes that the Claim or Action, for which a defense is sought, is not required to be defended pursuant to the terms of this lease, and a refusal to defend under such circumstances shall not be a breach of this lease. However, if the Indemnified Person shall be required by a final judgment to pay any amount in respect of any obligation or liability against which the Indemnifying Person is required to indemnify under this lease, the Indemnifying Person shall promptly reimburse the Indemnified Person in an amount equal to the amount of such payment. Further, if

such refusal, or any failure, to provide a defense against an Claim or Action is not to have been reasonably justified, then the Indemnifying Person shall be obligated to pay all of the out-of-pocket expenses incurred by the Indemnified Person in defending the Claim or Action or Action, including, but not limited to the value of the time, including travel time, that all of the employees, agents and representatives of the Indemnified Person dedicated to, or expended in furtherance of, the defense of the Claim or Action. The Indemnifying Person, who fails to provide a defense required by this lease to be provided, without any further action required by any Indemnified Person, hereby intentionally relinquishes and waives any and all rights of every nature to dispute, defend against or contest, in any manner (including but not limited to the waiver of every defense of every nature) the claim of the Indemnified Person, regarding the amount of, reasonableness of, necessity for or the Indemnifying Person's obligation to pay, the costs, fees and expenses, and other damages incurred by the Indemnified Person in defending the Claim or Action for which a defense by this lease was refused by the Indemnifying Person.

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

- (1) the Indemnifying Person fails or refuses to defend the Claim or Action on or before the ___ day after the Indemnifying Person has given written notice to the Indemnifying Person of the Claim or Action;
- (2) in response to a petition by the Indemnified Person, a court of competent jurisdiction rules that the Indemnifying Person failed or is failing to vigorously prosecute or defend such Claim or Action;
- (3) such Claim or Action may result in liabilities which would not be fully indemnified hereunder;
- (4) representation of the Indemnifying Person and the Indemnified Person by the same counsel would, in the opinion of that counsel, constitute a conflict of interest; or
- (5) the Claim or Action may result in a criminal proceeding against the Indemnified Person.

5. **Providing and Assisting with the Defense.**

- a. **Qualification of Counsel.** The Indemnifying Person shall provide a defense with qualified counsel that is selected by the Indemnifying Person, and such counsel shall be deemed to have been approved by the Indemnified Person, without further action by the Indemnified Person, unless the Indemnified Person establishes (a) a substantive and material conflict of interest with such counsel; or (b) a fair and substantial cause or reason to withhold such approval, such as the incompetence or significant inexperience of such counsel.
- b. **Cooperation.** The Indemnified Person shall cooperate in the defense and shall make reasonably available all records, witnesses, evidence and other tangible items, in the possession, custody or control fo the Indemnified Person, deemed relevant by the Indemnifying Person. The Indemnified Person shall also take all such other action, and sign such documents, as the Indemnifying Person shall deem to be reasonably necessary to defend such Claims or Actions in a timely manner.

6. **Litigation Expenses.**¹

- a. **Expenses Before and After Assumption of the Defense.** The Indemnifying Person shall pay for the Litigation Expenses incurred by the Indemnified Person

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

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

7. **Compromise and Settlement.**⁵

- a. **General Rule.** If an Indemnifying Person assumes the defense of an Claim or Action, it may not effect any compromise or settlement of the Claim or Action without the consent of the Indemnified Person affected by the compromise or settlement, and the Indemnified Person has no liability with respect to any compromise or settlement any Claim or Action effected without its consent [*add: but such consent shall not be unreasonably withheld*].⁴
- b. **Exceptions.** Despite the provisions of ¶C.7a, an Indemnifying Person may effect a compromise or settlement of an Claim or Action without obtaining the consent of the effected Indemnified Person if the following conditions are met:
- (1) There is no finding or admission of any violation of law or any violation of the rights of any person and no effect on any other Claim that may be made against the Indemnified Person;
 - (2) The sole relief provided is monetary damages that are paid in full by the Indemnifying Persons; and
 - (3) The compromise or settlement includes, as an unconditional term, the claimant's or the plaintiff's release of the Indemnified Person, in form and substance satisfactory to the Indemnified Person, from all liability in respect of the Claim or Action.

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

¹ "Defense costs." **Precondition - express negligence test satisfied.** In *Fisk Electric Co. v. Constructors & Assoc.s, Inc.*, 888 S.W.2d 813 (Tex. 1994), the supreme court found that the express negligence requirement for the enforcement of an indemnity agreement is not an affirmative defense to be alleged and proved by the defendant Indemnifying Person, but rather is a rule of contract construction. The court held that Fisk's obligation to pay attorney's fees arose out of its duty to indemnify. Absent a duty to indemnify, there is no obligation to pay attorney's fees. The supreme court declined to carve out an exception to the express negligence rule for contracts which although they did not expressly indemnify the Indemnified Person for its own negligence, clearly, expressly or broadly covered the Indemnified Person's defense costs. Also see *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App.—Houston [1st Dist.] 1995, writ denied), holding no right to attorney's fees absent an enforceable indemnity provision.

Attorney's fees. The expense of defending a liability suit and in subsequently enforcing the contractual indemnity are reimbursable when the Indemnified Person recovers contractual indemnification from the Indemnifying Person. An Indemnified Person's attorney's fees in defending a liability suit are recoverable from the Indemnifying Person as "indemnified damages" even though not expressly mentioned in the indemnity provision. Attorney's fees may be awarded to the Indemnified Person pursuant to TEX. CIV. PRAC. & REM. CODE § 38.001(8) (Vernon 1997) in connection with a suit against the Indemnifying Person for its breach of its contract of indemnity. *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.--Dallas 1999, *no writ*). The purpose of indemnification is to make the Indemnified Person whole. *Tubb v. Bartlett*, 862 S.W.2d 740, 751 (Tex. App.--El Paso 1988, *writ denied*); *Continental Steel Co. v. H. A. Lott, Inc.*, 772 S.W.2d 513, 517 (Tex. App.--Dallas 1989, *writ denied*); *Texas Const. Assoc., Inc. v. Balli*, 558 S.W.2d 513 (Tex. Civ. App.--Corpus Christi 1977, *no writ*); *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200 (Tex. Civ. App.--Houston 1959), *rev'd on other grounds*, 325 S.W.2d 126 (1959) and *vacated on other grounds*, 326 S.W.2d 915 (Tex. Civ. App.-- Houston 1959); *Barnes v. Calgon Corp.*, 872 F. Supp. 349, 353 (E.D. Tex. 1994).

Costs. However, a different rule may apply to "costs" and "expenses" beyond attorney's fees. In *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.--Dallas 1999, *no writ*) the court held that failure of the indemnity provision to expressly cover the Indemnified Person's litigation costs prevented recovery of the following expenses incurred by its attorney: filing fees, courier fees, postage, telephone expenses, long distance charges, and fax charges. The court considered these costs to be included within the hourly billing rates and reasonable fees of the attorney, unless the indemnity contract expressly covered these items as an Indemnified Matter.

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

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

² **Occurrence.** "Occurrence" has been defined by use of the definition given to this term in ISO's CG 00 01 Commercial General Liability Policy. If a broader definition is intended then the definition can be revised to read "including but not limited to." However, expanding the definition risks expanding the indemnity beyond insurance coverage.

³ **Comparative Indemnity.** See endnotes 16 and 25 to Form A, the Retail Lease, for a discussion of the express negligence doctrine and "comparative negligence". In order for an Indemnified Person to be indemnified for the portion of the liability caused by the Indemnifying Person's negligence, the indemnity clause must expressly state that it indemnifies the Indemnified Person for the Indemnifying Person's share of the concurrently caused Injury.

⁴ **Environmental Law Compliance and Indemnity.** The Forms Manual Retail Lease does not contain provisions addressing environmental liability and indemnity a part from the covenants of Tenant in ¶A.3 to obey all applicable laws relating to the use, condition, and occupancy of the Premises and Shopping Center, ¶A.11 to repair, replace and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear and tear excepted, and ¶B.4 not to permit waste; and the covenants of Landlord in ¶C.2 to obey all applicable law with respect to Landlord's operation of the Shopping Center, ¶C.4 to repair, replace, and maintain certain portions of the Shopping Center. The risk allocation provisions reflected by the mutual indemnities in ¶¶ A.18 and C.6 are drafted to allocate and apportion risk for "Injury" on a geographic basis, according to occurrence of Injury either in the Premises or in the Common Areas. The risk of environmental liability is not expressly addressed in ¶¶ A.18 and C.6, other than to note that the indemnity is regardless of the strict liability of the Indemnified Person. This author recommends that a separate addendum to the Retail Lease be drafted to address environmental covenants and risk allocation for environmental liabilities. Environmental covenants and indemnities have a special "jargon" arising out of federal and state laws. However, since a landlord's or tenant's environmental liabilities can be grounded in strict liability, the "express negligence" and "fair notice" tests must be satisfied in drafting such provisions. See endnote 18 to Form A, the Retail Lease, for a discussion of the strict liability and Texas law requirements for indemnity.

⁵ **No right to indemnity when voluntarily settle an indemnified liability absent contractual settlement authority.** Settlement by one joint tortfeasor extinguishes any common law and statutory contribution rights such person may have had. *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19 (Tex. 1987); *International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932 (Tex. 1988); TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(d) (Vernon 1997). In *MAN GHH Logistics GMBH v. Emscor, Inc.*, 858 S.W.2d 41 (Tex. App.--Houston [14th Dist.] 1993, *no writ*), the court of appeals denied both the seller and the buyer of a crane contribution and indemnity against the other after each had separately settled with the claimants for \$3,000,000 for deaths and injuries sustained when a 152 foot

tower crane fell over while being dismantled. The seller of the crane (Emscor) voluntarily settled two death claims in October, 1990. In November, 1990, the buyer of the crane (MAN GHH) agreed to a \$3,000,000 judgment in favor of the two families. Additionally, the court denied both the seller and the buyer respectively any right to "contractual contribution" pursuant to the reciprocal indemnity agreements contained in the Asset Purchase Agreement between seller and buyer. The Asset Purchase Agreement provided as follows:

Indemnification by Sellers. Sellers (Emscor), jointly and severally, hereby indemnify and hold harmless the Purchaser and its respective successors and assigns from and against any loss, damage, or expense (including reasonable attorney's fees) caused by or arising out of:

- (1) any breach or default in the performance by Sellers of any covenant or agreement of Sellers contained in this Agreement;
- (2) any breach of warranty or inaccurate or erroneous representation made by Sellers herein, in any Exhibit hereto, or in any certificate or other instrument delivered by or on behalf of Sellers pursuant hereto;
- (3) third party claims regarding Emscor's management of Purchaser's Wolff tower cranes prior to the Closing Date;
- (4) third party claims regarding any matter relating to title to or Emscor's maintenance of the Purchase Assets prior to the Closing Date; or
- (5) any liability arising out of any and all actions, suits, proceedings, claims, demands, judgments, costs, and expenses (including reasonable legal and accounting fees) incident to any of the foregoing.

The court dismissed each party's request for contractual indemnity and/or contribution from the other party. The court found that the quoted provision did not protect the buyer (and conversely the reciprocal provision did not protect the seller) because (1) it did not provide that the other party would reimburse the settling party for any voluntary settlements made with any plaintiffs; (2) the provisions did not mention "contribution" and failed to discuss any apportionment of fault; and (3) the provision did not express any intent by the parties for a claim for reimbursement. *Id.* at 43.

In *Liberty Steel Co. v. Guardian Title Co. of Houston, Inc.*, 713 S.W.2d 358, 360 (Tex. App.--Dallas 1986, *no writ*), the court held there did not exist an equitable right in the Indemnified Party (Guardian Title Co.) to settle a claim (an abstract of judgment bonded around) when the Indemnifying Person did not voluntarily step in and assume the defense against the adverse claimant. The Indemnified Person had sent a letter to the Indemnifying Person requesting the Indemnifying Person to "honor the terms" of the indemnity agreement. The court found that the indemnity contract did not contain a provision obligating the Indemnifying Person to offer to undertake the defense of the claim and that the Indemnified Person never made a "tender of the defense" to the Indemnified Person. Therefore, the Indemnified Person could not obtain reimbursement of the amount paid to settle the adverse claim when the Indemnified Person settled the claim in violation of the following contractual provision:

no payment, compromise, settlement, accord or satisfaction shall be made without the prior written approval of Liberty Steel (the Indemnifying Person)....

A court has upheld a provision in a contract that authorized a right-of-way owner to compromise and settle all claims for damage within the right-of-way in connection with an indemnity provision with a contractor. *Phillips Pipeline Co. v. McKown*, 580 S.W.2d 435 (Tex. Civ. App.--Tyler 1979, *writ ref'd n.r.e.*). Also see *Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.2d 340 (Tex. App.--Tyler 2001, *no writ*) and *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex. App.--Houston [14th Dist.] 2000, *writ denied*) upholding settlement authority granted by an Indemnifying Person to an Indemnified Person.

Reasonable and prudent. For a settling Indemnified Person to recover an amount of the settlement from this Indemnifying Person, the Indemnified Person must show the potential liability to a claimant and that the settlement was reasonable, prudent and made in good faith under the circumstances. *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 824 (Tex. 1972); *overruled on other grounds by Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987); *Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.2d 340 12-00-001-00123-CV (Tex. App.-Tyler 2001, *no writ*) and *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex. App. [14th Dist.] 2000, *writ denied*); *Texas Property Casualty Ins. Gty. Ass'n v. BSA*, 947 S.W.2d 682 (Tex. App.-Austin 1997); *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475, 477 (Tex. App.--Corpus Christi 1986, *writ ref'd n.r.e.*). Absent an unconditional contractual right to settle, an Indemnified Person who settles a claim without obtaining a judicial determination of his liability, assumes in his action for reimbursement, the burden of proving facts that might have rendered him liable to claimant, as well as the reasonableness of the amount he paid. *Aerospatiale Helicopter Corp. v. Universal Heath Services, Inc.*, 778 S.W.2d 492, 500 (Tex. App.--Dallas 1989), *cert. denied*, 498 U.S. 854, 111 S. CT. 149, 112 L.Ed.2d 115 (1990). Determining whether a settlement of a wrongful death case is reasonable involves experience and specialized knowledge. An attorney must review and analyze, among other things, the underlying facts, the identity of the defendant, the damage elements available to a plaintiff, the specific injuries or losses incurred by a plaintiff, the settlement amounts received in similar cases, the complexity of the case, as well as the strength and resources of the opposing counsel. See *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). Also see *Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.3d 340 12-00-001-00123-CV (Tex. App.-Tyler 2001, *no writ*) where court found that La Gloria settlement was reasonable, prudent and made in good faith and thus was to be reimbursed by Sieber & Calicutt pursuant to the indemnity agreement between La Gloria and Sieber & Calicutt. The court in *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex. App. [14th Dist.] 2000, *writ denied*) upheld a settlement as being reasonable and entirely covered by the indemnity agreement even though another defendant was also released because the expert's testimony supported the trial court's finding that the settlement amount was reasonable as to the Indemnified Person's potential liability independent of the other released defendant's potential liability; no apportionment of the settlement amount was required.

Good faith. An Indemnified Person can not recover to reimburse himself for amounts paid in settlement, if the settlement was not made in good faith. *H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 880 (Tex. App.--Corpus Christi 1996, *writ denied*). Additionally, even though an indemnity agreement vests settlement authority in the Indemnified Person, a contractual requirement of settling in "good faith" can lead to liability on the part of the settling Indemnified Person. The court in *H.S.M. Acquisitions, Inc.* found the terms of an agreed judgment between a claimant and the Indemnified Person to be collusive, in part because the settling parties agreed to keep the terms of the judgment confidential and not to file an abstract or other public notice of the judgment.

In *Associated Indemnity Corp. v. CAT Contracting, Inc.*, 918 S.W.2d 580 (Tex. App.--Corpus Christi 1996, *no writ*), the court found that an Indemnified Person breached a covenant of good faith contained in the settlement authorization provision of an indemnity agreement supporting a performance bond when the bonding company (Surety) settled a bond claim without adequate investigation of the circumstances of the claim, and without advance notice to the principal and an opportunity for the principal to argue its case with the obligee. The court further found a common law duty of good faith and fair dealing under these circumstances, the breach of which gave rise to mental anguish damages on the part of the owners of the principal.

Express negligence prerequisite. If the indemnity clause does not pass the express negligence test and the plaintiff's injuries arise from a negligence claim or through a strict liability claim against the Indemnified Person, then the Indemnifying Person is not liable for a settlement negotiated by the Indemnified Person, even though the indemnity agreement contains an absolute power to settle. *Coastal States Crude Gathering Co. v. Natural Gas Odorizing, Inc.*, 899 S.W.2d 289 (Tex. App.--Houston [15th Dist.] 1995, *no writ*)-Coastal not able to collect back on \$10,500,000 settlement paid to persons injured by fire and explosion fueled by propane gas odorized and sold by Coastal using odorizing chemicals supplied by Natural Gas Odorizing. Indemnity agreement failed to mention liability arising out of strict liability and was contained on back of purchaser order in inconspicuous fashion (same black ink as rest of order form).

OTHER COMMON LANDLORD-ORIENTED RISK MANAGEMENT PROVISIONS

- E. RELEASE.**¹ TO THE FULLEST EXTENT PERMITTED BY LAW, TENANT HEREBY WAIVES ALL CLAIMS AGAINST LANDLORD, ITS AGENTS AND EMPLOYEES, FOR ANY INJURY TO TENANT OR ANY OF TENANT'S EMPLOYEES OR ANYONE PERMITTED BY TENANT OR LANDLORD, ITS EMPLOYEES OR AGENTS, TO BE UPON THE PREMISES OR IN, ON OR ABOUT THE SHOPPING CENTER EXCEPT TO THE EXTENT SUCH CLAIM IS COVERED BY LANDLORD'S INSURANCE OR THAT WOULD HAVE BEEN COVERED BY LANDLORD'S INSURANCE IF IT HAD MAINTAINED THE INSURANCE REQUIRED TO BE MAINTAINED BY IT BY THIS LEASE. IN NO EVENT SHALL LANDLORD BE LIABLE FOR ANY INJURY WHICH IS CAUSED BY STEAM, WATER, RAIN OR SNOW OR OTHER THINGS WHICH MAY LEAK INTO, ISSUE OR FLOW FROM ANY PART OF THE SHOPPING CENTER OR FROM THE PIPES OR PLUMBING WORKS, INCLUDING THE SPRINKLER SYSTEM THEREIN OR FROM ANY OTHER PLACE OR FOR ANY INJURY CAUSED BY OR ATTRIBUTABLE TO THE CONDITION OR ARRANGEMENT OF ANY ELECTRIC OR OTHER WIRING OR OF SPRINKLER HEADS. IN NO EVENT SHALL LANDLORD BE LIABLE TO TENANT FOR ANY ACT OR OMISSION OF ANY OCCUPANT OF THE SHOPPING CENTER OTHER THAN LANDLORD, ITS AGENTS AND EMPLOYEES, OR OF ANY OWNER OTHER THAN LANDLORD OR OCCUPANT OF ANY PROPERTY ADJOINING THE SHOPPING CENTER. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY.**²
- F. LIMITATION OF LIABILITY.**¹ SHOULD LANDLORD BE A PARTNERSHIP, CORPORATION, OR LIMITED LIABILITY COMPANY, THE OBLIGATIONS OF LANDLORD UNDER THIS LEASE DO NOT CONSTITUTE PERSONAL OBLIGATIONS OF THE INDIVIDUAL PARTNERS OF THE PARTNERSHIP OR SHAREHOLDERS, OFFICERS OR DIRECTORS OF THE CORPORATION, OR MEMBERS OF THE LIMITED LIABILITY COMPANY, AS THE CASE MAY BE, AND TO THE FULLEST EXTENT PERMITTED BY LAW, TENANT SHALL LOOK SOLELY TO THE REAL ESTATE THAT IS THE SUBJECT OF THIS LEASE AND TO NO OTHER ASSETS OF LANDLORD FOR SATISFACTION OF ANY LIABILITY IN RESPECT OF THIS LEASE AND WILL NOT SEEK RECOURSE AGAINST THE INDIVIDUAL PARTNERS OF THE PARTNERSHIP OR SHAREHOLDERS, OFFICERS OR DIRECTORS OF THE CORPORATION, OR MEMBERS OF THE LIMITED LIABILITY COMPANY, AS THE CASE MAY BE, NOR AGAINST ANY OF THEIR PERSONAL ASSETS FOR SUCH SATISFACTION. IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT ANY MONEY JUDGMENT RESULTING FROM ANY DEFAULT OR OTHER CLAIM ARISING UNDER THIS LEASE AGAINST LANDLORD SHALL BE SATISFIED ONLY OUT OF THE NET RENTS, ISSUES, PROFITS AND OTHER INCOME ACTUALLY RECEIVED FROM THE OPERATION OF THE SHOPPING CENTER, AND IN NO EVENT GREATER THAN \$_____ (2007 DOLLARS).³ **THE LIMITATION OF LIABILITY IN THIS PARAGRAPH WILL APPLY EVEN IF THE INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE, GROSS NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE INJURY IS CAUSED BY THE WILLFUL MISCONDUCT OF THE RELEASED PARTY.**²

¹ **Exculpatory Clauses.** An exculpatory clause is a "contract clause which releases one of the parties from liability for his or her wrongful acts." BLACK'S LAW DICTIONARY (6th ed., 1990), p. 566. One commentator has explained the rationale for inclusion of exculpatory clauses in leases as follows:

[A]n exculpatory clause imposes on the tenant the burdens of bearing risk and obtaining insurance. Requiring the tenant to obtain insurance is efficient because the tenant knows the value of property on the leased premises, the risk to which it is exposed, and the extent of probable liability to third parties. The landlord's knowledge of these factors is almost certainly inferior.... Exculpatory clauses also result in a large savings in time and money to the parties and the legal system by avoiding the costs associated with the assigning of 'fault' in the event of casualty loss. Under the exculpatory clause, the loss is born by the tenant and its insurance company.

Jones, *Private Revision of Public Standards: Exculpatory Agreements in Leases*, 63 N.Y.U.L. Rev. 717, 733-734 (1988). Note almost all states invalidate exculpatory clauses that purport to relieve a landlord from liability for breach of statutory duties, such as building or fire codes. Annot. *Validity of Exculpatory Clause in Lease Exempting Lessor From Liability*, 49 A.L.R. 3d 321, § 10, pp. 351-356.

² **Express Negligence Test.** See [endnote 32](#) to the discussion of the waiver of claims/subrogation of the Retail Lease in this article as [Form A](#). To the extent that a release, exculpation provision or limitation of liability provision releases, waives, exculpates or limits another person's liability for its negligence, the provision must satisfy the express negligence test in order to be enforceable in Texas. This point is emphasized by a recent case, *Sydlik v. REEill, Inc.*, 2006 WL 1389552 (Tex. App.–Hou. [14th Dist.] 2006) where the court stated the rule as to pre-injury releases as follows: "If a release does not satisfy both of the fair notice requirements, then it is unenforceable. Thus, fair notice is the chief test we must apply, and conspicuousness and express negligence are merely the two prongs of that test." See *Polley v. Odom*, 957 S.W.2d 932 (Tex. 1997).

Consideration should be given to incorporating into exculpatory clauses the court-announced criteria for upholding "as is" clauses, such as reciting that the consideration paid by the lessor to the lessor (the rent) has been lowered due to the inclusion of exculpatory clauses.

³ **Additional Topics to Address.** Additional topics to be addressed in a limitation of liability clause are whether (a) equitable or injunctive relief is to be waived and (b) to carve out of the limitation of liability insurance proceeds available to one or both parties.

C. Forms Manual Form 11-34 Insurance Addendum to Lease

Insurance Addendum to Lease	
Lease	
Date:	March 1, 2007
Landlord:	Shopping Center Owner, L.P.
Tenant:	Retail Tenant, L.L.C.
This insurance addendum is part of the lease. ¹	
A. Tenant agrees to—	
1. Maintain the property and/or liability insurance policies required below ² (mark applicable boxes) and such other insurance coverages and/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises:	
Type of Insurance or Endorsement	Minimum Policy or Endorsement Limit
<i>Liability Insurance Policies Required of Tenant:</i>	
<input checked="" type="checkbox"/> Commercial general liability ³ (occurrence basis) ⁴	Per occurrence: ⁵ \$ 1,000,000 General Aggregate: ⁶ \$ 5,000,000
<i>Or</i>	
<input type="checkbox"/> Business owner's policy ⁷	Per occurrence: ⁵ \$ _____ General Aggregate: ⁶ \$ _____
<i>Required Endorsements to Tenant's General Liability or Business Owner's Policy:</i>	
<input checked="" type="checkbox"/> Designated location(s) general aggregate limit ⁸	\$5,000,000
<input type="checkbox"/> _____	\$ _____
<i>Additional Liability Insurance Policies Required of Tenant:</i>	
<input checked="" type="checkbox"/> Workers' compensation ⁹	\$ 500,000
<input checked="" type="checkbox"/> Employer's liability ¹⁰	\$ 1,000,000
<input checked="" type="checkbox"/> Business automobile liability ¹¹	\$ 1,000,000
<input type="checkbox"/> Excess liability ¹²	\$ _____
<i>Or</i>	
<input type="checkbox"/> Umbrella liability ¹³ (occurrence basis) ⁴	\$ _____
[Include any other desired endorsements. See chapter 18 of the Forms Manual.]	
<i>Property Insurance Policies:</i>	
<input checked="" type="checkbox"/> Causes of loss—special form ¹⁴	100 percent of replacement cost ¹⁵ of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property ¹⁶ located in the Premises.
<i>Or</i>	

Business owner's policy⁷ 100 percent of replacement cost¹⁵ of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property¹⁶ located in the Premises.

*Required Endorsements:*¹⁷

Business income and additional expense:¹⁸ Sufficient limits to address reasonably anticipated business interruption losses for a period of _____ months

Boiler and machinery¹⁹ \$ _____

Flood²⁰ \$ _____

Earth movement²¹ \$ _____

Ordinance or law coverage²² \$ _____

Glass²³ Sufficient limits to cover plate glass

Signs²⁴ Sufficient limits to cover exterior signage

[Include any other desired endorsements. See chapter 18 of the Forms Manual.]

2. Comply with the following additional insurance requirements:

- a. The commercial general liability (or business owner's property policy) must be endorsed²⁵ to name Landlord²⁶ and Lienholder as "additional insureds"²⁷ and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract."²⁸
- b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence²⁹ of Landlord or Lienholder.³⁰
- c. Property insurance policies must contain waivers of subrogation of claims against Landlord and Lienholder.³¹
- d. Certificates of insurance³² and copies of any additional insured³³ and waiver of subrogation endorsements³⁴ must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

3. Obtain the approval of Landlord and Lienholder with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates, and other evidence of Tenant's Insurance; the amounts of any deductibles or self-insured retentions³⁵ amounts under Tenant's Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.³⁶

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term:³⁷

Type of Insurance	Minimum Policy Limit	
<input checked="" type="checkbox"/> Commercial general liability ³ (occurrence basis) ⁴	Per occurrence: ⁵	\$ 5,000,000
	Aggregate: ⁶	\$ 50,000,000
<input checked="" type="checkbox"/> Causes of loss—special form ¹⁴ property	100 percent of replacement cost ¹⁵ of the Shopping Center exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirements of all lessees ¹⁶	

¹ **Geographic Indemnity But Different Approach for Insurance.** The Insurance Addendum specifies the types of insurance to be maintained by Tenant and Landlord, but utilize different means to identify the geographic responsibilities for Landlord and Tenant as to property insurance versus liability insurance. The Insurance Addendum identifies the portion of the Building to be covered by Tenant's property insurance as "the replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations...." Landlord's property insurance is to cover "the replacement cost of the Shopping Center exclusive of ... the rebuilding requirements of all lessees." However, the Lease does not similarly state the geographic area to be covered by the Tenant's and the Landlord's liability insurance but relies on the geographic coverage terms and definitions of the parties' liability policies.

² **Required Insurance.** The Insurance Addendum does not cover in detail the coverages required to be contained in the Tenant's and the Landlord's liability policies other than to provide that each is an occurrence basis policy and is to have the minimum coverage levels specified. The Insurance Addendum relies on Landlord's approval authority in ¶ A.3 as opposed to specifying in the Insurance Addendum minimum standards to be met in the policy to be furnished by Tenant. Insurance Addendum ¶ A.3 provides that Tenant is to obtain Landlord's approval of the form of Tenant's insurance policies, endorsements and certificates.

³ **General Liability Insurance.** Probably the most common error encountered in specifying CGL coverage is the use of outdated descriptive language. The **commercial general liability** form replaced the **comprehensive general liability** form in all states during the mid 1980s. However, many contracts will specify "*comprehensive* general liability insurance." Along with that, these contracts will often require a number of endorsements that were needed on this old form, but which were incorporated into the commercial general liability form. These include the following:

- Contractual liability endorsement (See endnote 28 for a discussion of "indemnity insurance").
- Broad form property damage endorsement.
- Personal and advertising injury liability endorsement.
- Host liquor liability endorsement.

This old terminology should be avoided in modern contracts. Commercial general liability policies typically and the ISO general liability policy form, which is an industry standard, is divided into Sections, Coverages, Exclusions, Definitions and Endorsements. The ISO CG policy is set up in the following parts:

Declarations.

Section I - Coverages

Coverage A. Bodily Injury and Property Damage Liability. (Note "Bodily Injury" and "Personal Injury" are different terms)

1. Insuring Agreement
2. Exclusions

Coverage B. Personal and Advertising Injury Liability

1. Insuring Agreement
2. Exclusions

Coverage C. Medical Payments

1. Insuring Agreement
2. Exclusions

Supplementary Payments - Coverages A and B

Section II - Who Is An Insured

Section III - Limits of Insurance

Section IV - Commercial General Liability Conditions

Section V - Definitions

Endorsements

The ISO commercial general liability policy categorizes liabilities into three categories: Coverage A for "Bodily Injury" and "Property Damage", Coverage B for "Personal and Advertising Injury Liability" and Coverage C for "Medical Payments." ISO defines each of these terms in the policy as follows:

"Bodily Injury" is "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

"Property Damage" is "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured."

"Personal and Advertising Injury" is injury, including consequential bodily injury, arising out of one or more of the following offenses: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organizations good, products or services; oral or written publication, in any manner, of material that violates a person's right of privacy; the use of another's advertising idea in the insured's advertisement; infringing upon another's copyright, trade dress or slogan in the insured's advertisement.

"Medical Payments" is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured's operations.

⁴ **Occurrence Basis.** Occurrence basis liability policies cover injuries or damages caused by an "occurrence" that takes place within the "coverage territory," but only if the injuries or damages "occur" during the policy period, regardless of when the claim is actually made. ISO defines and "occurrence" as "an accident, including continuous or repeated exposure to substantially the same

general harmful conditions." **"Claims-made"** liability policies cover claims actually made while the policies are in effect, regardless of when the injuries occurred. Typically, claims-made policies exclude coverage for occurrences prior to the policy's inception date. Some issuers of claims-made policies will amend their policy for an additional premium to cover "full prior acts." Coverage under a claims-made policy ends when the policy expires, unless renewed with retroactive coverage or with a coverage extension known as "extended reporting period" or "tail" coverage.

⁵ **Per Occurrence.** Another antiquated term that is often used is "**combined single limit.**" Versions of the CGL form used prior to 1986, and many other types of liability policies, had what were called "split limits." Split limits applied different limits to property damage liability and bodily injury liability. There was a "combined single limit endorsement" that could be added to the policy to make both bodily injury and property damage liability coverage subject to the same occurrence limit. This has been incorporated into the commercial liability form but without the terminology "combined single limit." Therefore, this term conveys no meaning and should generally be avoided.

Antiquated Terminology	Current Terminology
Comprehensive general liability insurance	Commercial general liability insurance
Public liability insurance	Commercial general liability and umbrella liability insurance
Manufacturers and contractors ("M&C") liability insurance	Commercial general liability insurance
Owners, landlords and tenants ("OL&T") liability insurance	Commercial general liability insurance
Contractual liability insurance	Commercial general liability insurance
Public liability insurance	Commercial general liability insurance
Independent contractors (protective) coverage	Commercial general liability insurance
Additional named insured, named insured, coinsured	Commercial general liability insurance
	Insured status using ISO endorsement CG 20 XX or equivalent (Use CG 20 10 for construction contracts, CG 20 11 for premises leases, CG 20 28 for equipment leases.)
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO forms' separation of insureds clause
Broad form comprehensive general liability endorsement	Commercial general liability insurance
Broad form property damage endorsement	Commercial general liability insurance
Combined single limit ("CSL")	Per-occurrence limit, general aggregate limit, and products-completed operations aggregate limit
Fire damage legal liability	Damage to premises rented to you.

⁶ **General Aggregate.** "General Aggregate Limit" is the maximum amount the insurer is required to pay during the policy period for Coverage A damages ("**Bodily Injury**" and "**Property Damage Liability**"), except bodily injury or property damage included within products-completed operations hazard, Coverage B damages ("**Personal and Advertising Injury Liability**"), and Coverage C expenses ("**Medical Payments**"). The General Aggregate Limit operates independently of the Products-Completed Operations Aggregate Limit. "**Products-Completed Operations Limit**" is the maximum amount the insurer is required to pay during the policy period for "products-completed operations" hazard. The products-completed operations hazard includes bodily injury and property damage occurring away from premises owned or rented by the named insured and arising out of the named insured's products or work, excluding products in the possession of the named insured, work not yet completed or abandoned, or products in transit.

⁷ **Business Owner's Policies.** A Business owner's policy is a package policy (covering commercial liability and commercial property insurance) and is a less costly alternative to separate commercial liability insurance and commercial property insurance policies. It is generally available to smaller non-manufacturing business. Large businesses that do not qualify for a business owner's policy purchase "**commercial package policies**" which combine into a single policy commercial property insurance, commercial liability insurance and lines such as employee dishonesty, crime and fidelity coverage, ordinance or law coverage, boiler and machinery insurance, liquor liability and hired and non-owned auto liability insurance.

⁸ **Designated Location Endorsement.** If the liability policy covers multiple locations or projects, its limits may be exhausted by claims at the other locations or projects. If the limits have been negotiated between the parties as the minimum coverages for this transaction, the policies will need to be endorsed to make them applicable in full to this location or a separate policy purchased for this location.

⁹ **Worker’s Compensation Insurance.** Worker’s compensation insurance is a statutory program that imposes strict liability on employers for injuries to employees occurring while the employees are acting in the scope of employment but limits the maximum recovery against the employer to a schedule of maximum recoveries. If an employer does not participate in the program, the employer is denied the common-law defenses of assumed risk, negligence of fellow employees, and contributory negligence. TEX. LABOR CODE ANN. § 406.033(a)(Vernon 2006). If the employer is not a subscriber to the worker’s compensation insurance system, there is no statutory limit on recovery by the injured employee against the employer.

Although an Indemnifying Person’s (tenant’s, contractor’s or subcontractor’s) workers’ compensation insurance will not eliminate the potential liability of the Indemnified Person (the landlord, owner or contractor in the above parenthetical examples), it may provide a buffer against potential claims and make it less likely that the Indemnified Person will be sued by an injured employee of the Indemnifying Person. Because workers’ compensation statutes limit the recovery by an injured employee from the employer, an indemnification provision is appropriate so as to ensure that the employer remains ultimately liable for damages in excess of the statutory workers’ compensation limits.

¹⁰ **Employer’s Liability Coverage.** Employer’s liability insurance provides additional coverages to the employer not contained in the state-specified form of worker’s compensation insurance.

¹¹ **Business Automobile Liability Policy.** Business automobile liability policy terminology:

Antiquated Terminology	Current Terminology
Comprehensive auto liability insurance	Business auto coverage form
Additional insured or coinsured status (unless a vehicle lease)	Insured status
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO forms' separation of insureds clause
Combined single limit	Each accident limit

¹² **Excess Liability Policy.** Excess liability insurance provides coverage in excess of scheduled underlying primary liability policies and payment is made only after payment has been made under the scheduled primary layer policy. The schedule both to excess liability policies and umbrella policies state the amount of underlying coverage required. Excess liability policies rely on the underlying primary policy for the terms of the insuring agreement and exclusions.

¹³ **Umbrella Policy.** Umbrella liability insurance, unlike an excess liability policy, has its own insurance agreement and exclusions and provides “drop down” coverage upon exhaustion of the limits of the underlying primary policy. An umbrella policy may provide coverage for claims not covered by the primary liability policy, subject to a self-insured retention. Differences may arise between coverages in a primary policy and an umbrella policy.

¹⁴ **Property Insurance Policy.** Outdated terminology requiring that the policy provide “fire and extended coverage” is often used in contracts. “Extended coverage” refers to an endorsement that was once added to a standard fire policy to cover the perils now insured under ISO’s basic causes of loss form. Since this endorsement is no longer used, a better approach to requiring this coverage would be to refer to the ISO “basic,” “broad,” or “special” causes of loss form. Prior property insurance forms used the terms “risk” and “perils.” Pre-“causes of loss” property insurance was written either on a “named peril” basis which insured property against loss or damage from causes of loss expressly enumerated in the policy or an “all risks” basis, which insured property against loss or damage from all causes of loss except those which were expressly excluded. “Fire and extended coverage” insurance was a named peril property insurance.

AVOID OUTDATED AND MISLEADING PROPERTY INSURANCE TERMINOLOGY	
Antiquated Terminology	Current Terminology
Fire and extended coverage or extended coverage endorsement	Basic causes of loss form
Additional named insured	Additional insured, loss payee, or mortgagee clause.

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

The ISO commercial property insurance is a form comprised of the following documents combined to make the policy: the ISO form CP 00 10, Building and Personal Property Coverage Form; declarations (ISO form IL 00 19, or a variation); one of the 3 forms of causes of loss forms (CP 19 19, 10 20 or 10 40); commercial property conditions (CP 10 90); common policy conditions (IL 00 17); endorsements describing property covered, additional limits and optional coverages.

Commercial property insurance covers “**Buildings**” and “**Business Personal Property**.” In this context, “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. See Endnote 16 for a discussion of “Business Personal Property”. “Business Personal Property” means personal property located within the Building and personal property out in the open within 100 feet of the Building. Business Personal Property includes furniture and fixtures; machinery and equipment; stock (merchandise held in storage or for sale, raw materials and in-process or finished goods), all other personal property owned by the named insured and used in its business; labor, materials, or services furnished by the named insured on the personal property for others; the named insured’s use interest as tenant in improvements and betterments (for example, fixtures, alterations, installations or additions to a structure occupied but not owned by the named insured which are acquired or made at the expense of the named insured but are not legally removable by the named insured); leased personal property for which the named insured has a contractual responsibility to insure; and personal property of others that is under the care, custody or control of the named insured and located in or on the Premises. Business Personal Property does not cover accounts, bills, currency, money, notes, securities; automobiles held for sale; personal property while airborne or waterborne; electronic data.

¹⁵ **Replacement Cost.** “Replacement cost” is the cost of repairing or replacing insured property at time of the occurrence of the loss, without reduction for loss of value through depreciation. Recovery is limited to the lesser of (a) the policy limit, (b) the cost to replace the lost or damaged property with other property of comparable material and quality and used for the same purpose, or (c) the amount actually spent to repair or replace the damaged or lost property. “**Actual cash value**” means replacement cost of the covered property at the time of loss with like-kind and quality less physical depreciation. Depreciation may be determined by consideration of age, condition at time of loss, obsolescence and other factors causing deterioration. An “**agreed value endorsement**” is an optional endorsement used where the named insured and the insurer agree upon the actual cash value or the replacement cost of the covered property before the policy is written and agree that co-insurance will not apply. “**Inflation guard**” is an optional endorsement designed to offset potential inflation by specifying a percentage in the declarations by which the coverage will increase annually as to the portion of the covered property specified.

¹⁶ **Business Personal Property Coverage.** “Business Personal Property” means personal property located within the Building and personal property out in the open within 100 feet of the Building. Business Personal Property includes furniture and fixtures; machinery and equipment; stock (merchandise held in storage or for sale, raw materials and in-process or finished goods), all other personal property owned by the named insured and used in its business; labor, materials, or services furnished by the named insured on the personal property for others; the named insured’s use interest as tenant in improvements and betterments (for example, fixtures, alterations, installations or additions to a structure occupied but not owned by the named insured which are acquired or made at the expense of the named insured but are not legally removable by the named insured); leased personal property for which the named insured has a contractual responsibility to insure; and personal property of others that is under the care, custody or control of the named insured and located in or on the Premises. Business Personal Property does not cover accounts, bills, currency, money, notes, securities; automobiles held for sale; personal property while airborne or waterborne; electronic data.

¹⁷ **Endorsements Not Listed in Insurance Addendum.** In addition to the endorsement choices listed in the Insurance Addendum, there are other endorsement which might be appropriate, for example, an endorsement to increase the coverage available under the property insurance policy for debris removal. “**Debris removal**” is usually included as part of the covered expense. The ISO commercial property form limits coverage to up to \$10,000 if (a) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (b) the cost of debris removal exceeds 25% of the sum of the paid loss plus deductible. An increase to these limits may be purchased by using ISO CP 04 15 Debris Removal Additional Limit of Insurance.

¹⁸ **Business income and additional expenses.** This type of insurance covers two types of loss: loss of earnings (formerly called “business interruption insurance”) and extraordinary additional expenses. Frequently recovery is limited to the length of time required to rebuild or repair the damaged property, plus an additional 30 days for recover business that may have been lost to competitors. ISO CP 0030 or ISO CP 00 32 (excludes extra expense coverage). “Business Income Rental Value” may be added to either of these forms insurance. Rental value protects the landlord against loss of rents during reconstruction and abatement of rentals if the abatement results from a loss under a named cause of loss in the property insurance.

¹⁹ **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 form CP 12 72 Joint or Disputed Loss Agreement.

²⁰ **Flood Insurance.** Flood losses are commonly excluded from property insurance policies. Flood losses are losses caused by rising waters, back up of storm sewers and storm surges. The Flood Disaster protection Act of 1973 mandated that federally regulated lending institutions could not “make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified ... as an area having special flood hazards and in which flood insurance has been made available under the national Flood Insurance Act of 1968 without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. 42 U.S.C.A. § 4012a(b)(1). Regulations implementing the flood insurance program are found at 44 C.F.R. pts. 59-78 (2006). See also TEX. LOC. GOV’T CODE ANN. 240.901 (Vernon 2005); TEX WATER CODE ANN. §§ 16.311-.324 (Vernon 2000 & Supp. 2005). Coverage can be obtained for these losses through flood insurance, a difference in conditions policy, or as an endorsement to a property policy.

²¹ **Earth Movement.** Earth movement losses, including loss due earthquake shocks, mud slides and volcanic eruptions is typically excluded from property insurance coverage. Coverage for these events can be affected through earthquake insurance (IS form CP 10 40), a difference in conditions policy, or by an endorsement.

²² **Ordinance or Law Coverage.** Ordinance or law coverage may be purchased using ISO CP 04 05 to cover the cost above the limit available under the ISO property insurance for cost of construction incurred to comply with an ordinance or law. The base form ISO property insurance limits such coverage to the lesser of \$10,000 or 5% of the policy limits.

²³ **Glass Insurance.** Damage to plate glass caused by vandalism or settling of the building is commonly excluded in property policies. Coverage can be obtained through “plate glass insurance,” issued by endorsement or as a separate policy.

²⁴ **Signs Insurance.** Exterior signage is not covered under most property insurance policies and its coverage for damage to exterior signage must be added by endorsement or covered under a separate policy.

²⁵ **Standard Form Endorsements.** General liability insurance such as that provided in the standard commercial general liability (CGL) coverage form developed by Insurance Services Office, Inc. (ISO), is the basic source of contractual liability coverage for most of the loss exposures created by hold harmless agreements. For this reason, it is also the policy with respect to which additional insured status is most often requested as a complement to or reinforcement of the hold harmless agreement. A number of standard endorsements have been developed by ISO to address the coverage requirements of various categories of additional insureds.

Number designations for ISO’s standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1985 *endorsement* forms for use in connection with its commercial general liability policy. *Endorsement* is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement’s promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction.

Each ISO designation is composed of four elements. The following is an example for the Endorsement Form appearing as Form F to this article called “CG 20 26 07 04”:

CG	20	26	07 04
The “CG” prefix in the endorsement’s designation identifies it as part of the ISO commercial general liability form series, introduced in	The first set of numbers identifies the “group” to which the endorsement form belongs. ISO endorsements are grouped according to	The second set of numbers identifies this endorsement within its group—in this case it indicates which additional insured endorsement is	The final four numbers in the endorsement designation identify the endorsement’s edition date. ISO has revised most of its standard

<p>1986. Prior to this time, ISO designated this series as "GL" in connection with its <i>comprehensive</i> general liability forms.</p>	<p>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.</p>	<p>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." A copy of Endorsement CG 20 26 07 04 is found in this article as <u>Form F</u>.</p>	<p>endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "07 04" or July 2004. November 1985 is the initial date of all ISO forms for the "CG" system. The <i>coverage</i> forms have been revised a number of times since then and currently bear an edition date of 10 01. Many of the <i>endorsement</i> forms were revised at the same time as the coverage forms and also bear a similar edition date.</p>
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The following is the ISO CGL Form Categories grouped by function:

Category Name	Category Number
Coverage Forms and Amendatory Endorsements	0
State Amendatory Endorsements	01 and 26
Termination and Suspension Endorsements	2
Deductible Endorsements	3
Additional Coverage Endorsements	4
Additional Insured Endorsements	20
Exclusion Endorsements	21
Special Provisions for Certain Types of Risks Endorsements	22
Coverage Amendment Endorsements	24
Amendment of Limits Endorsements	25
Claims-Made Only Endorsements	27
Miscellaneous Coverage Forms Endorsements	28 and 29
Underground Storage Tank Endorsements	30
Miscellaneous Endorsements	99

The following is a listing of all of the ISO Additional Insured Endorsements—Category 20.

Additional Insured—Club Members	CG 20 02
Additional Insured—Concessionaires Trading Under Your Name	CG 20 03
Additional Insured—Condominium Unit Owners	CG 20 04
Additional Insured—Controlling Interest	CG 20 05
Additional Insured—Engineers, Architects or Surveyors	CG 20 07
Additional Insured—Users of Golfmobiles	CG 20 08
Additional Insured—Owners/Lessees/Contractors (A)	CG 20 09
Additional Insured—Owners/Lessees/Contractors (B)	CG 20 10
Additional Insured—Managers or Lessors of Premises	CG 20 11
Additional Insured—State or Political Subdivisions—Permits	CG 20 12
Additional Insured—State or Political Subdivisions—Permits Relating to Premises	CG 20 13
Additional Insured—Users of Teams, Draft or Saddle Animals	CG 20 14
Additional Insured—Vendors	CG 20 15

Additional Insured–Townhouse Associations	CG 20 17
Additional Insured–Mortgagee, Assignee or Receiver	CG 20 18
Additional Insured–Charitable Institutions	CG 20 20
Additional Insured–Volunteers	CG 20 21
Additional Insured–Church Members, Officers and Volunteer Workers	CG 20 22
Additional Insured–Executors, Administrators, Trustees/Beneficiaries	CG 20 23
Additional Insured–Owners or Other Interests from Whom Land Has Been Leased	CG 20 24
Additional Insured–Elective or Appointive Executive Officers of Public Corporations	CG 20 25
Additional Insured–Designated Person or Organization	CG 20 26
Additional Insured–Co-owner of Premises	CG 20 27
Additional Insured–Lessor of Leased Equipment	CG 20 28
Additional Insured–Grantor of Franchise	CG 20 29
Additional Insured–Oil/Gas Operations–Non-Operator, Working Interests	CG 20 30
Additional Insured–Engineers, Architects or Surveyors Not Engaged by the Named Insured	CG 20 32
Additional Insured–Owners, Lessees or Contractors–Automatic Status When Required in Construction Agreement with You	CG 20 33
Additional Insured–Lessor of Leased Equipment–Automatic Status When Required in Lease Agreement with You	CG 20 34
Additional Insured–Grantor of Licenses–Automatic Status When Required by Licensor	CG 20 35
Additional Insured–Grantor of Licenses	CG 20 36
Additional Insured–Owners, Lessees or Contractors–Completed Operations	CG 20 37

²⁶ **Naming “Landlord” as an Additional Insured.** ¶ A.2a provides for “Landlord” and Lienholder to be named as “additional insureds.” The term “Landlord” is given broad meaning in the Definitions section of the Retail Lease. “Landlord” is defined as meaning “Landlord and its agents, employees, invitees, licensees, or visitors.” If it is intended that persons in addition to the named Landlord is to be listed as an additional insured as being protected by the additional insured endorsement, then consideration should be given to specifically listing the most important of these persons in the Schedule to the additional insured endorsement form where additional insureds are to be identified.

²⁷ **Coverage Afforded to an Additional Insured.** Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured’s acts or omission. An additional’s insured’s vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner’s liability for its contractor’s acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors* (2005); and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429 (1966). It has been urged that limiting additional insured coverage to the additional insured’s vicarious liability is illusory and against public policy. See the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured’s vicarious liability for the named insured’s negligence, or even to cases where the named insured is concurrently negligent with the additional insured.

Express negligence test not applicable to insurance covenant.

In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), cert. den’d, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed. 2d 45 (1993), the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring Getty to be listed as an additional insured on NL Industries’ liability policies in a case where the indemnity provision excluded indemnity for Getty’s negligence but the insurance provision did not expressly state that the insurance was to cover injuries due to Getty’s negligence. The court reviewed the following provision:

Seller (NL Industries-the chemical supplier) agrees to maintain at Seller’s sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser’s Purchasing Department evidencing such insurance with insurers acceptable to Purchaser (Getty - the chemical buyer):

...	
Workmen’s Compensation	\$500,000
Statutory Employer’s Liability	
General Liability:	\$500,000

Bodily Injury
 ...
 Automobile Liability: \$500,000
 Bodily Injury
 ...

All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.

Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations or other damages resulting from injury to any person ... arising out of or incident to the performance of the terms of this Order by Seller ... Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller. (Emphasis added by author.)

Previously, in a 1986 case ("*Getty Round 1*"), Getty had been unsuccessful in seeking indemnity against NL Industries. *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App.--Corpus Christi 1986, writ *ref'd n.r.e.*). Getty lost *Getty Round 1* when the court determined that the contractual indemnity provision meant what it said: "Seller shall not be responsible for any losses ... solely caused by the negligence of Purchaser." The facts giving rise to *Getty Round 1* are as follows. Getty purchased various chemicals from NL Industries for Getty's oil production and exploration operations in the Midland, Texas area. A barrel of chemical demulsifier delivered by NL Industries to Getty exploded in the vicinity of a Getty well, killing Carl Duncan, an independent contractor working for Getty. Duncan's estate and survivors brought wrongful death and survival actions against Getty and NL Industries (*Getty Round 1*). The jury found Getty 100% negligent. The jury also found that NL Industries was not negligent and that it placed adequate warnings on its chemicals. There was, however, no finding that the accident did not arise out of or was not incident to NL Industries' performance of its purchase order.

The court in the instant action ("*Getty Round 2*") was being requested by Getty to reverse the holding of the trial court and the court of appeals in a subsequent suit brought by Getty against NL Industries for its failure to name Getty as an "additional insured" on NL Industries' insurance policies and against NL Industries' insurers. Getty was suing on multiple theories: as to NL Industries--breach of contract to purchase insurance on its behalf; violation of § 1.203 of TEX. BUS. & COMM. CODE (Tex. UCC) (Vernon 1994) (obligation of good faith and fair dealing); negligence; violation of the Texas Deceptive Trade Practices Act; and common law fraud; and as to the insurers--breach of contract to extend it insurance coverage; violation of TEX. INS. CODE Art. 3.62 (Vernon 1981) (repealed) (failure to pay claim); breach of the duty of good faith and fair dealing; negligence; violation of the DTPA; and common law fraud. The trial court in *Getty Round 2* granted summary judgment against Getty on four grounds: (1) a contract provision requiring the seller to purchase liability insurance for the buyer violated the Texas Oilfield Anti-Indemnity Statute, §§ 127.001-.007, TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 1997); (2) the same contractual provision violated the common law express negligence rule; (3) the prior litigation of a related indemnity provision precluded the present suit under the doctrine of *res judicata* ("*Claim Bar*"); and (4) collateral estoppel prevented Getty from relitigating ultimate issues of fact and law litigated in *Getty Round 1* ("*Issue Bar*"). The court of appeals sustained the trial court's summary judgment on the basis that Getty was barred by *res judicata*, having already cross-claimed against NL Industries in *Getty Round 1* for contractual indemnity and having lost. In *dicta*, the court of appeals opined that the insurance provision would violate the Texas Oilfield Anti-Indemnity Statute by allowing Getty to avoid the consequences of its own negligence. The court of appeals also noted that Texas courts would "undoubtedly extend (the express negligence doctrine) to the insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the results of its sole negligence." 819 S.W.2d 908, 914. The supreme court found that Getty was not required to bring any of its cross-claims against NL Industries in the suit by Duncan. However, once Getty chose to cross-claim for indemnity, it was required under *res judicata* to bring all its actions in the same action. As to the claims against the insurers, the court held that Getty was not barred by either *res judicata* or collateral estoppel. *Res judicata* was not applicable even though as a general matter under Texas law a former judgment bars a second suit against all who were in "privity" with the parties to the first suit. Since NL Industries' insurance policies contained a "no-action" provision (suit against the insurer was specifically prohibited before the insured's liability was reduced to judgment), the court found that Getty could not have joined the insurers as defendants in *Getty Round 1* anyway. Collateral estoppel did not apply either since the court found that *Getty Round 2* was not a relitigation of either (1) an issue of fact--did Duncan's injuries arise out of NL's performance of the purchase order? (did the parties intend to limit the insurance to injuries caused by NL Industries' negligence?) or (2) an issue of law--did NL Industries' breach its insurance covenant? Finally, the court held that the express negligence doctrine would not be extended to contractual provisions, other than indemnity agreements, and therefore was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies. The court stated

We express no opinion regarding whether Getty is an additional insured under NL's insurance policies with INA or Youell, or the extent of such coverage, if it exists. *Id.* 806.

Prior to the adoption of the express negligence doctrine as the test to determine whether an indemnity provision extended to the indemnitee's negligence, the Texas Supreme Court followed the "clear and unequivocal" standard. *Fireman's Fund Insurance Co. v. Commercial Standard Indemnity Co.*, 490 S.W.2d 818 (Tex. 1972).

Rules of interpretation. If an additional insured endorsement is silent or ambiguous as to coverage of an additional insured's negligence, courts may look to the protecting party's indemnity language, other language in the contract, custom and practice, the language of the additional insured endorsement and certificate of insurance to interpret the endorsement's coverage.

[1] Ambiguous insurance covenant look to scope of indemnity clause.

In *Emery Air Freight Corp. v. General Transport Systems, Inc.*, 933 S.W.2d 312 (Tex. App.--Houston [14th Dist.] 1996, *no writ*), the Houston Court of Appeals found that the protecting party's failure to cause its insurance carrier to endorse its CGL policy to add the protected party as an additional insured did not breach the protecting party's insurance covenant when the injury arose out of the protected party's sole negligence. The insurance covenant and indemnity clause read as follows:

7. Contractor shall obtain and maintain at its own expense insurance in such forms and minimum amounts as set forth below naming Emery as an additional insured. Contractor shall furnish Emery certificates from all insurance carriers showing the dates of expiration, limits of liability thereunder and providing that said insurance will not be modified on less than thirty (30) days' prior written notice to Emery.

Minimum Limits of Insurance:

A.	Worker's Compensation	--	Statutory
B.	General Liability Insurance	--	\$1 Million Combined Single Limit
C.	Automobile Liability	--	\$1 Million Combined Single Limit

If Contractor fails to obtain and maintain the insurance coverage set forth above, Emery shall have the right, but not the obligation, to obtain and maintain such insurance at Contractor's cost or, at its option, to terminate this Agreement for cause as provided in Section 9 hereof.

8. Contractor shall be solely responsible and liable for any and all loss, damage or injury of any kind or nature whatever to all persons, whether employees or otherwise, and to all property, including Emery shipments while in the Contractor's custody and control, arising out of or in any way resulting from the provision of services hereunder, and Contractor agrees to defend, indemnify and hold harmless Emery, its agents, servants, and employees from and against any and all loss and expense, including legal costs, arising out of the provision of the services hereunder, by Contractor.

The court held that the contract between the parties did not require the protecting party to provide the protected party with insurance covering the protected party's sole negligence. *Id.* at 315. The court of appeals noted that the Texas Supreme Court had twice previously, in *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794 (Tex. 1992) and *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972) dealt with the interaction of an indemnity clause and an insurance clause in a contract. Based on these cases, the court of appeals concluded it was required to undertake a two-step analysis. The court is to (1) first, determine if the indemnity clause expressly requires the protecting party to indemnify the protected party for the protected party's negligence; and (2) secondly, determine if the indemnity and the insurance clauses are stand alone covenants or whether the insurance covenant is supportive of and limited by the scope of the indemnity clause. *Emery Air Freight Corp. v. General Transport Systems, Inc.*, 933 S.W.2d 312 (Tex. App.--Houston [14th Dist.] 1996, *no writ*).

The court held that even though Emery was to be listed as an additional insured on GTS's liability insurance policy, the "most reasonable construction" of the insurance provisions in the parties' contract "is that they were to assure the performance of the indemnity agreement as entered into by the parties." *Id.* at 314.

The court based this determination on the following factors: (1) the indemnity provision did not have an internal provision requiring insurance to support the indemnity distinct from other provisions for insurance in the agreement; (2) the insurance covenant did not require coverage of the protected party's negligence "*whether or not required*" by other clauses in the contract; and (3) the insurance covenant did not expressly cover the protected party's negligence.

Several jurisdictions seem to follow the same approach. See *Allianz Ins. Co. v. Goldcoast Partners, Inc.*, 684 So.2d 336 (11th Dist. 1996) – manufacturer's agreement to provide insurance to franchisees as additional insureds did not require coverage beyond manufacturer's own liability where manufacturer had no duty to indemnify franchisee for franchisee's own negligence; *Transcontinental Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 662 N.E.2d 500 (Ill. 1996) – agreement to procure insurance to the extent of indemnitor's agreement to assume indemnitee's negligence held void under Illinois Indemnification Act and thus, no coverage was available to indemnitee as additional insured; *Shaeed v. Chicago Transit Auth.*, 484 N.E.2d 542 (Ill. 1985) – insurance clause and contract required that subcontractor maintain insurance "insuring all subcontractor's indemnity obligations," court rendered insurance provision unenforceable because it sought insurance against an invalid agreement to indemnify; *Posey v. Union Carbide Corp.*, 507 F.Supp 39 (M. D. Tenn. 1980) – agreement to indemnify owner from any claims for bodily injury sustained on premises resulting from construction work along with agreement to procure insurance to the same effect held unenforceable by virtue of an invalid indemnity agreement. On the other hand, courts have ruled that an invalid and unenforceable indemnity agreement does not necessarily render coverage for an additional insured null and void. See *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh*, 44 Cal. App.4th 1633, 52 Cal. Rptr.2d 580 (Cal. 1996); *Bosio v. Branigar Org., Inc.*, 154 Ill. App.3d 611, 506 N.E.2d 996 (2nd Dist. 1987); *McAbee Constr. Co. v. Georgia Craft Co.*, 343 S.E.2d 513 (Ga. App. 1986); *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.*, 225 Cal. App. 740 (1986)

– agreement to procure insurance for additional insured’s sole negligence held enforceable despite state statute prohibiting risk transfers for sole liability.

[2] Ambiguous insurance policy construed in favor of coverage.

Cases Disregarding Exclusions of Negligence in Indemnity and Silence in Insurance Covenant in Construing Ambiguous AI Endorsement in Favor of Coverage of Additional Insured’s Negligence.

Attempts by a protecting party’s insurer to limit its additional insured coverage under an issued additional insured endorsement have been rejected in other jurisdictions even though the insurance covenant or indemnity in the contract between the named insured and the additional insured addressed only the negligence of the named insured. *J. A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill. App. 1995) - the court declined to limit the coverage of an issued additional insured endorsement to the coverage required by the contract between the protecting party and the protected party; *also see Mobil Oil Co. v. Maryland Cas. Co.*, 681 N.E. 552 (Ill. App. 1997), court refused to limit additional insured to limits specified in contract between protecting party and the additional insured/protected party where protecting party’s CGL policy limits exceed contracted for amount.

Cases Construing Ambiguous Additional Insured Endorsement in Favor of Coverage of Additional Insured for its Negligence.

In *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993), the federal court of appeals held that under Kansas law an additional insured endorsement did not limit the policy’s coverage to cases where the additional insured is held vicariously liable for the named insured’s negligence. In this case, the additional insured endorsement stated that the additional insured was included as an insured

but only with respect to liability arising out of operations performed by or on behalf of the named insured for the (additional) insured.

Applying rules of contract construction, the court held that at best, the phrase “but only with respect to liability arising out of operations” is ambiguous as to whose negligence is covered and whose negligence is excluded.

The court held in favor of a broad construction of coverage of the Additional Insured’s own negligence since the insurance carrier crafted the language. This case involved a suit by a patron at a festival held on city property where the injured patron sued the city alleging the city failed to warn the patron of a dangerous condition. The patron fell over a retaining wall that separated the festival grounds on the city’s property from an underground parking garage on the city’s property. The city tendered defense to the named insured festival operator’s insurance carrier on whose policy the city was an additional insured. The carrier declined defense arguing that the additional insured endorsement provided coverage only for the city’s vicarious liability for the acts and operations performed by the named insured, not for the city’s own negligence. The court found coverage as long as the additional insured’s negligence had a close and direct connection with the named insured’s operations.

Although a remote connection between (the named insured’s) operations and the plaintiff’s injuries would not suffice (to establish coverage for the additional insured) ... we conclude that the facts of this case clearly demonstrate the requisite causal connection. It is undisputed that (the plaintiff) was injured while walking from a dance sponsored by (the named insured) to the portable toilets set up by (the named insured). Under these circumstances, a reasonable insured in (the additional insured’s) position would understand that (the plaintiff’s) injuries, and (the additional insured’s) liability, “**arose out of**” (the named insured’s) operations.

Geographic Limit as to Place of Occurrence.

¶ A.2a does not specify or limit geographically the area of the Shopping Center to which Landlord’s protection as additional insured is to extend. This is different from how the parties allocated liabilities by the indemnities. In the Lease’s indemnity provisions the parties have carved up responsibility for liability based on geographic areas (Tenant is responsible for all Injuries occurring in the Premises; Landlord is responsible for all Injuries occurring in the Common Areas). This anomaly gives rise to a variance in coverage between a party’s indemnity and its required insurance coverage. For example, if an Injury occurs in the Common Areas, Landlord is to indemnify Tenant. However, Landlord has coverage for such liability to the extent it is a protected for that liability pursuant to the additional insured endorsement on Tenant’s liability policy. Attached as Form E is the industry standard ISO CG 20 11 Additional Insured CGL Endorsement designating Landlord as an additional insured on Tenant’s CGL policy. The standard form utilizes the term “premises” to define the geographic area giving rise to coverage. This designation does not limit the Landlord’s coverage to Injuries occurring “in” the Premises as such term is defined in the Lease. Coverage is for liabilities “arising out of” the premises leased to the Tenant. The definition of the term “premises” is not defined in the Tenant’s CGL policy. The additional insured endorsement form provides a blank line to describe the premises. Whether the landlord is covered as broadly as it intends may turn on what words are inserted in this blank! Courts have construed the insurance coverage broadly against the insurer. 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 effected if the schedule designates more or less than the “part of the premises” leased to the named insured.

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 AI 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 location (“the premises”) 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)—injury occurred to a HVAC repairman who was injured while walking on roof of landlord’s multi-tenant retail center to get to HVAC unit that tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement

form was an ISO CG 20 11 Additional Insured – Managers and Lessors of Premises (Form E). The injury neither occurred in the retail space leased to tenant or on the roof directly above the space. See also *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)—stating that 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; *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); *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. A similar conclusion was recently reached in *Minges Creek v. Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006). This case arose out of injury to a customer of a card shop who slipped in the icy parking lot of the mall in which the shop was located. The customer sued both the card shop and the mall. The lease provided that the shop was required to maintain liability insurance "with respect to the leased premises and the business operated by the Tenant" and to "name landlord (i.e., the mall owner), any other parties in interest designated by Landlord, and Tenant as insured." The additional insured endorsement to Tenant's CGL policy provided coverage to the additional insured landlord "with respect to liability arising out of Premises owned or used by you (the tenant). The court held that the landlord was not insured against the liability by tenant's additional insured endorsement. The court viewed the lease and the additional insurance endorsement as "inextricably intertwined" and stated that they "should be interpreted in context with each other." The court concluded that the card shop was required by its lease to provide insured status for the mall only with respect to the "leased premises"—the limited square footage set out in the lease, 6,796 square feet of interior space as shown in the mall's site plan attached to the lease. The court found that although the parking lot was provided for the "use" of the card shop and other tenants, it was not part of the "premises" used by the card shop. The court found that the context of the lease agreement "requires that the definition of premises in the policy be coextensive with the card shop's obligation to name (the mall owner) as an additional insured."

Cases Finding Coverage.

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

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

Franklin Mut. Ins. v. Security Indem. Ins., 275 N. J. Super. 335, 340, 646 A.2d 443, *cert denied* 139 N. J. 185, 652 A.2d 173 (1994). Also see *ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 637 N.Y.S.2d 117 (N.Y. 1st Dept. 1996)—court required the insurer of the tenant of a garage to defend the owner of the garage in a personal injury suit even though the accident occurred on the sidewalk in front of the tenant's property. The additional insured endorsement was issued on an inapplicable form as it provided additional insured coverage as to injuries arising out of premises "leased to" the named insured. There were no leased premises as the named insured was a garage operator. The court noted that named insured's CGL policy provided coverage to the named insured for garage operations including "the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations ...[; and] all operations necessary or incidental to a garage business." The court reasoned that "without traversing the sidewalk for access to and from the garage, there could be no use at all of the garage as a parking facility." *Id.* at 176. In *University of California Press v. G. A. Insurance Co. of New York*, 1995 U.S. Dist. Lexis 21442, 1995 WL 591307 (E.D.N.Y. 1995), the property damage and actual injury occurred within the leased premises. Books stored within the leased premises were damaged by leaking water from a sprinkler system malfunction one floor above the leased premises. The court found the language of the insurance agreement to be ambiguous and unclear as to whether

the term "arising out of" referred to where the breach took place, where the accident occurred or where the damage occurred.

Unable to reconcile that ambiguity, the court followed a basic principle of contract law and construed the ambiguity against the insurer as the policy's drafter. Thus, because the damage occurred within the leased premises, the court found in favor of coverage. The court in *Hormel Foods Corp. v. Northbrook Property & Casualty Insurance Co.*, 938 F.Supp. 555 (D. Minn. 1996), *aff'd*, No. 97-1197, 1997 U.S. App. Lexis 34146 (8th Cir. 1997) upheld coverage for an additional insured landlord which leased a hog-processing facility to the employer (Quality Pork Products, "QPP") of a person who was killed using a machine designed and manufactured by Hormel, installed on the premises, and leased to QPP by Hormel. The Northbrook insurance policy additional insured endorsement covered losses "arising out of the ownership, maintenance or use, of the leased premises." The court held that the machine was so intertwined with the facility's operations as to make injuries flowing from it attributable to the "ownership, maintenance, or use" of the facility. The machine was bolted to the floor walls and was "unambiguously part of the premises." How far some courts will extend additional insured coverage is illustrated by *SFH, Inc. v. Millard Refrigerated Services, Inc.*, 339 F.3d 738 (8th Cir. 2003). The warehouse lease required the lessee to carry CGL insurance and the lessor and its manager as additional insureds. Coverage was affected through a blanket additional insured endorsement covering all additional insureds required by named insured's contracts to be covered. The additional insured language was identical to the ISO CG 20 11 coverage as to "liability arising out of the ownership, maintenance or use of that part of the premises leased to you." The lessee's property was destroyed by a fire at the warehouse. It was determined that the one of the manager's employees had disabled the sprinkler system. The court found in favor of coverage, stating

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

²⁸ **Insured Contracts - “Indemnity Insurance.”** The Insurance Addendum at Paragraph A2a specifies that the Tenant’s CGL policy must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of “insured contract.” This specification addresses a fundamental risk management tool, the coordination of the indemnity and the insurance between the protecting party and the protected party. The specification in Paragraph A2a seeks to assure the Landlord that the contractually required CGL insurance provided by the Tenant insures the Tenant for its contractual undertaking to indemnify the Landlord. In addition to CGL policies providing direct coverage of the Named Insured and additional insured’s for covered liabilities, coverage may be afforded to the Named Insured for certain indemnities. Most but not all CGL policies cover the protecting party for liability for “Bodily Injury” and “Property Damage” arising under an “insured contract” (sometimes referred to as “contractually assumed liability insurance”). Coverage is accomplished through the addition to the CGL Policy of an exception to an exclusion from coverage. Standard form CGL policies (like ISO CG 00 01) provide as to “Coverage A” the following exceptions to the exclusion from coverage of contractually assumed liability. Coverage A under standard form CGL policies is for loss arising out of “Bodily Injury” or “Property Damage.” “**Bodily Injury**” is in such policies defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” “**Property Damage**” in such policies is defined as “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.” The exception to exclusion from Coverage A reads

This insurance does not apply to “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. 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; or
2. that the insured would have in the absence of the contract or agreement. (Emphasis added)

An “**Insured Contract**” is defined in the standard ISO CGL policy form as including

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 [2004 endorsement CG 24 26 , *provided the ‘bodily injury’ or ‘property damage’ is caused, in whole or in part, by you or by those acting on your behalf*]. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (Emphasis added)

Note that ISO has published the italicized language for inclusion in CGL policies by an endorsement CG 24 26. This introduces into the “insured contract” definition a “contributory negligence” condition equivalent to the one contained in the 2004 revisions to ISO’s additional insured endorsements. Inclusion of this type language into a CGL policy effectively eliminates coverage for the named insured’s indemnification of a third party for its sole negligence. Care therefore must be taken by named insureds in coordinating and negotiating the terms of their CGL policies and indemnity agreements. It is possible for a named insured to be “uncovered” in such circumstances for an indemnity of another party’s sole negligence. If this is coupled with an exclusion from additional insured coverage for an additional insured’s sole negligence, the named insured may find itself acting as the insurer or in breach of its covenants to protect the additional insured/indemnified party!

Recall that the Tenant’s indemnity obligation at Paragraph A . 18 in the Retail Lease expressly states that Tenant’s indemnity “WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD” and thus is an indemnity by Tenant of Landlord for Injuries caused solely by Landlord. The Forms Manual’s indemnity requirement and the insurance requirement at Paragraph A.2a of the Insurance Addendum conflict with the current insurance provisions contained in ISO based forms.

Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for its indemnitee’s sole negligence. ISO issued in 2004 an endorsement, CG 24 26 07 04, which modifies the definition of “insured contract” to eliminate coverage for the sole negligence of an indemnitee. 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.

Contractual Liability coverage excludes coverage for “**Personal Injury**” liability assumed by contract or agreement, unless such coverage is endorsed on to the insured’s CGL policy. A similar exception to the exclusions from Coverage B (coverage for “**Personal and Advertising Injury**”) is generally not contained in standard form CGL policies. Thus, in such cases, the named insured’s liability policy will not protect it against its contractually assumed liability for Personal and Advertising Injury, unless it obtains a special endorsement to its policy adding an exception to the exclusion in Coverage B. “**Personal and Advertising Injury**” is defined in Coverage B to standard CGL policies as “injury, including consequential bodily injury, arising out of one or more of the following offenses:

- (i) false arrest, detention or imprisonment; (ii) malicious prosecution; (iii) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (iv) oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s good, products or services; (v) oral or written publication of material that violates a person’s right of privacy; (vi) the use of another’s advertising idea in your “advertisement”; or (vii) infringing upon another’s copyright, trade dress or slogan in your “advertisement.”

For example, guard service contracts typically contain a provision requiring the owner to indemnify the guard service from liability for the types of liabilities that are embraced by the term "**Personal Injury**" (libel, slander, defamation of character, false arrest, wrongful eviction, and evasion of privacy). In such case unless the owner has its CGL policy endorsed to cover this indemnity, the owner is uninsured for this contractually assumed liability. Alternatively, the owner could require that it be listed as an additional insured on the guard service's CGL policy.

²⁹ **Coverage for Additional Insured's Sole Negligence?** The general reference to the Landlord being listed as an additional insured on the Tenant's commercial general liability policy does not specify the scope of the matters to be covered by the additional insured endorsement other than to state that the additional insured endorsement form will not exclude coverage for the sole or contributory ordinary negligence of the Landlord or Lienholder. The industry standard additional insured endorsement forms issued by ISO do not expressly extend coverage to the additional insured's sole negligence. In 2004 ISO modified several of its endorsement forms to expressly exclude from coverage the sole negligence of the additional insured. Many insurers additional insured forms now contain express exclusions of the additional insured's sole negligence. An issue may exist as to whether ISO's standard endorsement form issued for use by tenants to list landlords as an additional insured on a tenant's CGL policy extends to cover the landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its policy that expressly covers the Landlord's sole negligence. As a result it is possible that the additional insured endorsement furnished by Tenant will not be in compliance with this requirement.

³⁰ **"Other Insurance"**. The Insurance Addendum is silent as to the effect of the additional insured having "other insurance" available to it for liabilities covered by the additional insured endorsement. In the event the additional insured does not require or do something more the named insured's carrier will require and be entitled to contribution by the additional insured's other insurance. See discussion at [endnote 14](#) to [Form D](#), the author's suggested Supplement to Insurance Addendum for provisions requiring the additional insured's own liability policy to be non-contributing as to the primary layer of coverage afforded by the additional insured endorsement.

³¹ **Waiver of Subrogation in Property Insurance Policies.** In the landlord-tenant relationship, the tenant is liable to the landlord if the tenant negligently destroys the premises (e.g., negligently caused fire) absent a provision in the lease to the contrary. *Nagorny v. Gray*, 261 S.W.2d 741 (Tex. Civ. App.--Galveston 1953, *no writ*).

Covenant Requiring Party to Insure its Own Property Not Equivalent to Waiver of Recovery or Waiver of Subrogation. Upon payment by the landlord's insurer for the insured property loss, the landlord's insurer is subrogated to the landlord's claim and can sue the tenant to recoup the insurance proceeds. In *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956), the Texas Supreme Court held that where the lease merely provided that the landlord agreed to carry fire and extended coverage insurance on the building, part of which was occupied by the landlord, there was no duty on the landlord to procure insurance for the benefit of the tenant, and the insurers were not precluded from obtaining a subrogated cause of action from payment of damages on account of fire caused by tenant's negligence. The court rejected the tenant's contention that the intent of the parties for including a covenant of the landlord to insure its own building (presumably the cost was built into the rent) was to exculpate the tenant for its own negligence.

Covenant Requiring Other Party to Pay for Insurance Equivalent to Waiver of Recovery by Insured Against Insurance Purchaser. In *Publix Theatres Corp. v. Powell*, 71 S.W.2d 237 (Tex. Comm. App. 1934), the lessee agreed in the lease to carry the fire insurance on the leased building, at the lessee's expense, naming the landlord as the insured. The insurer paid, but the landlord still sued the tenant for the loss. The supreme court declared that to permit the lessor to keep the insurance money and also to collect from the lessee would be a double recovery.

In *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142 (Tex. App.--Houston [1st Dist.] 1991, *writ denied*), the court of appeals refused to limit the waiver of subrogation contained in the lease to claims against the current tenant so as to permit the otherwise subrogated insurer to pursue the former tenant after assignment. First Tape, therefore, was able to retain the protection of the waiver of subrogation clause even after the lease was assigned.

Waivers of Subrogation or Waiver of Recovery? Waiver of recovery is the landlord or tenant waiving its rights or recovery for the acts of the other. Waiver of subrogation is the landlord or tenant or both waiving the right of its insurer to be subrogated to the landlord's or tenant's claim. While a waiver of recovery also is a waiver of subrogation (because the insurer has no rights left to which to be subrogated), a waiver of subrogation alone is not a waiver of recovery.

Valid Despite Negligence of Released Party. In Texas, waiver of recovery and waiver of subrogation clauses are valid. See *International Co. v. Medical-Professional Building of Corpus Christi*, 405 S.W.2d 867 (Tex. Civ. App.--Corpus Christi 1966, *writ ref'd n.r.e.*)--lessee waived in advance any claims for damages caused by lessor's negligent failure to maintain boilers in portion of premises under landlord's control "to extent that lessee was compensated by insurance for such damages;" and *Williams v. Advanced Technology Ctr., Inc.*, 537 S.W.2d 531 (Tex. App.--Eastland 1976, *writ ref'd n.r.e.*)--subrogation suit brought against lessee by lessor's fire insurance carrier was barred by lessor's waiver of subrogation clause contained in lease, notwithstanding lessee's breach of the lease by permitting the leased premises to be used for an extra hazardous operation.

Conflicts - Return of Premises Covenant vs. Waiver of Recovery Provision. A lease may require the tenant at the termination of the lease to return the leased premises in its original condition except for "reasonable wear and tear and damage by casualty not occurring through the tenant's negligence". Such a clause is potentially in conflict with a waiver of subrogation clause.

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.

Avoids Double Coverage. To require each party to carry coverage for negligently causing damage to another party's property forces the landlord and the tenant to insure both the landlord's and the tenant's property, which results in each insuring its own and the other party's property. To avoid this need for double coverage each party can agree to look to its own insurance carrier for property loss caused by the acts or omissions of the other party and waive rights of recovery and subrogation against each other. If both landlord and tenant are to be liable for the risk of negligently caused loss to the property of the other, then the landlord and every tenant in a multi-tenant project must not only be sure to have a policy for its own property but must be sure that their liability insurance is sufficient to cover the replacement cost of the entire building and all of tenants' property therein. A more sensible approach is to have the landlord take out a casualty policy and have the premium costs paid by the tenants in the building under an operating cost pass-through provision in the lease.

Allocates Risk to Property Insurer. A waiver of subrogation clause assures that the insurance carrier for the property owner pays for the property loss as opposed to the other party's (the negligent landlord's or tenant's, as the case may be) liability insurance carrier. See Hagan, *Using Waivers and Indemnities in Commercial Leases*, THE PRACTICAL REAL ESTATE LAWYER 11 (1993), also repeated at ALI- ABA'S PRACTICE CHECKLIST MANUAL FOR DRAFTING LEASES: Checklists, Forms, and Drafting Advice from *The Practical Lawyer* and *The Practical Real Estate Lawyer* 149 (1994), for the rationale that the appropriate allocation of risk is to require each party to insure its own property and waive recovery, and waive subrogation against the other for damages to each other's property due to the negligence of either party.

Usually Inadequate Liability Insurance to Cover Risk. Why is this the best approach? This question incorrectly assumes that there is adequate liability insurance to cover the loss. Many times there will be no liability insurance because the party self-insures. The more likely situation is that the liability insurance policy of the negligent party will have limits far short of the loss involved (for example, where a negligent employee of the tenant leaves the coffee pot on at night which results in a large office building burning down). In a large multi-tenant building, the loss could easily exceed the liability insurance coverage of a small tenant. Even if there is sufficient property loss coverage under the liability policy, there usually is a large deductible and dissipation of the time and energy in a contest between the insurance companies and the parties over the issue of who negligently caused the fire.

Risk Already Factored in to Property Insurance Premium. Also, more importantly, is the fact that claims against property insurance are much less likely to result in higher premiums or loss of coverage than claims against the liability insurance. The property insurance carrier has more than likely already calculated its premium based on the assumption that it will not be able to recoup its costs via subrogation against a negligent tenant.

"Premises." 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*).

³² **Certificates of Insurance.** The general reference to the Tenant providing the Landlord with a certificate of insurance does not specify the items to be covered in the certificate of insurance. Certificates of insurance are not insurance, just evidence of insurance. Although it is typical to rely on a certificate of insurance as if it were insurance, a more prudent practice is to obtain and review the underlying policy and endorsements. As a general rule, certificates of insurance do not govern the insurance policy's coverage. A certificate of insurance can be misleading in several ways and provide a false sense of security that the policy matches the certificate. Common problems with certificates of insurance include the possibility that certificates issued by agents contain errors and the possibility that the certificates fail to reveal special limitations applicable to the coverage afforded. Some courts take the position, based on language similar to the above-quoted language from the ACORD™ 25-S Form, that a certificate of insurance does not create coverage. See *S.L.A. Property Management v. Angelina Casualty Co.*, 856 F.2d 69 (8th Cir. 1988) (certificate listing a different person as the additional insured did not control over actual listing on policy endorsement); and *Mercado v. Mitchell*, 264 N.W.2d 532 (Wis. 1978). Being designated as a Certificate Holder does not make the certificate holder an insured, additional insured, or a third party beneficiary covered by the policies insurance. *Gracida v. Tagle*, 946 S.W.2d 504 (Tex. App.—Corpus Christi 1997, *no writ*).

Statements contained in an ACORD™ 25 Certificate:

This certificate does **not** amend, extend or alter coverage afforded by the policies below.

Preservation of Policy Provisions. 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 of the terms, exclusions and conditions of such policies. Limits as shown may have been reduced by paid claims.

Cancellation. Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will **endeavor** to mail ___ day's written notice to the certificate holder named to the left **but failure** to mail such notice shall impose no obligation of liability of any kind upon the company, its agents or representatives.

³³ **Why It is Important to Read the Endorsement.** The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E.D. Tex. 1994) also illustrates the risk inherent in not reading the insurance policy of the party obligated to name the prospective additional insured as an additional insured. The court found that a fact issue existed defeating a summary judgment motion as to whether the proposed additional insured had accepted the defendant's insurance policy which contained an additional insured provision that included the plaintiff, but which provision was worded so as to exclude coverage in cases where the proposed additional insured was already insured (a so-called "**Escape Clause**").

Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

The party providing the insurance provided insurance naming the proposed additional insured as an additional insured and therefore did not violate the covenant to name the plaintiff as an additional insured, but the additional insured provision contained as Escape Clause. Timely review and objection may need to occur to defeat this waiver argument!

The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000) in which the 6th Circuit applied Texas law emphasizes why it is important to obtain and read a copy of the Additional Insured Endorsement and not to rely either upon a statement in the Certificate of Insurance that “x” is an additional insured for liabilities arising out of the work “y” or upon a general statement in the contract that “x” is to be listed as an additional insured on “y’s” commercial general liability policy. The court in this case held that the additional insured endorsement meant exactly what it said “the negligence of the additional insured is excluded” and that the certificate of insurance stating that “x” was an additional insured and the contractual provision in the contract between “x” and “y” that be listed as an additional insured did not clearly provide for coverage of the additional insured’s negligence. The following are the provisions in the contract, the certificate of insurance and the endorsement.

Contract. Contractor [Bath] shall have a comprehensive general liability policy in the amount of at least \$1,000,000 with an Additional Insured Endorsement naming Owner [BP Chemical] as an additional insured.

Contractor hereby indemnifies and agrees to defend and save Owner and its affiliated Corporations, their agents, servants and employees harmless from any and all losses, expenses, demands and claims that may be claimed or for which suit is brought for any actual or alleged bodily injury or death occurring to any person whatsoever, in any manner arising out of or in connection with, or resulting in whole or in part out of the acts of omissions of Contractor, or any subcontractors employed by or under the direct control of the Contractor, and their respective officers, agents and employees in the performance of the Work in accordance with this Agreement, and agrees to pay all damages, costs and expenses, including attorneys’ fees, arising in connection therewith. Such obligation shall not apply when the liability arises solely from the negligence of Owner, its employees or agents. Such obligation shall also be limited, in a case involving or alleging joint negligence between Contractor and Owner, its employees or agents, to Contractor’s actual percentage of comparative negligence, if any, found by the trier of fact in a cause of action brought against Contractor arising out of the performance of the Work or alleged negligence in accordance with this Agreement. This indemnity obligation of Contractor shall not be applicable to the extent that Owner is provided coverage as an additional insured under Contractor’s insurance policies as specified in Exhibit A to this Contract, or to the extent that the right of indemnity is prohibited or limited by the laws of the state in which the Work is located.

Certificate of Insurance. Owner is an additional insured thereunder as respects liability arising out of or from the Work performed by Contractor for Owner.

Endorsement. It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities arising out of their operations performed by or for the named insured, but excluding any negligent acts committed by such additional insureds.

³⁴ **Waiver of Subrogation Form.** See Form K to this Article for ISO CG 24 04 10 92 Waiver of Transfer of Rights or Recovery Against Other To US for the industry standard endorsement for a waiver of subrogation and related commentary.

³⁶ **Deductibles or Self-Insured Retentions.** Forms Manual § 18.8: “Both a deductible and a self-insured retention, or SIR, require the insured to pay the first dollars of a loss. However, the potential that a third-party claimant will not be compensated under a liability policy with an SIR is substantially greater than that under a policy with a deductible. When a deductible exists under a liability policy, the insurance company keeps control of the adjustment process, defends the insured, pays the claim to the third party, and thereafter charges the insured for the deductible. If an SIR exists, the insured controls the adjustment process to the extent of its SIR (unless the insured has contracted with a third party to administer the process) and the liability insurer has no duty to defend the insured or pay the claim to the third party until the SIR is exhausted.

³⁶ **Criteria as to Acceptable Insurer.** The Insurance Addendum does not give Tenant guidance as to what level of creditworthiness and rating for the insurance company will be acceptable to the Landlord. As set out in the Supplement to Insurance Addendum, another approach is to specify the level that will be acceptable by reference to one of the industry standard rating services, such as Best’s Key Rating Guide. See Footnote 2 to the Supplement to Insurance Addendum.

³⁷ **No Provision for Review of Landlord’s Insurance by Tenant.** Note that the Insurance Addendum does not provide Tenant with the authority to review and approve the form of Landlord’s policies or specifying minimum standards to be addressed in the policies to be furnished by Landlord. The Insurance Addendum does not provide that Tenant is to be listed as an additional insured on Landlord’s liability policy as to Injuries occurring in the Common Areas. Tenant should require that Landlord cause its insurance carrier to issue an endorsement to Landlord’s CGL policy listing Tenant as an additional insured as to Tenant’s liability for Injuries occurring in the Common Areas. After all, Tenant is paying for Landlord’s CGL insurance as part of the Operating Expenses. Lease ¶ A.7. A form of additional insured endorsement to Landlord’s CGL policy is standard form ISO CG 20 26 07 04 as Form F. As discussed in the Commentary following Form F, the ISO endorsement form can be tailored to limit Tenant’s protection as an additional insured to Injuries occurring in the Common Areas. The ISO form as standardly issued does not make that distinction.

D. Supplement to Insurance Addendum to Lease**Supplement to Insurance Addendum¹**

Lease

Date: March 1, 2007

Landlord: Shopping Center Owner, L.P.

Tenant: Retail Tenant, L.L.C.

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

A. Policies.

1. **Qualifications of Issuer.** All policies 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* of A-, or better, and admitted to engage in the business of insurance in the State of Texas.²
2. **Liability Policies.**
 - a. **CGL Policies.** Commercial general liability policies must be on the most current ISO CG 00 01 or equivalent.³ The commercial general liability policy shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract).⁴ The separation of insured language must not be modified. If the named insured's liability policy does not contain the standard ISO separation of insureds provision, or a substantially similar clause, it shall be endorsed to provide cross-liability coverage.⁵ Defense will be provided as an additional benefit and not included within the limit of liability.⁶ The policy limits may be written on a combination of primary and umbrella coverage, and if written with an umbrella policy, it shall meet the requirements specified in Paragraph 6 below.⁷ If the CGL policy contains a general aggregate limit, it shall apply separately to this location pursuant to the most current ISO form CG 25 04 Designated Location General Aggregate Limit.⁸ Each party's CGL policy shall be endorsed to waive the insurance carrier's right of subrogation against the other party. Attached is the waiver form to be used.⁹
 - b. **Workers Compensation.** Tenant's workers compensation policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord.
 - c. **Business Auto Policy.** Tenant's business auto policy shall be endorsed to list Landlord as an additional insured. Tenant's business auto policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord. Attached is the waiver form to be used.
3. **Additional Insurance Coverage.**¹⁰ With respects to the additional insured status:
 - a. **Landlord as Additional Insured on Tenant's CGL Policy.** Under Tenant's commercial general liability policy, Landlord shall be included as an additional insured using an ISO CG 20 11 01 96 endorsement¹¹ or equivalent, and under the commercial umbrella, if any. During construction of the leasehold improvements by Tenant and its contractor, Landlord shall be included as an additional insured on Tenant's commercial general liability policy using an ISO CG 20 10 07 04 endorsement¹² or equivalent.

- b. **Tenant as Additional Insured on Landlord's CGL Policy.** Under Landlord's commercial general liability policy, Tenant shall be included as an additional insured using an ISO CG 20 26 07 04 endorsement¹⁴ or equivalent, and under the commercial umbrella.
4. **Notification Provisions.** Contain a provision for 30 days' prior written notice by insurance carrier to the additional insured as a requirement for cancellation, non-renewal, or substantial modification.
5. **Primary and Noncontributory.** The named insured's liability policy will be primary and noncontributory. The additional insured's other insurance will be excess coverage and not contribute to the primary coverage provided by the named insured's policy.¹⁶
6. **Umbrella and Excess Insurance Policies.** The umbrella policy shall be written on an umbrella basis in excess over and no less broad than the liability coverage referenced herein. Inception and expiration dates will be the same as the CGL insurance. Coverage must "drop down" for exhausted aggregate limits under the liability coverage referenced herein. The policy shall be endorsed to provide aggregate limits on insurance for this location.
7. **Approved Revisions.** No policy may include an endorsement restricting, limiting or excluding coverage required herein in any manner without the prior written approval of the other party.
8. **Approved Deductibles and Self Insured Retentions.** No deductible or self insured retention in excess of \$_____ shall be made without the prior written approval of the other party.
9. **Superseding or Discontinued Forms.** If the forms of policies, endorsements, certificates, or evidence of insurance required by this Exhibit are superseded or discontinued, the protected party will have the right to require other equivalent forms.
10. **Approval Required for Different Forms.** Any policy or endorsement form other than a form specified in this Addendum as hereby supplemented must be approved in advance by the protected party.

B. Evidence of Insurance. Insurance must be evidenced as follows:

1. **Liability Insurance.** ACORD™ Form 25 *Certificates of Liability Insurance* for liability coverages in the form attached hereto as an Exhibit.
2. **Property Insurance.** ACORD™ Form 24 *Certificate of Property Insurance* for property coverages in the form attached hereto as an Exhibit.
3. **Time to Be Provided.** Evidence to be delivered to the protected party prior to Tenant's occupancy of the Premises and at least 30 days prior to the expiration of current policies.
4. **Certificate of Insurance** Certificates must—
- a. **Certificate Holder.** Show the protected party as certificate holders (with the protected party's mailing address).
- b. **Issuers.** Show the insurance companies producing each coverage and the policy number and policy date of each coverage.
- c. **Producer.** Name the producer of the certificate (with correct address and telephone number) and have the signature of the authorized representative of the producer.

<p>d.</p> <p>e.</p> <p>f.</p> <p>g.</p> <p>C.</p> <p>D.</p>	<p>Endorsements. Specify the additional insured status and/or waivers of subrogation and be accompanied by copies of all required endorsements.</p> <p>Deductibles and SIRs. State the amounts of all deductibles and self-insured retentions.</p> <p>Primary Status and Aggregate Limits. Show the primary status and aggregate limit per project or location where required.</p> <p>Revisions to ACORD™ Printed Form. The phrases “endeavor to” and “but failure to mail such notice will impose no obligation or liability of any kind upon Company, its agents or representatives” must be deleted from the cancellation provision of the ACORD™ 25 certificate and the following express provision added: “This is to certify that the policies of insurance described herein have been issued to the Insured for whom this certificate is executed and are in force at this time. In the event of cancellation, non-renewal, or material reduction in coverage affecting the certificate holder, 30 days’ prior written notice will be given to the certificate holder by certified mail or registered mail, return receipt requested.”</p> <p>Contractors. Tenant shall also require its Contractor performing the Work for the Tenant Improvements to carry liability insurance meeting the above requirements and minimum limits, including if contractor’s CGL policy contains a general aggregate limit, it shall be endorsed to apply separately to this location, except that the Landlord and Lienholder will be listed as additional insureds on an ISO form CG 20 10 07 04¹⁷, unmodified and in the form attached as an Exhibit to this Addendum. If requested in writing by Landlord, Tenant will provide to Landlord a certified copy of any or all insurance policies or endorsements required by this lease.</p> <p>Disclaimer. By requiring insurance coverage herein, a party does not represent to the other party that coverage and limits will necessarily be adequate to protect the named insured or the additional insured or any other person, and such coverage and limits shall not be deemed as a limitation on the Indemnifying Person’s liability under the indemnity granted to the Indemnified Person.</p>
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¹ **Why Supplement the Insurance Addendum.** The Author recommends that a Supplement be added to the Insurance Addendum to address the following points:

1. Policy Form. The Supplement to the Insurance Addendum can specify minimum acceptable insurance policy forms. This provides the parties with a common expectation and agreement as to insurance coverage prior to the expenditure of significant funds in designing space or making other lease arrangements. It also will permit the parties to involve their insurance advisors prior to signing the Lease.
2. Adding Tenant as an Additional Insured on Landlord’s CGL Policy. Adding Tenant as an additional insured on the Landlord’s CGL policy is in line with the indemnities contained in the Lease. Additionally, adding Tenant as an additional insured is in line with the Tenant’s expectations that it is insured by the “Shopping Center’s” insurance for which it is paying through its Pro Rata Share of CAM for injuries occurring in the Common Areas.
3. Additional Insured Form Specified with Specified Manuscripted Changes. Adding a Supplement to the Insurance Addendum to specify the additional insured endorsement form similarly adds clarity to the lease negotiation process. It will avoid misunderstanding as to the scope of the additional insured coverage. It hopefully will result in determining on the front end if there will be difficulty in producing the desired additional insurance coverage. The approach recommended by this Author is that sample additional insured endorsement forms for attachment to the Tenant’s CGL policy and the Landlord’s CGL policy be attached as Exhibits to the Supplement.
4. Certificate of Insurance Form Attached. Similarly, specifying the content of the certificate of insurance helps avoid future failure to produce an appropriately detailed certificate. The approach recommended by this Author is that a sample certificate of insurance be attached to the Supplement as an Exhibit.

² **Qualifications of Insurer.** 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.” A/VIII is considered a minimum acceptable rating in many leases.

Secure Best’s Ratings	
A++, A+	Superior
A, A-	Excellent
B++, B+	Very Good
Vulnerable Best’s Ratings	
B, B-	Fair
C++, C+	Marginal
D	Poor
E	Under Regulatory Supervision
F	In Liquidation
S	Rating Suspended

Financial Size Category	Policy Holders’ Surplus (\$ millions)
I	Up to 1
II	1 to 2
III	2 to 5
IV	5 to 10
V	10 to 25
VI	25 to 50
VII	50 to 100
VII	100 to 250
IX	250 to 500
X	500 to 750
XI	750 to 1000
XII	1000 to 1250
XIII	1250 to 1500
XIV	1500 to 2000
XV	2000 or more

Rating modifiers of “u” for “Under Review or “q” for Qualified sometimes appear with a Best’s Rating. For companies that are not rated are designated “NR-1” for “insufficient data” and “NR-2” for “insufficient size and/or operating experience.” Other rating agencies are Standard & Poors Insurance Rating Services <http://www.standardandpoors.com/ratings/>, Moody’s Investor Services <http://www.moodys.com/insurance>, Fitch, Inc. <http://www.titchratins.com>, Demotech, Inc. www.demotech.com and Weiss Ratings, Inc. <http://www.weissratings.com>

³ **ISO Forms Are Standard.** See [endnote 8](#) to the Insurance Addendum (Form C to this Article) for a discussion of ISO and ISO forms.

⁴ **Specification of Coverage Lines Acts as a Checklist.** The ISO CGL policy form covers each of these lines of coverage. The inclusion of this list serves as a checklist to confirm coverages upon receipt of the policy if a non-ISO form is tendered. Of particular interest from a risk management standpoint is the specification that the policy include coverage for “liability assumed under an insured contract [(including the tort liability of another assumed in a business contract)].” As noted in [endnote 11](#) to the Forms Manual’s Insurance Addendum to Lease discussing the requirement in Paragraph B2a thereof, the Insurance Addendum to Lease requires the

"insured contract" definition contained in the Tenant's CGL policy not be endorsed to exclude the sole negligence of Landlord or Lienholder. Tenant may have difficulty obtaining insurance meeting that requirement as current ISO CGL forms exclude from the Named Insured's coverage of its insured contracts indemnities of another's sole negligence.

⁵ **"Cross-Liability Coverage."** The Supplement to Insurance Addendum specifies that the Landlord and Tenant's CGL policies are to be on the most current ISO CGL policy form or equivalent. The Supplement also specifies that the CGL policy is not to have its **"separation of insured"** language modified (a/k/a the **"severability of interests clause"**). Additionally, the Supplement to Insurance Addendum stipulates that if the CGL policy does not contain the standard ISO separation of insureds provision, or a substantially similar clause, the CGL policy shall be endorsed to provide cross-liability coverage. The ISO CGL policy contains the following separation of liability clause providing **"cross-liability coverage"**:

SEPARATION OF INSURED'S CLAUSE

Except with respect to the limits of insurance, and any rights or duties specifically assigned to the first Named Insured in this Coverage part, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

ISO, 1992©

By virtue of adding one party to another party's insurance policy as an additional insured there results 2 insureds on the same policy. "Cross liability coverage" is coverage added to the Named Insured's policy to assure the insureds that adding the additional insured will not invalidate the Named Insured's coverage for any liability it may have to the additional insured. The liability of one insured to another is called **"cross-liability."** The separation of insured language establishes separate coverage for each insured under the policy, except as respects the policy limits. Separation of insured language is generally provided in non-ISO CGL policy forms and in business auto policy and umbrella liability policy forms. Since the separation of insured language is contained in the ISO CGL policy form, ISO does not have an endorsement form to add separation of insured language to a CGL policy. It is prudent to specify that the required liability policies provide cross-liability coverage as would be achieved under the standard ISO separation of insureds clause. If you are tendered a non-ISO CGL or other liability policy, you should examine it to confirm that it contains separation of insured language protective of the insured and the additional insured.

⁶ **Defense of Additional Insured.** Subject to the scope of liability coverage set out in the additional insured endorsement, the Named Insured's CGL policy provides the additional insured with the same rights to a defense as it provides a right to defense to the Named Insured. The various duties of an insurer to its insured are illustrated by *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103 (Tex. App.—Texarkana 1994, *no writ*) where Monsanto was awarded \$71,048,070.22 for actual and treble damages, prejudgment interest and attorney's fees arising out of the insurer's obtaining a financial interest in, and control of, litigation against its insured in an attempt to defeat the insured's reimbursement rights under an environmental impairment liability policy. INS. CODE Art. 21.21 § 16(a) violation.

The Supplement to Insurance Addendum provides that the additional insured's defense will be provided as an additional benefit and not included within the limit of liability. The policy limits are available to cover insured liabilities of both the Named Insured and the additional insured.

Depending on the wording of the indemnity, the Indemnifying Person may have contractually agreed to provide the Indemnified Person with a defense. In this respect the Indemnify Person may be relying on its CGL policy insurer to cover this contractual undertaking. In the past there have been issues as to the scope of the defense obligations of a Named Insured's insurer to the Named Insured's indemnitee. Because of such issues, Indemnified Persons required that they also be additional insureds on the Indemnifying Person's liability policies.

⁷ **Permissive as to Umbrella Policies.** Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies. See Paragraph 6 for further requirements for the Umbrella Policy.

⁸ **Designate Location General Aggregate Limit.** If the liability policy covers multiple locations or projects, its limits may be exhausted by claims at the other locations or projects. If the limits have been negotiated between the parties as the minimum coverages for this transaction, the policies will need to be endorsed to make them applicable in full to this location or a separate policy purchased for this location.

⁹ **ISO Form of Waiver of Subrogation for Liability Policies.** See Form K. ISO CG 24 04 10 92 Waiver of Transfer of Rights or Recovery Against Others To Us and related footnotes.

¹⁰ **ISO Additional Insured Endorsements.** See Forms E-G to this Article. In the absence of implementing manuscript changes to the ISO endorsement forms, the following coverage obtains under the forms as promulgated. Both Landlord and Tenant are additional insureds on the other party's CGL insurance. Assuming that Landlord's and Tenant's CGL policies are on the current ISO CGL policy form, including having been endorsed with the 1997 mandatory "other insurance" change in language endorsement, then each additional insured shall be covered for the risks identified in the additional insured endorsement on a primary coverage basis without the additional insured's other insurance being called on to contribute to cover the primary liability to the extent of the limits of the named insured's insurance.

¹¹ **Landlord As Additional Insured on Tenant's CGL Policy.** See Form F to this Article. The CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises added to the Tenant's CGL policy listing Landlord as an additional insured will cover the Landlord as an additional insured on Tenant's CGL policy for all liability arising out of the ownership, maintenance or use of that part of the "Premises" leased to Tenant, but not for any occurrence which takes place after the Tenant ceases to be a Tenant and not for any liabilities arising out of structural alterations, new construction or demolition operations performed by or on behalf of the Landlord.

¹² **Additional Endorsement to Tenant's CGL Policy to Cover Construction Activities of Tenant.** See Form G to this Article. The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to the Tenant's CGL policy listing Landlord as an additional insured will cover Landlord for bodily injury, property damage, and personal injury caused in whole or in part by the Tenant's acts or omissions or the acts or omissions of those acting on the Tenant's behalf in the performance of Tenant's "ongoing operations" at the Shopping Center and related property, without exclusion for construction activities.

¹³ **Tenant as Additional Insured On Landlord's CGL Policy.** See Form F. The CG 20 26 07 04 Additional Insured – Designated Person or Organization added to the Landlord's CGL policy will cover the Tenant as an additional insured on the Landlord's CGL insurance policy for bodily injury, property damage, and personal injury caused in whole or in part by Landlord or by the acts or omissions of those acting on Landlord's behalf in the performance of Landlord's ongoing operations or in connection with premises owned by the Landlord.

¹⁴ **Primary and Noncontributory.** 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 one's own policy. Additional insured Indemnified Persons must verify that any "other insurance" coverage to which they have access will not interfere with payment by the Indemnifying Person's policy on a primary and non-contributory basis. This is the interplay of the Indemnifying Person's CGL policy with the additional insured's own CGL policy. Assuming both the Indemnifying Person's CGL policy and the additional insured/Indemnified Person's policies are standard from policies, then both will declare themselves to be **primary** insurance **unless** some modification is effected to eliminate this dual coverage. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969); *Texas Employers Ins. V. Underwriting Members*, 836 F.Supp. 398, 404 (S. D. Tex. 1993).

Note that endorsing the Indemnifying Person's policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. The standard ISO form policy also provides for **proportion** when other insurance is available to the additional insured. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969). Without more, in such cases the additional insured's desire to have the named insured's policy respond prior to the additional insured's own policy is thwarted.

The following are common means employed to avoid the protected party's own policy contributing to the loss covered to the extent of the additional insurance coverage afforded on the protecting party's policy:

- (1) Endorse the protected party's policy to be primary. The above stated approach of endorsing the protecting party's CGL policy to state that it is primary with respect to other insurance maintained by the additional insured (as noted above most standard CGL policies state they are primary).
- (2) Endorse the protected party's policy to be primary and noncontributory. In addition to requiring that the protecting party's insurance be endorsed to state that it is primary, also requiring that the protecting party's policy be endorsed to state that it is "noncontributory" (an example of this approach is to endorse the protecting party's policy with an endorsement reading "Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the insured named above.") The meaning of the word "**noncontributory**" in this insurance context is not intuitive. "Noncontributory" does not mean that the coverage afforded by protecting party's CGL policy will not contribute to cover the additional insured's liability, but it means that the protecting party's CGL carrier will not seek contribution from any other "applicable" insurance (e.g., the additional insured's own CGL policy). What is being said is that the protecting party's CGL coverage is primary but contributory—it will respond on a primary basis to pay a covered claim, but will seek contribution from any other insurance structured to respond on a similar primary basis. Unfortunately, the phrase "primary and noncontributory" does not have an established legal meaning in many jurisdictions. Reliance on this approach opens the protected party to litigation with the protect party's carrier as to what was meant by this endorsement. A protecting party's carrier may balk at endorsing its named insured's policy to be "primary and noncontributory" due to concerns not that it is waiving contribution from the protected party's CGL policy but that it might be inadvertently be eliminating contribution by other carriers that have issued additional insurance coverage to additional insured on the protecting party's policy (for example, a general contractor with additional insured status under multiple subcontractors' policies or a building owner that is an additional insured under each of its tenants' policies).
- (3) Endorse the protected party's policy to be excess. The third approach is for the protected party (the additional insured) to have its own carrier endorse the protected party's CGL policy to state that coverage under the protected party's policy is excess to coverage available to the protected party as an additional insured on another person's policy.

In April 1997 ISO revised its "other insurance" clause in its standard CGL policy form to do just that. ISO add in Paragraph 4b(2) an exception to the declared primary coverage in Paragraph 4a for additional insurance coverage of the named insured. Thus, ISO revised its standard policy to provide that in a case where the protected party has both its own CGL policy and is an additional insured on the protecting party's CGL policy, then the protected party's CGL insurance states that its coverage is excess to the coverage available to through being covered under the additional insured endorsement on the protecting party's insurance.

4. Other Insurance

b. Excess Insurance

This insurance is excess over: ...

(2) Any other *primary* insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured *by attachment of an endorsement.*

Note, however, the 1997 language does not apply where additional insured status is not obtained by an endorsement to the protecting party's CGL policy. This provision is not triggered if the additional insured is automatically an additional insured on another insured's CGL policy. In such cases, it is still necessary to endorse the additional insured's own policy to make it excess over a protecting party's policy in order to avoid both policies being primary and co-contributing. This should be an easy sell to the protected party's carrier as the result is to make its policy excess coverage.

Also remember the protected party's policy may not contain the 1997 language. If this is the case then the protected party's policy should be endorsed to make it excess over all other coverage available to the protected party in order to achieve the elimination of overlapping coverage and contribution.

Alert: the following are traps to be avoided by the protected party:

- (1) Do not assume that the protecting party's insurance contains standard wording. It might not contain the standard wording that the policy affords primary coverage over other insurance available to the additional insured. In such case reliance on the 1997 ISO language or other endorsement to the additional insured's own policy to state that it is excess over other coverage available to the additional insured may be misplaced. Some policies maintained by protecting party's provide that its coverage of the additional insured is not primary but on an excess basis. In such case, endorsing the protecting party's policy to provide that it is excess coverage creates a case where both policies declare them to be excess.

Also, if the protected party's own insurance does not provide (e.g., the pre-1997 ISO policies) for an exception to its contributing with all other policies available to the protected party, nonstandard language in the protecting party's to the effect that it provides excess coverage to an additional insured in cases where the additional insured has available insurance will result in the protected party's insurance being primary and the protecting party's coverage of the protected party as an additional insured being excess. If this is the situation, then the protecting party should insist on the protecting party's policy being endorsed to provide that it affords primary and noncontributory coverage with respect to the additional insured's own policy coverage.

- (2) Do not assume that the protecting party's additional insured endorsement does not have a provision in it stating that the additional insured's coverage is on excess or contributory basis. Even though the protecting party's policy may have standard language to the effect that coverage for insureds is primary and noncontributory for other insurance coverage available to the insured, the additional insured endorsement may have overriding language.

The protected party should require in the contract with the protected party that the additional insured coverage to be provided to the protected party will be on a primary, noncontributory basis. Failure of the protecting party to provide such coverage will be a breach of this insurance covenant. Note, some CGL policies provide that they automatically provide primary coverage when required by the contract between the parties (a "**primary-when-required**" provision). For example the following is a "primary-when-required" provision contained in some CGL policies:

The insurance provided to the additional insured is excess over any other insurance naming the additional insured as an insured, whether primary, excess, contingent, or on any other basis; unless you have agreed in a written contract that such coverage will apply on a primary basis.

- (3) Do not forget that umbrella insurance is not primary insurance and that to avoid the protected party's insurance becoming contributing with umbrella coverage or becoming primary to the umbrella policy some additional action is required. In order to ensure that the protected party's own CGL policy is excess and noncontributory to the protecting party's umbrella policy, the protected party should consider (a) having its own CGL policy endorsed to provide that it is not only excess to other primary coverage available to it as an additional insured but also excess over umbrella insurance provided by the protecting party (excess over any insurance available to it as an additional insured, whether primary, excess, contingent, or on any other basis") or (b) striking from the "other insurance" provision in the protected party's CGL policy the word "primary" from the 4b(2) exception to primary coverage of the protected party's own policy, or (c) having the protecting party's umbrella insurance endorsed to state that it afford primary and noncontributory coverage to the additional insured.

¹⁵ **Landlord and Tenant as Additional Insureds on Contractor's CGL Policy.** See Form G to this Article. The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to Tenant's contractor's CGL policy listing Landlord and Tenant as additional insureds will cover Landlord and Tenant for bodily injury, property damage, and personal injury caused in whole or in part by the contractor's acts or omissions or the acts or omissions of those acting on the contractor's behalf in the performance of contractor's ongoing operations at the Building and related property.

E. Endorsement to Tenant’s CGL Insurance Scheduling Landlord as an Additional Insured

ADDITIONAL INSURED—MANAGERS OR LESSORS OF PREMISES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Designation of Premises¹ (Part Leased to You*): _____.

[insert suite no., street address and other descriptive information as to what is the “premises” and add the following: and the appurtenant use of the Common Areas as defined in the Retail Lease between Retail Tenant, L.L.C. as Tenant and Shopping Center Owner, L.P., as Landlord].

2. Name of Person or Organization (Additional Insured): _____².

[insert name of additional insureds: (a) Shopping Center Owner, L.P., and its successors and assigns as owner of the Property (the “Shopping Center Owner”), and its directors and employees, (b) Third Party Management, L.L.P. (the “Property Manager”), (c) General Electric Credit Corporation (“Shopping Center Owner’s Lender”).]

3. Additional Premium: _____.

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

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of³ the ownership, maintenance or use⁴ of that part of the premises⁵ leased to you* and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to⁶:

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.

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* “You” and “your” refers to the named insured (the one to whose policy this endorsement is attached).

¹ **Adding Landlord as Additional Insured to Tenant’s CGL Policy.** This endorsement is used most commonly when a landlord is to be listed as an additional insured on the tenant’s liability insurance policy.

² **What Persons in Addition to Landlord to be Additional Insureds?** Insurance Addendum ¶ 2a provides for “Landlord” and Lienholder to be named as “additional insureds.” The term “Landlord” is given broad meaning in the Definitions section of the Retail Lease. “Landlord” is defined as meaning “Landlord and its agents, employees, invitees, licensees, or visitors.” If it is intended that persons in addition to the named Landlord are to be listed as additional insureds, then each of these persons by category and the most important of these persons be identified and listed in the Schedule provided in the additional insured endorsement form to identify the additional insureds.

³ **“Arising Out Of” Effects Broad Coverage.** Coverage is broad as it covers the additional insured’s liability for Injuries “arising out of” its ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)” as opposed to using language employed in some of the other current ISO endorsement forms that were amended in 2004 to change from “arising out” to “caused by.”

⁴ **“Out of Ownership, Maintenance or Use of Premises.”** Coverage also is broad as it covers the additional insured’s liability for injuries arising out of its “ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant).” This language is broad. It applies clearly to the landlord’s vicarious liability for acts of the tenant (*i.e.*, the “use” of the premises). The language is also expansive and general enough to apply directly to the landlord’s own negligence. It covers liability arising out of the “ownership” and “maintenance” of the premises, areas in which the landlord could be held liable regardless of any involvement of the tenant. The general reference in the Forms Manual’s Insurance Addendum to the Landlord being listed as an additional insured on the Tenant’s liability policy does not specify the scope of the matters to be covered by the additional insured endorsement other than to state that the additional insured endorsement form will not exclude coverage for the sole or contributory ordinary negligence of the Landlord or Lienholder. The 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 the 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 the 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 the Landlord’s sole negligence. As a result it is possible that the additional insured endorsement furnished by Tenant will not be in compliance with this insurance requirement of the Insurance Addendum.

⁵ **“Arising Out of the Premises.”** This endorsement provides a blank line for the description of the “Premises.” Care must be exercised in completing this blank. This endorsement has a major potential coverage issue. It extends coverage to the additional insured landlord for liability for bodily injury and property damage “arising out of” ownership, maintenance or use “of that part of the premises leased” to the Tenant. A coverage issue may occur if the bodily injury or property damage occurs outside of the “premises” as such term is defined in the lease (for example, in the Common Areas maintained by the Landlord or in the alley behind the project).

The most common factually litigated scenario regarding these endorsements involves injuries occurring “outside” the “part” of the premises “shown in the schedule” leased to the tenant. This issue can also take on the nuance of whether coverage is effected 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 the 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 location (“the premises”) 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)—injury occurred to a HVAC repairman who was injured while walking on roof of landlord’s multi-tenant retail center to get to HVAC unit that 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 injury neither occurred in the retail space leased to tenant or on the roof directly above the space.

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

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

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

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

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

See also cases construing the scope of indemnities as to injuries arising out of the use of the "premises" as not extending to injuries not occurring in the premises (but note courts follow a strict construction rule limiting private parties contracts not employed in construing insurance contracts): *Rensselaer Polytechnic Inst. v. Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991)—stating that 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.

Cases Finding Coverage.

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

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

Franklin Mut. Ins. v. Security Indem. Ins., 275 N. J. Super. 335, 340, 646 A.2d 443, *cert denied* 139 N. J. 185, 652 A.2d 173 (1994). Also see *ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 637 N.Y.S.2d 117 (N.Y. 1st Dept. 1996)—court required the insurer of the tenant of a garage to defend the owner of the garage in a personal injury suit even though the accident occurred on the sidewalk in front of the tenant's property. The additional insured endorsement was issued on an inapplicable form as it provided additional insured coverage as to injuries arising out of premises "leased to" the named insured. There were no leased premises as the named insured was a garage operator. The court noted that named insured's CGL policy provided coverage to the named insured for garage operations including "the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations ...[; and] all operations necessary or incidental to a garage business." The court reasoned that "without traversing the sidewalk for access to and from the garage, there could be no use at all of the garage as a parking facility." *Id.* at 176. In *University of California Press v. G. A. Insurance Co. of New York*, 1995 U.S. Dist. Lexis 21442, 1995 WL 591307 (E.D.N.Y. 1995), the property damage and actual injury occurred within the leased premises. Books stored within the leased premises were damaged by leaking water from a sprinkler system malfunction one floor above the leased premises. The court found the language of the insurance agreement to be ambiguous and unclear as to whether

the term "arising out of" referred to where the breach took place, where the accident occurred or where the damage occurred.

Unable to reconcile that ambiguity, the court followed a basic principle of contract law and construed the ambiguity against the insurer as the policy's drafter. Thus, because the damage occurred within the leased premises, the court found in favor of coverage. The court in *Hormel Foods Corp. v. Northbrook Property & Casualty Insurance Co.*, 938 F.Supp. 555 (D. Minn. 1996), *aff'd*, No. 97-1197, 1997 U.S. App. Lexis 34146 (8th Cir. 1997) upheld coverage for an additional insured landlord which leased a hog-processing facility to the employer (Quality Pork Products, "QPP") of a person who was killed using a machine designed and manufactured by Hormel, installed on the premises, and leased to QPP by Hormel. The Northbrook insurance policy additional insured endorsement covered losses "arising out of the ownership, maintenance or use, of the leased premises." The court held that the machine was so intertwined with the facility's operations as to make injuries flowing from it attributable to the "ownership, maintenance, or use" of the facility. The machine was bolted to the floor walls and was "unambiguously part of the premises." How far some courts will extend additional insured coverage is illustrated by *SFH, Inc. v. Millard Refrigerated Services, Inc.*, 339 F.3d 738 (8th Cir. 2003). The warehouse lease required the lessee to carry CGL insurance and the lessor and its manager as additional insureds. Coverage was affected through a blanket additional insured endorsement covering all additional insureds required by named insured's contracts to be covered. The additional insured language was identical to the ISO CG 20 11 coverage as to "liability arising out of the ownership, maintenance or use of that part of the premises leased to you." The lessee's property was destroyed by a fire at the warehouse. It was determined that the one of the manager's employees had disabled the sprinkler system. The court found in favor of coverage, stating

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

⁶ **Exclusions.** This endorsement contains two significant carve outs. The first is for liabilities for injuries that "take place after (the tenant) ceases to be a tenant in that premises." This carve out excludes coverage for liabilities for injuries that technically occur after cessation of the tenancy but relate to acts or omissions during the tenancy. Coverage for liabilities for injuries arising after expiration of the tenancy but attributable to the tenant's acts or omissions prior to completion may be added by requiring both this endorsement and the CG 29 37 endorsement. The second carve out is for alterations, new construction or demolition operations "by or on behalf of the (additional insured—e.g., the landlord)." This carve out excludes protection for liabilities for injuries associated with construction activities. If the tenant will be engaged in any construction activities (e.g., tenant improvements), then another endorsement form should be used.

F. Endorsement to Landlord's CGL Insurance Policy Scheduling Tenant As An Additional Insured

ADDITIONAL INSURED—DESIGNATED PERSON OR ORGANIZATION ¹

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: _____.

[insert name of additional insureds: (a) Retail Tenant, L.L.C., and its successors and assigns, as Tenant, and its members and employees and (b) Bank of America, N.A. ("Tenant's Lender").]

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

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

- A. In the performance of your* ongoing operations; or
- B. In connection with your premises owned by or rented to you*.

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* "You" and "your" refers to the named insured (the one to whose policy this endorsement is attached).

¹ **"Catch All" Designated Person Additional Endorsement Form - Designating Tenant as an Additional Insured on Landlord's CGL Policy.** This endorsement may be used when no other ISO form exists for the purpose or when the parties designate this form as the form to be used. This form is suitable for use to designate Tenant as an additional insured on Landlord's CGL policy. In a landlord-tenant context, it may be used to provide additional insured coverage to an owner on a tenant's CGL policy and *vice versa* to provide additional insured coverage to a tenant on a landlord's CGL policy.

² **No Express Exclusions - Except Limited to Injuries "Caused by" Named Insured.** This endorsement is the broadest of the ISO Additional Insured Endorsements. This endorsement provides additional insured coverage for liability bodily injury, property damage and personal and advertising injury caused, in whole or in part, by the named insured's (in this case the Landlord) acts or omissions "in connection with your premises owned by ... you." This endorsement form does not contain any carve outs from coverage like other ISO additional insured endorsement forms. However, by its express coverage terms it eliminates certain coverages. For example, the injury must be caused at least in part by the named insured. This eliminates coverage for the additional insured's sole negligence. The injury must occur in connection with premises owned by the named insured. The term "premises" is not defined, but likely will be given a broad meaning by courts. In the context of a lease, courts will likely interpret this endorsement listing the Tenant as an additional insured on the Landlord's CGL policy as covering more than merely the "Premises" leased to Tenant, but also the Common Areas.

See discussion in Form H "Fair Form Manuscripted Endorsement as to "fair form" modifications to this ISO form and "fair form" modifications to the Forms Manuals' indemnity provision in Form B Supplement to Risk Management Provisions suggested by the author. For example, Should Tenant indemnify Landlord for Injuries occurring in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual's approach is to allocate 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. A "fairer" approach may be to provide each party with coverage on a primary basis on the other party's CGL policy for injuries occurring in a geographic area (e.g., inside or outside the Premises; in the Common Areas and the Parking Garage) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence.

**G. Endorsement to Contractor’s Insurance Policy
Making Tenant and Landlord Additional Insureds**

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

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: _____.

[insert name of additional insureds:(a) Shopping Center Owner, L.P., and its successors and assigns as owner of the Property, and its directors and employees (the Landlord), (b) Third Party Management, L.L.P. (the Landlord’s management company), (c) General Electric Credit Corporation (the Landlord’s Lender), (d) Retail Tenant, L.L.C., and its successors and assigns, as Tenant, and its members and employees, (e) Bank of America, N.A. (“Tenant’s Lender”).]

(If no entry appears above, 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 insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused ², in whole or in part, by:

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

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

B. With respect to the insurance afforded to these additional insureds, the following exclusion is added:

2. Exclusions ³

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 site 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.

* “You” and “your” refers to the named insured (the one to whose policy this endorsement is attached).

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

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

The "caused in whole or in part" language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties. 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 is barred by the workers' comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer.

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

H. Author's "Fair Form" Manuscripted Endorsements

The risk allocation approach taken in the Forms Manual is to allocate responsibility for the risk of Injuries on a geographic basis. The reciprocal indemnities allocate 100% of the risk of liability for Injuries occurring in the Common Areas to the Landlord and allocate to Tenant 100% of the risk of liability for Injuries occurring in the Premises. The Insurance Addendum in the Forms Manual provides for the Tenant to insure the Landlord as an additional insured on the Tenant's CGL policy under insurance endorsement forms acceptable to the Landlord, but without specification of the acceptable form, except to provide that the endorsement form must not expressly exclude the sole negligence of Landlord from the definition of "insured contract" and to provide that the additional insured endorsement must not exclude coverage for the sole or contributory ordinary negligence of Landlord.

The most likely CGL policy form and additional insured endorsement form to be tendered by the Tenant is the ISO CGL policy form and ISO's CG 20 11 form since ISO forms are the industry standard. As explained in the Endnotes following the indemnity provisions of the Retail Lease and the Insurance Addendum, ISO's insured contract language and additional insured endorsement form do not match up with the risk allocation made in the Forms Manual's Retail Lease. In 2004 ISO modified the insured contract language by issuing an endorsement CG 24 26 revising the definition of "insured contract" to be one in which the named insured

... assumes(s) 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.* (language added in 2004 in italics).

Although the endorsement has been provided by ISO to its members under as an optional tool, most insurers as a matter of practice have made it mandatory. As a result neither the Tenant's obligations under its broad indemnity of Landlord for Injuries occurring in the premises nor the Landlord's obligations under its broad indemnity of Tenant for Injuries occurring in the Common Areas is covered by the indemnifying party's CGL insurance if the Injury is caused solely by the negligence of the indemnified person. This constitutes a default by Tenant on its agreement in the Insurance Addendum since it agreed that its CGL insurance would not be endorsed to exclude the sole negligence of the Landlord from the definition of "insured contract." The Insurance Addendum does not place a similar obligation on the Landlord not to permit its CGL insurance to be endorsed to exclude the sole negligence of Tenant from the definition of "insured contract." However, Landlord may find itself in the unfortunate circumstance of having agreed to the broad form indemnity of Tenant for Injuries occurring in the Common Areas, only to learn that its indemnity of Tenant is not backed by its insurance in the case of an Injury occurring in the Common Areas caused by the Tenant's sole negligence.

ISO's approach under the CG 20 11 endorsement form, which is used to name the Landlord as an additional insured on the Tenant's CGL policy, is to insure the Landlord for all liability arising out of the use of that part of the premises to Tenant without express carve outs for either the additional insured Landlord's sole negligence or the Landlord's negligence even if it is the chief cause of the Injury. As discussed in the Endnotes to the ISO CG 20 11 endorsement form, courts are split as to whether the endorsement form as so worded covers the Landlord for Injuries occurring outside of the premises described in the lease. This issue has not been adjudicated in Texas. Assuming that a Texas court adopts the construction that this ISO endorsement form only covers Landlord for Injuries arising in the Premises (not in the Common Areas), the issue still exists whether the court would hold that the endorsement insured the Landlord for Injuries occurring in the Premises that are the result of Landlord's sole negligence.

ISO's approach under the CG 20 26, which can be used to name Tenant as an additional insured on Landlord's CGL policy, is to insure Tenant for all liability in connection with premises owned by Landlord provided the Injury is caused in part by Landlord or by those acting on Landlord's behalf. Thus, under this endorsement Tenant is not insured for Injuries occurring in the Shopping Center, including the Common Areas, caused by Tenant's sole negligence.

The following risk allocation questions arise from the risk allocation position taken in the Retail Lease:

Should Tenant indemnify Landlord for Injuries, occurring either outside or in the Premises, if Landlord is greater than 50% negligent or even solely negligent? Should Tenant insure Landlord for Injuries, occurring either outside or in the Premises, if Landlord is greater than 50% negligent or even solely negligent?

Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent?

The author urges that a “fairer” approach is to make manuscript changes to the standard ISO forms to provide each party with coverage on a primary basis on the other party’s CGL policy for Injuries occurring in a geographic area (e.g., inside or outside the Premises, in the Common Areas) but exclude from such coverage (a) the additional insured’s sole negligence and (b) the additional insured’s negligence if it is 51% or greater than the named insured’s negligence.

In order to effectuate the author’s recommendation, the following revisions to the ISO CG 20 11 form should be requested to be made by the Tenant’s CGL insurance issuer:

Endorsement No. _____ is amended to add the underlined language and to delete the language shown as ~~struck out~~.

The term “**premises**” as used in this Endorsement means the “**Leased Premises**” of (number) square feet described in the Retail Lease between you as Tenant and the additional insured identified above as Landlord, but does not include the “**Common Areas**” such as the parking areas and alleys.

The insurance does not apply to:

3. Any “bodily injury”, “property damage” or “personal and advertising injury” caused:

- a. in whole by the negligent acts or omissions or willful misconduct of the Landlord, or
- b. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord if the aggregate of the Landlord’s plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater.

A slightly different approach is to expressly allocate to Tenant CGL insurance liability for Injuries occurring outside the Premises if caused solely by Tenant or if inside the Premises if Landlord is not more than 51% negligent.

Endorsement No. _____ is amended to add the underlined language and to delete the language shown as ~~struck out~~.

The term “**premises**” as used in this Endorsement means the “**Shopping Center**”, including “**Common Areas**”, of which a part is leased to you as Tenant and called herein the “**Leased Premises**”, and the Leased Premises itself (as such capitalized terms are defined in the Retail Lease between you as Tenant and the additional insured identified above as Landlord).

3. The insurance does not apply to any “bodily injury” or “property damage” or “personal and advertising injury” caused:

- a. in whole by the negligent acts or omissions or willful misconduct of the Landlord or by persons acting on behalf of Landlord, or
- b. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord occurring **outside** of the Leased Premises, such as occurring in the Common Areas, the Parking Garage or the Support Facilities.
- c. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord occurring **inside** the Leased Premises, if the aggregate of the Landlord’s plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater.

In order to effectuate the author's "fair form" recommendation, the following revisions to the ISO CG 20 26 form should be requested to be made by the Landlord's CGL insurer:

Endorsement No. _____ is amended to add the underlined language and to delete the language shown as ~~struck out~~.

The term "**premises**" as used in this Endorsement means the "**Shopping Center**", including "**Common Areas**", including the parking areas and alleys, of which Shopping Center a part is leased to the additional insured as Tenant and called herein the "**Leased Premises**, and the Leased Premises itself (as such capitalized terms are defined in the Retail Lease between the additional insured as Tenant and you as the named insured as Landlord). This insurance does apply to "bodily Injury" or "property damage" or "personal and advertising injury" caused in part by Landlord and by those persons acting on behalf of Landlord in the Shopping Center, including the Common Areas and the Leased Premises, even if caused in part by the negligent acts or omissions of Tenant plus those persons acting on behalf of Tenant, except as excluded below.

The insurance does not apply to any "bodily injury" or "property damage" or "personal and advertising injury" caused:

- (1) in whole by the negligent acts or omissions or willful misconduct of the Tenant or by persons acting on behalf of Tenant, or
- (2) in part by the negligent acts or omissions of Tenant or by those persons acting on behalf of Tenant occurring **inside** the Leased Premises if the aggregate of Tenant's plus those persons acting on behalf of Tenant percentage share of all negligence is 51% or greater.

In support of this approach an argument may be made that Injuries occurring outside of the Leased Premises should be covered by the project's liability insurance, even if caused in part by the negligence of Tenant, since all tenants, including Tenant, are paying for such coverage as Common Area Maintenance, provided the Injury is caused in part by Landlord and by those persons acting on behalf of Landlord.

If the parties wish to contract for this type of "fair form" allocation of the mutual insurance to be obtained under the Lease, the following insurance specification would be added to Paragraph A3a Landlord as an Additional Insured on Tenant's CGL Policy:

Modifications to Required Endorsement Form. The additional insured endorsement shall be modified to specify that it includes coverage of Injuries occurring outside the Premises only if the Injury is caused by the sole negligence of the Tenant. The additional insured endorsement shall be modified to specify that it excludes coverage for Injuries occurring inside the Premises, if the injury or damage is caused:

- (a) in whole by the negligent acts or omissions or willful misconduct of the Landlord or
- (b) in part by the negligent acts or omissions of Landlord if the aggregate of the Landlord's plus its contractors' percentage share of all negligence is 51% or greater.

and the following insurance specification would be added to Paragraph A3b Tenant as An Additional Insured on Landlord's CGL Policy:

Required Modifications to Endorsement Form. The additional insured endorsement shall be modified to specify that it includes coverage for Injuries in the Common Areas provided the Injury is not caused by the sole negligence of the Tenant and provided the Landlord is negligent and that it includes coverage for Injuries occurring in the Premises if the Injury is caused in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord and if the aggregate of the Landlord's plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater..

**I. An Example of a “Bad” Manuscripted Automatic
Additional Insured Endorsement**

**BITUMINOUS FIRE & MARINE INSURANCE
CONTRACTORS EXTENDED LIABILITY COVERAGE - GL-2785-TX (07/00)**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

It is agreed that the provisions listed below apply only upon the entry of an in the box next to the caption of such provision.

- A. Partnership and Joint Venture Extension
- B. Blanket Additional Insureds - Construction Contracts ¹
- C. Blanket Waiver of Subrogation
- D. Unintentional Failure to Disclose Hazards
- E. Broadened Mobile Equipment
- F. Personal Injury - Contractual Coverage
- G. Nonemployment Discrimination
- H. Liquor Liability
- I. Broadened Conditions
- J. Blanket Additional Insureds - Equipment Leases

.....

B. BLANKET ADDITIONAL INSUREDS - CONSTRUCTION CONTRACTS

Section II - WHO IS AN INSURED is amended by adding the following:

7. Any person or organization for whom you ² are performing operations³ if you² and such person or organization have agreed in a written contract or written agreement executed prior to any loss that such person or organization will be added as an additional insured on your policy up to the limits of liability required by such contract or agreement with respect to liability resulting from:

- a. “your ² work” for the additional insured(s), or
- b. actions or omissions of the additional insured(s) in connection with their² general supervision of “your ² work.”

8. With respect to the insurance afforded these additional insureds, the following additional provisions apply:

- b. Additional Exclusions. This insurance does not apply to:

(1) “Bodily injury” or “property damage” for which the additional insured(s) are obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the additional insured(s) would have in the absence of the contract or agreement.⁴

(2) “Bodily injury” or “property damage” occurring after:⁵

(a) All work on the project(s) (other than service, maintenance, or repairs) to be performed by or on behalf of the additional insured(s) has been completed; or

(b) That portion of “your ² 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.

- (3) "Bodily injury" or "property damage" arising out of any act or omission of the additional insured(s) or any of their employees, other than the general supervision of work performed for the additional insured(s) by you.⁶
- (4) "Property damage" to:⁷
- (a) Property owned, used or occupied by or rented to the additional insured(s):
 - (b) Property in the care, custody, or control of the additional insured(s) or over which the additional insured(s) are for any purpose exercising physical control; or
 - (c) "Your² work" for the additional insured(s)
- (5) "Bodily injury", "property damage" or "personal and advertising injury":
- (a) Arising out of the rendering or failure to render any professional services by you² or by any additional insured, but only with respect to either or both of the following operations:
 - (i) Providing engineering, architectural or surveying services to others in your² or the additional insureds capacity as an engineer, architect or surveyor, and
 - (ii) Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with work you² or an additional insured performs.
 - (b) Subject to paragraph (c) below, professional services include:
 - (i) The preparing, approving or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
 - (ii) Supervisory or inspection activities performed as part of any related architectural or engineering activities.

- (c) Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you² in connection with your operations as a construction contractor.

Any coverage provided herein will be excess⁸ over any other valid and collectable insurance available to the additional insured(s) whether primary, excess, contingent or on any other basis unless you¹ have agreed in a written contract or written agreement that this insurance will be primary.

This insurance will be noncontributory only if so stated in a written contract or written agreement.⁹

¹ **Blanket Automatic Additional Insured Endorsement Form.** This endorsement form is an automatic or blanket additional insured endorsement form. It amends the policy to name a category of additional insureds. If a person or entity fits the category it is an additional insured without further condition that the insurer issue an endorsement recognizing a specific person or entity as an additional insured on the policy. The certificate of insurance presented by the tenant at the time of execution of the lease stated that the landlord was covered as an additional insured. This particular endorsement was tendered by the insured after being pressed by the landlord to prove up its compliance with the requirement in the lease that the landlord was an additional insured on the tenant's CGL policy. As noted in endnote 3 below, this endorsement form is designed for construction situations and not to cover the landlord's liabilities arising out of the "ownership, maintenance or use of premises leased to the insured." Landlord was involved in an extended effort but was ultimately successful in prevailing upon tenant to provide appropriate additional insured endorsement forms.

² **"You" and "Their".** "You" = the named insured contractor or subcontractor. "Their" = additional insured contractor or owner.

³ **Coverage for Injuries Arising Out of Named Insured's "Operations."** The blanket automatic additional insured provision contained in this endorsement as Paragraph B II 7 designates as the additional insured "any person for whom you are performing operations." Is the tenant performing "operations" for the landlord when the tenant contracts with a contractor to build improvements to the leased premises? This endorsement form is not crafted to apply to a tenancy or to a tenant undertaking leasehold improvements, but is crafted for a additional insureds to a contractor's CGL policy. In order to eliminate questions such as this landlord should require clarification from the issuer or require an endorsement clearly covering the landlord's liability arising out of the "ownership, maintenance or use of premises leased to the insured" without exclusion for "liabilities arising out of structural alterations, new construction or demolition operations performed by tenant or on behalf of tenant."

In cases where the named insured is a contractor performing services for a tenant covered as an additional insured on the contractor's CGL policy, the tenant's employees, officers, directors, successors and assigns and the landlord and its employees, officers, directors, successors and assigns would not be covered as they are not specifically listed. In such case additional endorsements are required to extend coverage to these persons.

⁴ **Exclusion for Liabilities Assumed by Named Insured by Indemnity.** Paragraph 8b(1) is an exclusion for liabilities assumed (taken on by indemnity) by the named insured. As it turned out the named insured's CGL Policy did not contain "indemnity insurance" and thus the named insured was not covered on its indemnity of the landlord under the lease.

⁵ **Exclusion for Liabilities Arising Out of Completed Operations.** Paragraph 8b(2) is an exclusion for the "completed operations hazard," liabilities incurred by the additional insured (the additional insured's negligence) occurring after completion of all work by or on behalf of the additional insured or after completion of the named insured's work.

⁶ **Exclusion of Additional Insured's Negligence.** Paragraph 8b(3) is an exclusion for the additional insured's negligence other than liability of the additional insured due to its general supervision of the named insured's work for the additional insured. This carve-out effectively guts protection for the additional insured. In order for the additional insureds to have protection for their sole or contributory negligence, this policy must be endorsed to extend coverage to liabilities arising out of the acts or omissions of the additional insureds, whether or not caused by the negligence of the additional insured. This type of "gut all coverage" of the additional approach was addressed and construed recently by the Texas Supreme Court in *Autofina Petrochemicals, Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005). The additional insured provision read:

2. The insurance afforded the additional insured under this endorsement does not apply to ... any liability arising out of any act, error or omission of the additional insured, or any of its employees....

The court rejected the insurance company's position that the additional insured was not covered for Injuries caused in part by the additional insured's negligence. Fina, the additional insured, argued successfully that the exclusion was only for Injuries caused by Fina's sole negligence. The court stated

Fina contends Paragraph 2 excludes Fina's sole negligence. We adopt this reasonable construction. See *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (holding a court "must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent"). In addition, we adopt Fina's construction because Continental's interpretation that the exclusion bars all coverage when any negligence on the part of the premises owner is pleaded, unless the owner's responsibility is based solely on vicarious liability for the acts of the contractor, would render coverage under the endorsement largely illusory. See *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997); see also *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (noting a premises owner has no vicarious liability for the acts of an independent contractor performing work on a site, but is liable for the contractor's work only if the premises owner exercises control over the contractor's work.

⁷ **Exclusion of Property Damage.** Paragraph 8b(4) is an exclusion for property damage to the additional insured's property even if due to the named insured's negligence. The additional insured is relegated to its property insurance.

⁸ **Coverage Provided by Endorsement Is Excess Over Additional Insured's Other Insurance Except if Contract Between Named Insured and Additional Insured Requires this Coverage to Be Primary.** Note that the blanket additional insured endorsement provides that the insurance afforded thereby to the additional insured will be "**excess**" over the additional insured's "other insurance" unless the contract between the insured and the additional insured requires this coverage to be primary.

⁹ **Coverage Provided by this Endorsement will** Also, note that the blanket additional insured endorsement provides that the insurance coverage afforded by the blanket additional insured endorsement will be "**contributory**" unless the contract between the named insured and the additional insured requires the coverage to be noncontributory. "Noncontributory" means that even if the contract between the named insured and the additional insured requires the named insured's coverage of the additional insured to be primary, the named insured's carrier will not require contribution by the additional insured's policy. The contract between the named insured and the additional insured should be drafted to provide that the named insured's CGL policy will not only be primary but also that the additional insured's other insurance will be excess of the coverage available to the additional insured by this additional insured endorsement and that additional insured's own policy will not be required to contribute with this policy. See discussion of "other insurance" at endnote 14 to Form D to Supplement to Insurance Addendum.

**J. An Example of a “Better” Manuscripted Automatic
Additional Insured Endorsement ¹**

CNA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

Coverage afforded under this extension of coverage endorsement does not apply to any person or organization covered as an additional insured on any other endorsement now or hereafter attached to this Coverage Part.

....

2. MISCELLANEOUS ADDITIONAL INSURED

WHO IS AN INSURED (Section II) is amended to include as an Insured any person or organization (called additional insured) described in paragraphs **2.a** through **2.g.** below whom you are required to add as an additional insured on this policy under a written contract or agreement ² but the written contract or agreement must be:

1. Currently in effect or becoming effective during the term of this policy; and
2. Executed prior to the “bodily injury,” “property damage” or “personal injury and advertising injury,” but

Only the following persons or organizations are additional insureds under this endorsement and coverage provided to such additional insureds is limited as provided herein:

...

c. Managers or Lessors of Premises ³

A manager or lessor of premises but only with respect to liability arising out of the ownership, maintenance or use of that specific part of the premises leased to you 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; or
- (2) Structural alterations, new construction or demolition operations performed by or on behalf of such additional insured.

...

e. Owners/Other Interests - Land is Leased

An owner or other interest from whom land has been leased by you but only with respect to liability arising out of the ownership, maintenance or use of that specific part of the land leased to you ⁴ and subject to the following additional exclusions:

This insurance does not apply to:⁵

- (1) Any “occurrence” which takes place after you cease to be a tenant in that land; or
- (2) Structural alterations, new construction or demolition operations performed by or on behalf of such additional insured.

....

Any insurance provided to an additional insured designated under paragraphs **a.** through **g.** above does not apply to “bodily injury” or “property damage” included within the

“products-completed operations hazard”.

As respects the coverage provided under this endorsement, Paragraph **4.b. SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS** is deleted and replaced with the following:

4. Other Insurance

b. Excess insurance

This insurance is excess over:

Any other insurance naming the additional insured as an insured whether primary, excess, contingent or on any other basis unless a written contract or agreement specifically requires that this insurance be either primary or primary and noncontributing. Where required by written contract or agreement, we will consider any other insurance maintained by the additional insured for injury or damage covered by this endorsement to be excess and noncontributing with this insurance.⁶

....

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(Ed. 04/04)

¹ **Why This Endorsement is Better than the “Bad” Endorsement Form I.** This is a standard additional insured endorsement form available upon request on liability policies issued by CNA. Unlike the manuscripted endorsement form set out as Form I to this article, this form does not include an express exclusion from coverage of the Tenant’s indemnity (see Form I, Paragraph II 8b(1)). The CNA form provides automatic coverage to lessors of premises leased to the insured (Form I does not and is limited to providing automatic additional insured coverage to persons for whom the insured is performing “operations” and does not address liabilities arising out of the leasing of the premises).

² **Blanket Automatic Additional Insured Endorsement Form.** This language creates the “automatic” insured feature of the endorsement. Coverage as an additional insured is triggered by the tenant agreeing in the lease to add the landlord as an additional insured without a further requirement that the insurer issue an endorsement specifically naming the landlord as an additional insured.

³ **“Lessors” as Additional Insured.** Paragraph 2c is the language in the endorsement naming the “manager” and “lessor” as “insureds” within the meaning of Who Is An Insured - Section II of the Tenant’s CGL policy.

⁴ **Coverage for Liabilities Arising Out of Leased Premises.** Coverage under this endorsement form afforded to the Landlord is broad as Paragraph 2c provides that the insured’s lessor is covered “with respect to liability arising out of the ownership, maintenance or use of that specific part of the premises leased to you....” Note, however, that an issue may exist as to whether this coverage is broad enough to cover Injuries occurring in the Common Areas. See endnote 27 to Form C for a discussion of whether additional insureds are insured for Injuries occurring outside of the Premises leased to the insured. Use of the words “**specific part**” might indicate a limitation on the geographic scope of coverage for the additional insured.

⁵ **Common Exclusions.** This endorsement contains two common exclusions to coverage: (1) liabilities arising out of occurrences which take place after tenant ceases to be a tenant and (2) liabilities arising out of construction activities performed by or on behalf of the landlord. These exceptions are identical to the exceptions to the ISO 29 11 01 96 additional insured endorsement used to designate lessors as additional insureds on lessees’ CGL policies and are discussed in the endnotes following Form E. In order to cover the additional insured landlord for Injuries occurring as a result of Tenant construction activities and to cover the liability risk after construction is “completed operations” coverage will need to be effected by additional endorsements and are not covered by this automatic additional insurance form of endorsement.

⁶ **Additional Insured’s Other Insurance is Excess and Non-Contributory If So Provided in their Lease.** Paragraph 4 b is the insurer’s agreement that the insurance coverage provided to the additional insured Landlord will be primary and any other insurance maintained by the additional insured will be noncontributing as to the additional insured’s liabilities covered under the Tenant’s CGL policy if the lease so provides. Although the Forms Manual’s Lease does not so provide, the Supplement to Insurance Addendum attached to this Article as Form D so provides. See endnote 14 to Form D for a discussion of “other insurance” provisions in CGL policies and approaches to address this issue.

K. CGL Waiver of Subrogation Endorsement**Waiver of Transfer of Rights or Recovery Against Others To Us¹**

This endorsement modifies insurance provided under the following:

SCHEDULE

Name of Person or Organization: _____.

[Insert Released Persons: (a) Shopping Center Owner, L.P., and its successors and assigns as owner of the Property (the "Shopping Center Owner"), and its directors and employees, (b) Third Party Management, L.L.P. (the "Property Manager"), (c) General Electric Credit Corporation ("Building Owner's Lender").]

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

The TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US Condition (Section IV)–COMMERCIAL GENERAL LIABILITY CONDITIONS) is amended by the addition of the following:

We waive any rights of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage arising out of your ongoing operations or your work done under a contract with that person or organization and included in the "products-completed operations hazard." This waiver applies only to the person or organization shown in the Schedule above.²

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¹ **Pre- and Post Loss Waivers of Subrogation.** Condition 8 of ISO's CGL policy forbids the insured from impairing the insurer's subrogation rights after a loss has occurred. The following is Condition 8:

CGL SUBROGATION PROVISION**8. Transfer Of Rights Of Recovery Against Others To Us**

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 loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

Copyright, ISO Properties, Inc., 2000

Despite the fact that Condition 8 of ISO's CGL policy impliedly (though not expressly) allows an insured to waive recovery against a third party prior to loss, ISO nevertheless has promulgated this form. This form serves a purpose. It documents that the insurer is aware of the contractual agreement between its insured and the person named in the schedule. It also serves as evidence that the insured's waiver of its own recovery rights has not jeopardized its coverage under the policy. Since the other party will usually have a substantial interest in knowing that the endorsed policy is valid and in force, the reinsurance provided by a formal subrogation waiver can be significant. However, it is generally thought that a waiver of subrogation in a contract benefitting a party who will be included as an additional insured under the named insured's policy is not required. The liability insurer is generally prohibited from subrogating against the additional insured. A reason one might include the waiver of subrogation endorsement and a contractual waiver of recovery in this situation is that the named insured (the contractor) might fail to effect the additional insured status on behalf of the additional insured-owner.

² **Waiver is Limited to Designated Persons/Entities.** This statement emphasizes the importance of listing all person as to whom you wish the insurer to waive its right of subrogation.

L. Waiver of Subrogation in ISO Form Commercial Property Policies

**ISO COMMERCIAL PROPERTY CONDITIONS
SUBROGATION CLAUSE**

I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or from 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 person in writing:

1. Prior to a loss to your Covered Property or Covered Income.¹
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;
 - c. your tenant.²

This will not restrict your insurance.

Copyright, ISO Commercial Risk Services, Inc., 1983, 1987³

¹ **ISO Property Insurance Contains a Clause Consenting in Advance to Pre-Loss Waiver of Insurer's Right of Subrogation.** This form is the subrogation provision contained in the ISO Commercial Property Conditions Form, Form CP 00 90. It grants broad rights to the insured to waive pre-loss the insurer's subrogation rights. Unlike many property insurance forms it expressly grants this right, rather than impliedly authorizing pre-loss waiver. Thus, there is no need to request or attach an endorsement form waiving subrogation rights to an ISO Commercial Property containing this provision. Inclusion of a waiver in the lease executed by Landlord and Tenant affects a waiver of the insurer's subrogation rights.

² **ISO Property Insurance Contains a Clause Consenting in Advance to a Post-Loss Waiver of Insurer's Right of Subrogation as to Tenants.** The ISO form even goes a step further in permitting a post-loss waiver of the property insurer's subrogation rights by a landlord as to its tenant. This may come into play if the lease does not contain a pre-loss waiver and the landlord desires to waive the insurer's subrogation rights in order to maintain the business relationship with the tenant.

³ **Caution: Non-ISO Property Insurance Forms Should be Reviewed to Confirm that They Have a Clause Consenting in Advance to Pre-Loss Waiver of Insurer's Right of Subrogation.** If the property insurance is written on a non-ISO Commercial Property form, then the policy conditions must be examined in connection with drafting into the lease waiver of recovery and pre-loss waiver of subrogation provisions. Many property policies recognize either expressly or impliedly that the insured may waive the insurer's rights of subrogation prior to a loss. However, some forms, particularly inland marine policy forms (common in builder's risk policies) do not permit pre-loss waiver of the insurer's subrogation rights. If there is any uncertainty, it is prudent to seek a clarifying endorsement.