

**RISK MANAGEMENT FOR LANDLORDS, TENANTS AND CONTRACTORS**

**Through Contractual Provisions for Indemnity, Additional Insureds,  
Waivers of Subrogation, Exculpations and Releases**

**Volume 2: “*The Forms*”**

William H. Locke, Jr.  
GRAVES, DOUGHERTY, HEARON & MOODY  
515 Congress Avenue  
Suite 2300  
Austin, Texas 78701-3587  
512-480-5736  
blocke@gdhm.com

May, 2003

Austin, Texas

Additional forms and discussion on this topic are found at [www.gdhm.com/Indemnity.pdf](http://www.gdhm.com/Indemnity.pdf)

## BIOGRAPHICAL INFORMATION

### **William H. Locke, Jr.**

Graves, Dougherty, Hearon & Moody,  
A Professional Corporation  
515 Congress Ave., Suite 2300  
Austin, Texas 78701  
512/480-5736  
FAX: 512/478-1976  
[blocke@gdhm.com](mailto:blocke@gdhm.com)

#### EDUCATION:

B.A., The University of Texas  
J.D. with Honors, The University of Texas

#### PROFESSIONAL ACTIVITIES:

Board Certified in Real Estate Law: Commercial, Residential and Farm and Ranch  
Life Fellow, Texas Bar Foundation  
Fellow of College of Law of State Bar of Texas  
Director, Texas College of Real Estate Attorneys  
Past President, Corpus Christi Bar Association  
Past Chairman, Zoning and Planning Commission of City of Corpus Christi  
Past President, Corpus Christi (Nueces County) Bar Association

#### LAW RELATED PUBLICATIONS AND HONORS:

Co-author of State Bar of Texas publication Texas Foreclosure Manual  
Author/speaker for the State Bar of Texas, Advanced Real Estate Law Course on "Field Guide for Due Diligence on Income Producing Properties"  
Author/speaker for the State Bar of Texas, Annual Advanced Real Estate Drafting Course and the Annual Advanced Real Estate Law Course on "Risk Management"; "Shifting of Extraordinary Risk: Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation and Exculpation"  
Author/speaker for the Advanced Real Estate Law Course: Leases In-Depth of Southern Methodist University on "Civil Forfeiture Actions;" and at the Annual Mortgage Lending Institute on "Seizure of Lender's Collateral Under Drug Enforcement Laws"  
The Best Lawyers in America (Real Estate)  
Who's Who in America

## ANNOTATED RISK MANAGEMENT FORMS:

### **Indemnity, Additional Insureds, Waivers of Subrogation, Exculpations and Releases**

Risk shifting 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 concerns provisions dealing with the shifting of "extraordinary" risk from one party to the other. Each contracting party's risk-related goals are (1) to accept no more risk than it can reasonably bear or insure, and (2) to transfer the balance of the risk to the other party. The following factors are involved in the ultimate determination as to how much risk a party receives or transfers: (A) which party is in the best position to control the extent of the occurrence of the risk?; (B) does one party have specialized knowledge of the type of risks most likely to occur and how to prevent or identify them?; (C) custom and practice in the particular industry (for example, sellers to buyers; landlords to tenants; owners to contractors; contractors to subcontractors); (D) the bargaining strength of the respective parties; and (E) statutory and common law public policies.

Indemnity agreements are common in most business relationships involving real estate. For example, the following types of agreements are indemnity agreements or are in the nature of indemnity agreements: title insurance, payment and performance bonds, and letters of credit. Indemnity agreements are contained in the following contracts: sales agreements, oil and gas leases, easements, agency agreements, construction contracts, loan agreements, notes (provisions for attorney's fees), and escrow agreements. Attached to this Article is an Appendix of Annotated Forms of extraordinary shifting of risks.

**"Indemnity"**<sup>[1]</sup> is, "I agree to be liable for your wrongs." Indemnity is a shifting of the risk of a loss from a liable person to another. However, many times scrivener use an indemnity provision when they do not know whether the Indemnified Person is a potentially liable person. 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"**<sup>[76]</sup> is, "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"**<sup>[76]</sup> is, "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. *See Wallerstein v. Spirt*, 8 S.W.3d 774 (Tex.App.-Austin [3<sup>rd</sup> Dist.] 1999, *no writ*) - involving an indemnity by partners but not a release between partners.

The Texas Supreme Court has imposed certain requirements, such as the "fair notice" principle<sup>[16]</sup> and the "express negligence" doctrine,<sup>[15]</sup> in order for a liable party to be able to shift its liability for its negligence to another person. 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<sup>[16]</sup> 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.

*Spence*, at 634.

The Texas Supreme Court expressed 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). In *Ethyl*, the court observed

As we have moved closer to the express negligence doctrine, the scribes 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 scribes 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 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.<sup>[76]</sup> Most recently, 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 an Indemnified Person's strict liability to expressly state that it covers such strict liability.<sup>[26]</sup>

The most common method of risk management is through contractual provisions for insurance. The success of an entity's approach to contractual risk transfer can be considered successful if it meets the following criteria.

- Risks retained are appropriate and affordable.
- Risk as an element of the overall transaction and negotiation is incorporated at the onset.
- Indemnity, insurance, and other pertinent conditions are not so onerous that contract negotiations drag on unnecessarily delaying the transaction or necessitating the use of second-rate service providers to accomplish the contract's purpose.
- Contractual conditions allocating risk are not so onerous that a court disallows their operation at a future point in time.
- Insurance requirements are clear, using recognized terms that can be interpreted both at the time the contract is negotiated and in possible future disputes.

- 
- Insurance and other support for the indemnity is in place when a loss occurs.
  - A thorough insurance monitoring process keeps the transferee in compliance with the insurance requirements.
  - The performance of the contract is monitored and regularly evaluated.

Criteria quoted from CONTRACTUAL RISK TRANSFER Strategies for Contract Indemnity and Insurance Provisions (International Risk Management Institute, Inc. 2003).

This Article is presented in two parts: **Volume 1 “*The Law*”** and **Volume 2 “*The Forms*.”** Volume 1 first addresses Texas law in the absence of an agreement. Additionally, the relationship of the statutorily-created doctrine of contribution to indemnity and the adoption of statutory schemes of allocating risk (comparative responsibility and the later adopted scheme of "proportionate responsibility") are explained. An approach to drafting a "successful" indemnity provision is explored. In the final part of Volume 1 the law as to exculpation, release, limitation of liability, insurance coverages, additional insured designations, and waiver of subrogation provisions as companions to indemnity provisions is analyzed. Volume 2 contains risk management provisions contained in the most common forms in use in commercial construction projects and office leases (e.g., AIA A201 General Conditions and the State Bar Real Estate Office Lease form). Also included are alternative indemnity, insurance, and waiver provisions to effect a different shifting of risks than are contained in the “standard” forms. Accompanying each of these forms is a commentary noting the bias (the protected party) and a discussion of the risk allocations and the methods by which the risk is allocated. Also, included are the insurance endorsement forms commonly referenced in the construction contract and office lease risk management provisions and a commentary as to risk coverage and exclusions to coverage addressed by these insurance endorsements. Each of these forms has been annotated with footnotes identifying relevant case law and containing additional commentary explaining the risks being addressed by each form and certain gaps in coverage not addressed or possibly inadvertently being misaddressed.

### Hypothetical

Several of the forms (Appendices 2, 7-14, 21 and 22) have been completed to address the following hypothetical.

DeBaker & Coolidge, L.L.P. (“**Tenant**”) desires to lease a medical office suite (the “**Leased Premises**”) in a multi-tenant medical office building known as “Fannin Center” (the “**Office Building**”) from Crescent Real Estate (“**Landlord**” or the “**Building Owner**”). The Office Building has been completed and is occupied by other tenants. The Leased Premises is an entire floor in the Office Building. It has never been occupied by another tenant, and has not been finished-out, but is basically bare concrete enclosed by exterior walls of the Office Building. The Office Lease provides for the Tenant to build out the improvements to the Leased Premises, including certain improvements that would be considered Common Areas improvements, if located on other floors of the Office Building (for example, the bathrooms, HVAC handlers, and certain partitioning). The Landlord is funding a tenant allowance to cover “building standard” improvements to the floor. The balance of the cost of the Tenant Improvements will be paid for by Tenant. Tenant has hired Joe AIA (the “**Tenant’s Architect**”) to design and supervise the Tenant Improvements. Tenant has also hired ABC Construction, Inc. (“**Tenant’s Contractor**”) to construct the Tenant Improvements. Landlord has required Tenant to coordinate the construction of the Tenant Improvements with Constructors, Inc., the building contractor (the “**Building Contractor**”) and its architects and engineers, including the Building Design Architect (the “**Landlord’s Architect**”) and the HVAC engineer for the Office Building (the “**Office Building HVAC Contractor**”). Tenant’s construction activities will have to be coordinated with various other contractors of the Landlord providing on-going operational services at the Office Building, including the management service (the “**Project Manager**”), the security guard service (the “**Security Contractor**”) and the parking garage contractor (the “**Parking Garage Operator**”).

Landlord has tendered to Tenant, and you have been recommended by the Landlord’s broker to the prospective Tenant, to review Landlord’s standard Office Lease (Appendix 5). Landlord also has provided Tenant with a copy of another office lease in use for a comparable office building (Appendix 6) and assures Tenant that it should have no problem complying with the requirements of the Office Lease and that since this is a standard deal, very little lawyer time should be involved.

The Office Lease provides that Tenant, Drs. DeBaker and Coolidge (the “**Tenant’s Principals**”), and the Tenant’s Contractor are to indemnify Landlord and certain “**Landlord-Related Persons**” (the Project Manager, the Office Building Architect, the Building Contractor, the Office Building HVAC Contractor, the Security Contractor, Parking Garage Contractor, and Landlord’s Lender) from injuries occurring during the construction and thereafter during the tenancy (**3.18.3** “*Tenant shall indemnify and defend the Landlord Parties against all Claims arising, or alleged to arise, from Tenant’s Insurable Injuries*”) and to provide liability insurance protecting Landlord and the other Landlord-Related Persons as to injuries occurring in and around the Office Building arising out of the construction of the Tenant Improvements and thereafter during the Lease Term. (**11.2.1.1** “*Commercial general liability insurance on ISO Form CG 00 01 93 or CG 00 01 06 95 (or, if Tenant has 2 or more locations covered by the policy and the policy contains a general aggregate limit, ISO form amendment ‘Aggregate Limits of Insurance Per Location’ CG 25 04 11 85) in the amounts and with the coverages described in Exhibit A. Landlord Parties shall be included as ‘additional insureds’ using ISO additional insured form CG 20 26 11 85, without modification. A waiver of subrogation in favor of Landlord Parties using ISO form CG 24 04 10 92 is also required.*”). The Office Lease contains provisions addressing property insurance covering the Tenant Improvements during construction and after their completion during the Lease Term. The Office Lease also requires Tenant to obtain Payment and Performance Bonds covering the construction of the Tenant Improvements.

Tenant asks you to review the indemnity and insurance provisions of the Office Lease and to assure it that it is “standard and not a problem.” (Appendix 5 3.18.1 and **11.2**)

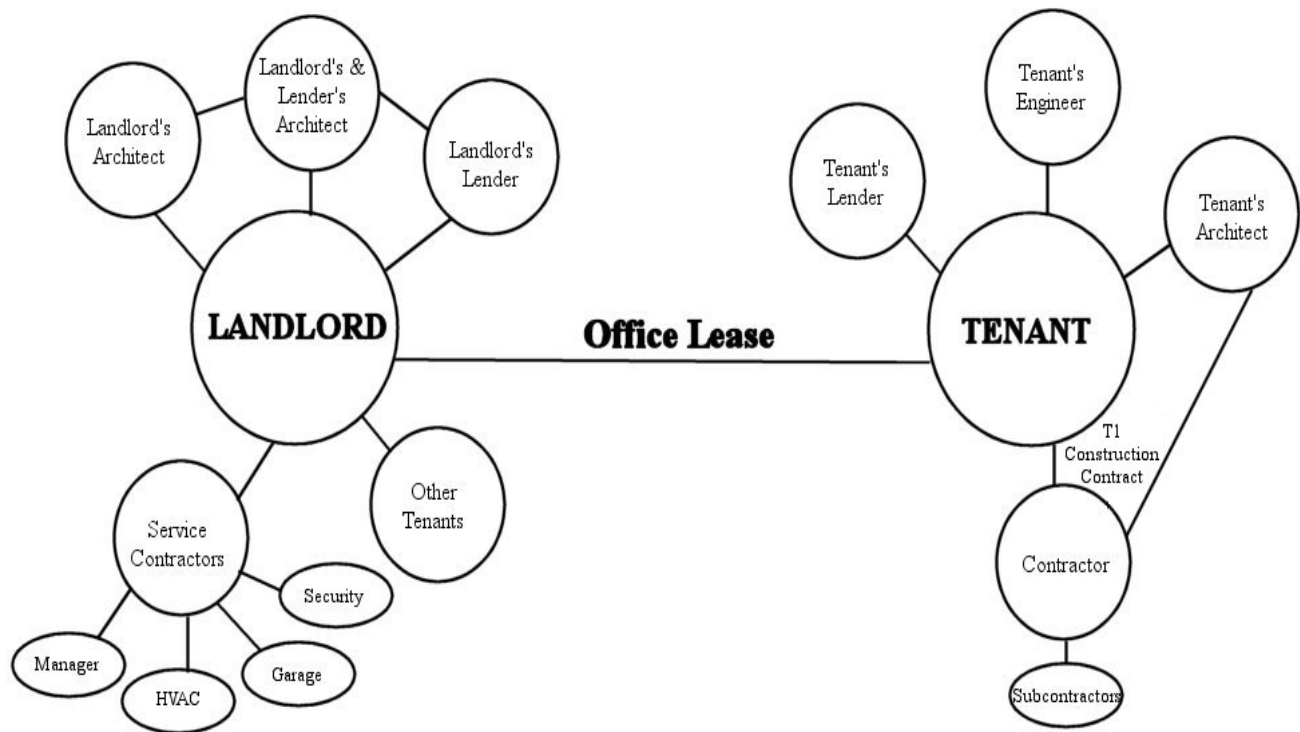
Tenant’s Architect has prepared and delivered to you a Construction Contract for the Tenant Improvements (Appendix 1). You take comfort from the detailed indemnity and insurance provisions contained in the AIA form. You notice that the AIA form identifies your prospective client as the “Owner.” The form provides that the Owner is to purchase and carry the “*Owner’s usual liability insurance.*” (**11.2.1**). You notice that the Construction Contract provides that the Contractor is to purchase “*such insurance as will protect the Contractor from claims which may arise out of or result from the Contractor’s operations*” (**11.1.1**) and that the “*Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor’s usual sources as primary coverage*

for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract." (11.3.1). Further "the Owner (is to) reimburse the Contractor" for such insurance. (11.3.1). You note that the Contract provides that the "Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds..." (11.3.3). You further note that the Contract provides that "the Owner shall purchase and maintain ... property insurance written on a builder's risk 'all-risk' or equivalent policy form" and that "this insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the project." (11.4.1). You wonder if these provisions are consistent with the Office Lease.

The parties involved in this hypothetical have been requested to have their respective insurance agents issue Certificates of Insurance reflecting the contracted-for coverages. (Office Lease 11.2.3; Construction Contract 11.1.3).

You begin reading Chapter 11 of the Texas Real Estate Forms Manual of the State Bar of Texas, and in particular the Office Lease (Appendix 4). You begin looking for a CLE article to answer all of your questions and to be your "go-to source!"

You make a sketch of the various parties involved.



<b>APPENDIX TABLE OF CONTENTS</b>		<b>Page No.</b>
1	AIA A201 - General Conditions of the Construction Contract .....	8
2	Revision to AIA Risk Management System .....	15
3	Another Construction Contract .....	30
4	State Bar Form Office Lease Risk Management Provisions .....	38
5	Crescent Office Lease .....	40
6	Another Office Lease .....	47
7	Office Lease – Risk Allo cated Based on M odified Contractual Comparative Responsibility .....	54
8	Construction Project - Certificates of Liability and Property Insurance .....	68
9	Office Lease - Certificates of Liability and Property Insurance .....	76
10	TE 99 01B (BAP Texas) Additional Insured .....	90
11	TE 20 46A (BAP Texas) Changes In Transfer Of Rights Of Recovery Against Others To Us (Waiver Of Subrogation) .....	92
12	WC 42 03 04 A Workers Compensation And Employers Liability Insurance Policy .....	94
13	CGL Endorsement - CG 20 10 10 01 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization .....	96
14	CGL Endorsement - CG 20 26 11 85 Additional Insured–Designated Person or Organization .....	98
15	CGL Endorsement - CG 20 11 10 96 Additional Insured–Managers or Lessors of Premises .....	105
16	CGL Endorsement - CG 20 24 11 85 Additional Insured–Owners or Other Interests from Whom Land Has Been Leased .....	107
17	CGL “Other Insurance” Clause (1986 Through 1996 Editions of ISO’s CGL 00 01) .....	109
18	1998 ISO CGL 00 01 “Other Insurance” Clause .....	111
19	CGL Endorsement - Endorsement to Indemnitee’s “Other Insurance” Clause Occurrence Form .....	112
20	CGL Endorsement - Blanket Endorsement .....	113
21	CGL Endorsement - CG 20 33 07 98 Additional Insured–Owners, Lessees or Contractors–Automatic Status When Required in Construction Agreement with You .....	118
22	CGL Endorsement - 20 37 10 01 Additional Insured–Owners, Lessees or Contractors–Completed Operations .....	120
23	CGL Waiver of Subrogation Endorsement - CG 24 04 10 92 Waiver of Transfer of Rights or Recovery Against Others To Us .....	122



---

24	Owner's Protective Liability Policy Endorsement - CG 29 88 10 93	
	Waiver of Transfer of Rights or Recovery Against Others To Us .....	123
	Footnotes .....	124

## Appendix 1

### AIA A201 - General Conditions of the Construction Contract (Contractor and Architect form)

[Emphasis has been added to highlight certain risk management terms and issues. Indemnities are composed of five elements, which are identified in this form and in each of the other risk management forms as follows for purposes of comparing the scope of each element in the forms: [1. *the Indemnifying Person*]; [2. *the Indemnified Persons*]; [3. *the Indemnified Liabilities*]; [4. *the Indemnified Matters*]; and [5. *the Excluded Matters*]. A similar methodology is applicable to the components of releases and waivers: [1. *the Releasing Person*]; [2. *the Released Persons*]; [3. *the Released Liabilities*]; [4. *the Released Matters*]; and [5. *the Excluded Matters*]. Following this form and each of the forms in this Appendix is a Commentary as to the scope of the form and the biases contained therein. Further explanations of certain terms and issues are footnoted throughout each form as follows <sup>[#]</sup>]

### 3.18 INDEMNIFICATION.<sup>[1]</sup>

**3.18.1** To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3, the Contractor [*1. the Indemnifying Person*] shall indemnify <sup>[2]</sup> and hold harmless the [*2. the Indemnified Persons*:] Owner, Architect, <sup>[7]</sup> Architect's consultants, <sup>[6]</sup> and agents and employees of any of them <sup>[6]</sup> from and against [*3. the Indemnified Liabilities*:] **claims**, <sup>[8]</sup> damages,<sup>[9-10]</sup> losses and expenses, including but not limited to attorneys' fees, <sup>[11]</sup> **arising out of** <sup>[32-33]</sup> or resulting from performance of **the Work**, provided that such claim, damage, loss or expense is attributable to [*4. the Indemnified Matters*:] bodily injury,<sup>[28-26]</sup> sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) <sup>[43]</sup> including loss of use resulting therefrom, **but only to the extent caused** <sup>[29]</sup> in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless** of whether or not such claim, damage, loss or expense is **caused** <sup>[20-22]</sup> in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.<sup>[15-17][40]</sup>

**3.18.2** In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Paragraph 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.<sup>[27]</sup>

**3.18.3** The obligations of the Contractor under this Paragraph 3.18 shall not extend to [*5. the Excluded Matters*:] the liability of the Architect, <sup>[7]</sup> the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give

directions or instruction by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage. . . .

### 10.3 HAZARDOUS MATERIALS.<sup>[26]</sup>

**10.3.1** If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop work in the affected area and report the condition to the Owner and Architect in writing.

**10.3.3** To the fullest extent permitted by law, the Owner [**1. the Indemnifying Person**] shall indemnify<sup>[2]</sup> and hold harmless [**2. the Indemnified Persons:**] the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against [**3. the Indemnified Liabilities:**] claims,<sup>[8]</sup> damages,<sup>[9-10]</sup> losses and expenses, including but not limited to attorneys' fees,<sup>[11]</sup> **arising out of**<sup>[32-33]</sup> or resulting from [**4. the Indemnified Matters:**] performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph **10.3.1** and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that [**5. the Excluded Matters**] such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.<sup>[36]</sup>

....

**10.5** If, without negligence on the part of the Contractor<sup>[26]</sup>, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify<sup>[2]</sup> the Contractor for all cost and expense thereby incurred.

....

### 11.1 CONTRACTOR'S LIABILITY INSURANCE

**11.1.1** The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractors operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 claims for damages insured by personal injury liability coverage;
- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;

- .7 claims for bodily injury or property damage arising out of completed operations; and
- .8 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

**11.1.2** The insurance required by Subparagraph **11.1.1** shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

**11.1.3** Certificates of insurance acceptable to the Owner<sup>[72]</sup> shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph **11.1** shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire initial at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph **9.10.2**. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

## **11.2 OWNERS'S LIABILITY INSURANCE**

**11.2.1** The Owner shall responsible for purchasing and maintaining the Owner's usual liability insurance.

## **11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE**

**11.3.1** Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's **vicarious liability** for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Clauses **11.1.1.2** through **11.1.1.5**.

**11.3.2** To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive<sup>[76]</sup> all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

**11.3.3** The Owner shall **not** require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability Insurance coverage under Paragraph **11.1**.<sup>[27, 46-48, 52-56, 60-61]</sup>

## 11.4 PROPERTY INSURANCE

**11.4.1** Unless otherwise provided, the Owner<sup>[68]</sup> shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph **9.10** or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph **11.4** to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the project.

**.1** Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

**.2** If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

....

**11.4.6** Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverage required by this Paragraph **11.4**. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

**11.4.7 Waivers of Subrogation.** <sup>[62-71, 76]</sup> The Owner and Contractor [**1. the Releasing Persons**] waive <sup>[62-71, 76-81]</sup> all rights against [**2. the Released Persons:**](1) **each other**] and any of their **subcontractors**, sub-subcontractors, agents and employees, each of the other, and (2) the **Architect**, Architect's consultants, separate contractors, agents <sup>[77]</sup> and employees described in Article **6**, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages [**3. the Released Liabilities**] caused by fire or other perils or other causes of loss to the extent [**4. the Released Matters:**] **covered by property insurance** obtained pursuant to this Paragraph **11.4** <sup>[63]</sup> or other property insurance applicable to the Work, <sup>[71b]</sup> except [**5. the Excluded Matters:**] such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require [**1. the Releasing Persons**] of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. <sup>[67]</sup> A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance

---

premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged. <sup>[ 71c ]</sup> (*Emphasis and references to the 5 Elements of Indemnities and Releases added to this AIA form by author for illustration of risk management issues.*)

---

### Commentary:

**Hypothetical.** In the hypothetical, the Tenant’s Architect prepared the Construction Contract using its standard AIA forms, the AIA A101 and A201. You notice that the AIA A101 form has been completed with the Tenant shown as the “Owner.” The form provides that the Owner is to purchase and carry the “Owner’s usual liability insurance.” (11.2.1). You notice that the Construction Contract provides that the Contractor is to purchase “such insurance as will protect the Contractor from claims which may arise out of or result from the Contractors operations” (11.1.1) and that the “Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor’s usual sources as primary coverage for the Owner’s, Contractor’s and Architect’s vicarious liability for construction operations under the Contract.” (11.3.1). Further “the Owner (is to) reimburse the Contractor” for such insurance. (11.3.1). You note that the Contract provides that the “Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds...” (11.3.3). You further note that the Contract provides that “the Owner shall purchase and maintain ...property insurance written on a builder’s risk ‘all-risk’ or equivalent policy form” and that “this insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the project.” (11.4.1). You wonder if these provisions are consistent with the Office Lease.

**Indemnity.** The AIA risk management system reflected in the AIA A201 seeks to shift the risk of liabilities [3.18.1] “arising out of the Contractor’s performance of the Work, if such liabilities are caused in whole or in part by the negligent acts or omissions of the Contractor or by its Subcontractor [or] anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.” This indemnity language does not meet either the express negligence test or the fair notice test. <sup>[ 15, 20-21 ]</sup> As a result it does not indemnify the “Owner, Architect, Architect’s consultants, and agents and employees of any of them” (the Indemnified Persons) for the Indemnified Liabilities for which this provision was intended. The “regardless of whether ... caused in part by a party indemnified hereunder” does not expressly refer to the negligence, in whole or in part of the Indemnified Persons.

A similar malady exists as to the indemnity contained in 10.03.3, which is an indemnity by the Owner of the Contractor as to claims against the “Contractor, Subcontractors, Architect, Architect’s consultants and agents and employees of any of them ... provided that such damage, ... is not due to the sole negligence of a party seeking indemnity.”<sup>[36]</sup> This indemnity language does not meet either the express negligence test or the fair notice test.<sup>[ 15, 26, 36 ]</sup> As a result it does not indemnify the “Contractor, Subcontractors, Architect, Architect’s consultants and agents and employees of any of them” (the Indemnified Persons) for the Indemnified Liabilities for which this provision was intended. The phrase “provided that such damage, ... is not due to the sole negligence of a party seeking indemnity” does not expressly indemnify the Indemnified Persons for hazardous materials liability arising out of either the concurrent negligence of the Indemnified Persons or their non-negligent strict liability. The reiteration in Paragraph 10.5 of the 10.3.3 indemnity by the Owner is

also subject to the same maladies; it is neither conspicuous and does not expressly state that the Contractor is being indemnified for its strict liability. <sup>[ 15, 26, 36 ]</sup>

**Insurance.** The liability insurance coverage being provided by Contractor pursuant to Paragraph **11.1** protects the Contractor against liability for liabilities “which may arise out of or result from the Contractor’s operations...” This provision does not directly protect the Owner, except to the extent of the protection afforded by Clause **11.1.1.8** which protects the Contractor for “claims involving contractual liability insurance applicable to the Contractor’ obligations under Paragraph **3.18.**” Clause **11.1.1.8** is not direct insurance in favor of the Indemnified Persons. It is indirect protection to the extent that the **3.18** indemnity is effective. Since **3.18** is not enforceable in Texas, an issue exists as to whether the “assumed liability on an insured contract” coverage under the Contractor’s CGL policy will provide the Indemnified Persons any protection. <sup>[ 15, 26, 36, 49 ]</sup>

Paragraph **11.3** provides the Owner with an option at the Owner’s expense to require the Contractor to purchase Project Management Liability insurance for the “Owner’s, Contractor’s and Architect’s **vicarious liability** for construction operations under the Contract.” Subparagraph **11.3.1** provides that “Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner.” Subparagraph **11.3.3** provides that the “Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds.” Thus, the AIA system contemplates that the most common form of risk shifting device will not be employed to protect the Indemnified Persons for the very risk that were attempted to be shifted to the Contractor under the indemnity in Paragraph **3.18**, the risk of liability for concurrently negligently caused liabilities.

A common method of protecting the Owner from the risk of liability arising out of its concurrent negligence is to require the Contractor to have its insurance company list the Owner and the other Indemnified Persons as additional insureds under an ISO Additional Insured Endorsement, such as an ISO CG 20 10 01 Additional Insured - Owners, Lessees or Contractors – Scheduled Person or Organization (**Appendix 13**) or an ISO CG 20 26 11 85 Additional Insured - Designated Person or Organization (**Appendix 14**). Additional insured status as to liabilities arising after final completion of a contractor’s work may be endorsed on to the contractor’s CGL policy by ISO CG 20 37 10 01 Additional Insured - Owners, Lessees or Contractors – Completed Operations (**Appendix 22**). See the Commentary following each of these forms. Also, see the additional insured provisions contained in **Appendices 2 and 3** and the related Commentary.

**Waivers of Subrogation.** <sup>[63-71,76]</sup> The “waiver of subrogation” provision contained in Subparagraph **11.4.7** is both a covenant requiring the Owner and the Contractor to cause their insurance companies to endorse their property insurance policies to waive subrogation against the Owner and Contractor and a release of claims for “damages caused by fire or other perils or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph **11.4** or other property insurance applicable to the Work.” This provision is neither conspicuous nor express as to the negligence of the parties and as such an issue exists as to its enforceability as a release and waiver. <sup>[69,70, 76]</sup>

The waiver of recovery and subrogation is “*to the extent covered by property insurance obtained pursuant to this Paragraph **11.4** or other property insurance applicable to the Work.*” These waivers are not broad enough to cover property losses to property other than the Work, for example where the “owner” under the construction contract is a tenant doing tenant improvements, the waiver does not extend to losses to the tenant’s FF&E or property beyond the Work site, such as other

portions of the Leased Premises; and, for example, where the Work being done for the owner is only as to a portion of an owner's facility, the waiver of recovery does not extend to property losses outside the Work covered by insurance.<sup>[72b]</sup> The waiver as drafted in the AIA form is also limited by the time period of construction and will not cover the Releasing Party's property losses arising after Work completion but attributable to the "Released Party's" work.<sup>[72c]</sup> Care should be taken by the parties in coordinating the indemnity, the insurance and the waiver of subrogation provisions to avoid the failure to address a timing of loss issue (*e.g.*, broad indemnity covering post Work liabilities, but failure to insure the loss under a completed operations endorsement, or by failure of the waiver of subrogation provision to extend to post-Work completion losses paid by the owner's insurance.

This Subparagraph **11.4.7** does not address either a waiver of claims by the Owner and Contractor for liabilities to the extent covered by liability insurance provided by a party to protect the other or a waiver of subrogation by the liability insurance issuers. Thus, although the Contractor indemnifies the Indemnified Persons under Paragraph **3.18**, its liability insurance issuer which has paid the claim has not released its right to subrogate to the Contractor's claim against the Owner *et al.* See **Appendix 2**.



## Appendix 2

### Revision to AIA Risk Management System (Owner form)

**[Hypothetical]:** Tenant improvements by Tenant with risk management provisions protecting Building Owner and Tenant. This form favors the Tenant and assumes that the Contractor is carrying the builder's risk insurance and performance and payment bonds are covered in a separate provision.]

### ADDENDUM TO AIA DOCUMENT A201

THIS ADDENDUM to AIA Document A201 shall amend, supplement, modify, delete and replace by substitution (or where applicable, be inserted as) the indicated provisions of the Contract Documents between **DeBaker & Coolidge, L.L.P.** ("**Owner**") and **ABC Construction, Inc.** ("**Contractor**") for which **Joe AIA** is the architect ("**Architect**"). Wherever the terms hereof are inconsistent with the other Contract Documents, the terms hereof shall be controlling. Paragraphs are numbered herein to fit into the paragraph numbering scheme of the A201. DeBaker & Coolidge, L.L.P. is referred to herein and in the Contract Documents as "Owner" but it is understood and agreed that such reference is to it as the owner of the tenant's interest as tenant not as owner of the fee simple of the property. Crescent Real Estate is the owner of the fee simple and is the landlord of DeBaker & Coolidge, L.L.P. Crescent Real Estate is referred to herein as the "**Building Owner.**" The Contract Documents are only executed by and binding upon DeBaker & Coolidge, L.L.P. as the tenant of the Building Owner.

## **ARTICLE 3. CONTRACTOR.**

### **3.18 INDEMNIFICATION.**<sup>[1]</sup>

**3.18.1 Definitions.** For purposes of this Paragraph 3.18, the following terms are defined. These definitions incorporate terms defined in other portions of this Contract.

**.1 "Indemnify"** means to protect, defend, hold harmless, pay and be solely responsible for the "Indemnified Liabilities" (as such term is herein defined).<sup>[2]</sup>

**.2 "Liabilities"** shall include<sup>[8-11]</sup> all, whether foreseeable or unforeseeable, claims, damages (including actual, consequential and punitive), losses, fines, penalties, liens, causes of action, suits, judgments, settlements and expenses [including court costs, attorney's fees (including attorney's fees in defending and/or settling a claimed Liability and attorney's fees to collect on this Indemnity), costs of investigation, and expert witnesses] of any nature, kind or description by, through or of any person or entity, including property loss or damage in, on or about the Project, bodily or personal injury, sickness, disease, and/or death (including bodily or personal injury and/or death of employees of Contractor or of any Instrumentality of Contractor).

**.3 "Indemnified Liabilities"** shall be all Liabilities arising from Indemnified Matters except solely from Excluded Matters (as such terms are herein defined).

**.4 "Arising out of"** means directly or indirectly, in whole or in part (A) to occur as a result of, (B) to cause, or (C) to result in.<sup>[29-33]</sup>

**.5 "Instrumentality"** shall mean by, through or of the person including (A) the person, (B) subcontractors of the person, (C) the employees of the person or of subcontractors of the person, and (D) any person that the person or subcontractors of the person control or exercise control over.

**.6 "Indemnified Persons"** shall include <sup>[6]</sup>

(A) Owner, Owner's partners, affiliated companies of Owner or of any partner of Owner,

(B) Owner's construction lender,

(C) Architect <sup>[7]</sup>,

(D) (1) Crescent Real Estate (the "**Building Owner**"), (2) any lender whose loan is secured by a lien against the Building Owner's interest in the Property, including General Electric Credit Corporation (the "**Office Building Owner's Lender**"), (3) Crescent Management, L.L.P., its successors and assigns (the "**Property Manager**"), (4) Crescent Office Building Architects (the "**Owner's Architect**"), (5) the following contractors of the Owner: \_\_\_\_\_ (the "**Parking Garage Operator**"), \_\_\_\_\_ (the "**Security Services Contractor**"), Constructors, Inc. (the "**Building Contractor**"), and \_\_\_\_\_ (the "**Office Building HVAC Contractor**"), and

(E) as to each of the persons listed in (A)-(D) the following persons: each such person's respective partners, partners of their partners, and any successors, assigns, heirs, personal representatives, devisees, agents, stockholders, officers, directors, employees, and affiliates of any of the persons listed in (E).

### 3.18.2 INDEMNITY.

**.1 Indemnified Matters.** <sup>[17]</sup> *Contractor agrees to indemnify the Indemnified Persons for all Indemnified Liabilities arising out of* <sup>[32-33]</sup> *or alleged* <sup>[29]</sup> *to have arisen out of, any of the following matters (the "Indemnified Matters"):*

(A) *the operations* <sup>[33]</sup> *of the Contractor and its Instrumentalities, including the Work performed hereunder, or any part thereof,*

(B) *breach by Contractor of the Contract, and* <sup>[12]</sup>

(C) *any act, omission, willful misconduct, strict liability,* <sup>[15-17,26]</sup> *breach of warranty, express or implied, or violation of any laws, ordinances, rules, regulations or codes, now or hereafter existing, of or by Contractor or any Instrumentality of the Contractor, including the negligence in whole or in part of the Contractor* <sup>[22]</sup> *or an Instrumentality of the Contractor, whether or not arising in connection with the Work performed by Contractor or an Instrumentality of Contractor.*

**.2 Negligence and Strict Liability as an Indemnified Liability.** <sup>[15-17, 25-26]</sup> *Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity*

*obligations and/or liabilities assumed by the Indemnifying Persons under the terms of this Contract, be without limit and without regard to the cause or causes thereof (including pre-existing conditions), strict liability, or the negligence of any Indemnified Person and/or any Indemnifying Person, regardless of whether such negligence be sole, joint or concurrent, active or passive. It is the expressed intention of Owner and Contractor that the Contractor's indemnity shall apply to and include any and all Indemnified Liabilities and Indemnified Matters even if such Indemnified Liabilities Matters arise out of<sup>[29-33]</sup> or are alleged to arise*

**(A)** *in whole the sole negligence, of an Indemnified Person, or in part the concurrent negligence<sup>[19]</sup>, of any Indemnified Person including Owner and any other person,<sup>[21-22, 27]</sup>*

**(B)** *the strict liability of an Indemnifying Person or an Indemnified Person, or<sup>[24-26]</sup>*

**(C)** *the unintended consequences of intentional acts; injuries the natural result of intentional acts, if the injuries were unexpected, or unforeseen, or unintended; or*

**(D)** *liabilities arising out of acts in violation of law, committed negligently and without intent to inflict injury.*

**.3 Excluded Matters.** *The Indemnified Liabilities do not include (the "Excluded Matters") any Liabilities arising solely from the*

**(A)** *gross negligence of an Indemnified Person or an Instrumentality of an Indemnified Person; or<sup>[35]</sup>*

**(B)** *willful misconduct of an Indemnified Person or an Instrumentality of an Indemnified Person.<sup>[37]</sup>*

**Revision:** Paragraph 3.18.2.3 may be revised to exclude Matters (a) solely arising from the negligence of the Owner or another Indemnified Person or (b) to the extent they are attributable in whole or in part to the negligence of an Indemnified Person.

**Revision:** The "Indemnified Matters" or the "Excluded Matters" may specifically list the following additional "acts or omissions" of an Indemnified Person: *willful misconduct, gross negligence, or deliberate acts*. Public policy arguments against enforcing one or more of these matters as Indemnified Liabilities may be encountered.<sup>[19, 23]</sup>

**Revision:** **Contractual Comparative Responsibility – Where No Cross Indemnities.** Paragraph 3.18.2 and .3 may be revised as follows to change the “broad form” indemnity to a “limited form” indemnity by the Indemnifying Person to the extent of its “comparative responsibility” for the Indemnified Liabilities:

**.4 Contractual Comparative Responsibility.** *Notwithstanding anything in the Contract Documents to the contrary, if an Indemnified Liability arises out of the joint or concurrent causation, responsibility or fault, whether negligence, strict liability in tort, gross negligence, breach of warranty, express or implied, products liability, breach of the Contract or willful misconduct of the parties hereto or their Instrumentalities, the Indemnifying Person shall indemnify the Indemnified Person to the extent only that the Indemnifying Person’s or its Instrumentality’s negligence, strict liability in tort, gross negligence, breach of warranty, express or implied, products liability, breach of the Contract Documents or willful misconduct causes or contributes to the Indemnified Liabilities. In the event any Indemnifying Person should fail or refuse to participate in settlement of an Indemnified Liability, the Indemnified Person may settle with the claimant without prejudice to the Indemnified Person’s indemnity rights set forth herein, it being expressly recognized that a settlement, after demand shall be made on the non-settling Indemnifying Person, constitutes a settlement of the proportionate fault, including but not limited to, negligence of both the settling Indemnified Person and the non-settling Indemnified Person, which proportionate fault may later be apportioned between the parties hereto.*

**Revision:** **Cross Indemnities by Contractor and Owner as to their respective Contractual Comparative Responsibility.** The indemnity set out above may be changed from an indemnification by the Contractor of the Owner, to a mutual indemnity by each party of the other for the Indemnifying Person’s Contractual Comparative Responsibility as follows: Revise the definition of “Indemnified Person” to “Indemnified Owner-Related Persons” and add a definition for “Indemnified Contractor-Related Persons” and restate the Contractor’s indemnity in terms of being the Owner’s mutual indemnity as follows:

**.6 "Indemnified Owner-Related Persons"** shall include <sup>[6]</sup>

- (A) Owner,
- (B) Owner's construction lender,
- (C) Architect <sup>[7]</sup>,

(D) (1) Crescent Real Estate (the Building Owner), (2) any lender whose loan is secured by a lien against the Building Owner’s interest in the Property, (3) Crescent Management, L.L.P., its successors and assigns (the “Property Manager”), (4) Crescent Office Building Architects (the “Owner’s Architect”), (5) the following contractors of the Owner: Parking Garage Operator, Security Services Contractor, and the Office Building HVAC Contractor, and

(E) as to each of the persons listed in (A)-(D) the following persons: each such person's respective partners, partners of their partners, and any successors, assigns, heirs, personal representatives, devisees, agents, stockholders, officers, directors, employees, and affiliates of any of the persons listed in (E).

.7 "Indemnified Contractor-Related Persons" shall include <sup>[6]</sup>

(A) Contractor,

(B) Contractor's bonding company,

(C) Architect <sup>[7]</sup>, and

(D) as to each of the persons listed in (A)-(C) the following persons: each such person's respective partners, partners of their partners, and any successors, assigns, heirs, personal representatives, devisees, agents, stockholders, officers, directors, employees, and affiliates of any of the persons listed in (D).

### 3.18.2 INDEMNITY.

.1 **Indemnified Matters.** <sup>[17]</sup> *By Contractor. Contractor agrees to indemnify the Indemnified Owner-Related Persons for all Indemnified Liabilities arising out of,<sup>[32-33]</sup> or alleged <sup>[29]</sup> to have arisen out of, any of the following matters (the "Indemnified Matters"):*

(A) *the operations <sup>[33]</sup> of the Contractor and its Instrumentalities, including the Work performed hereunder, or any part thereof,*

(B) *breach by Contractor of the Contract, and <sup>[12]</sup>*

(C) *any act, omission, willful misconduct, strict liability, <sup>[15-17, 26]</sup> breach of warranty, express or implied, or violating of any laws, ordinances, rules, regulations or codes, now or hereafter existing, of or by Contractor or any Instrumentality of the Contractor, including the negligence in whole or in part of the Contractor <sup>[22]</sup> or an Instrumentality of the Contractor, whether or not arising in connection with the Work performed by Contractor or an Instrumentality of Contractor.*

*By Owner. Owner agrees to indemnify the Indemnified Contractor-Related Persons for all Indemnified Liabilities arising out of,<sup>[32-33]</sup> or alleged <sup>[29]</sup> to have arisen out of, any of the following matters (the "Indemnified Matters"):*

(A) *the operations <sup>[33]</sup> of the Contractor and its Instrumentalities, including the Work performed hereunder, or any part thereof,*

(B) *breach by Owner of the Contract, and <sup>[12]</sup>*

(C) any act, omission, willful misconduct, strict liability, <sup>[ 15 -17 , 26 ]</sup> breach of warranty, express or implied, or violation of any laws, ordinances, rules, regulations or codes, now or hereafter existing, of or by Owner or any Instrumentality of the Owner, including the negligence in whole or in part of the Owner<sup>[22]</sup> or an Instrumentality of the Owner, whether or not arising in connection with the Work performed by Contractor or an Instrumentality of Contractor.

**.2 Negligence and Strict Liability as an Indemnified Liability.** <sup>[ 15-17, 25-26 ]</sup>

<sup>1</sup> Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by the Indemnifying Person under the terms of this Contract, be without limit and without regard to the cause or causes thereof (including pre-existing conditions), strict liability, or the negligence of any Indemnified Person and/or any Indemnifying Person, regardless of whether such negligence be sole, joint or concurrent, active or passive. It is the expressed intention of Owner and Contractor that the Indemnifying Person's indemnity shall apply to and include any and all Indemnified Liabilities and Indemnified Matters even if such Indemnified Liabilities or Matters arise out of<sup>[29 - 33 ]</sup> or are alleged to arise

(A) in whole the sole negligence, of an Indemnified Person, or in part the concurrent negligence of any Indemnified Person and any other person, <sup>[ 21 - 22, 27 ]</sup>

(B)<sup>[24-26]</sup> the strict liability of an Indemnifying or an Indemnified Person, or

(C) the unintended consequences of intentional acts; injuries the natural result of intentional acts, if the injuries were unexpected, or unforeseen, or unintended; or

(D) liabilities arising out of acts in violation of law, committed negligently and without intent to inflict injury.

**.3 Excluded Matters.** The Indemnified Liabilities do not include (the "Excluded Matters") any Liabilities arising solely from the

(A) gross negligence of an Indemnified Person or an Instrumentality of an Indemnified Person; or <sup>[35]</sup>

(B) willful misconduct of an Indemnified Person or an Instrumentality of an Indemnified Person. <sup>[37]</sup>

**.4 Contractual Comparative Responsibility.** Notwithstanding anything in the Contract Documents to the contrary, if a Indemnified Liability arises out of the joint or concurrent causation, responsibility or fault, whether negligence, strict liability in tort, gross negligence, breach of warranty, express or implied, products liability, breach of the Contract or willful misconduct of the parties hereto or their Instrumentalities, the Indemnifying Person shall indemnify the Indemnified Person to the extent only that the Indemnifying Person's or its Instrumentality's negligence, strict liability in tort, gross negligence, breach of warranty, express or implied, products liability, breach of the Contract or willful misconduct causes or contributes to the Indemnified Liabilities. In the event any Indemnifying Person should fail or refuse to

*participate in settlement of an Indemnified Liability, the Indemnified Person may settle with the claimant without prejudice to the Indemnified Person's indemnity rights set forth herein, it being expressly recognized that a settlement, after demand shall be made on the non-settling Indemnifying Person, constitutes a settlement of the proportionate fault, including but not limited to, negligence of both the settling Indemnified Person and the non-settling Indemnified Person, which proportionate fault may later be apportioned between the parties hereto.*

**Revision:**     **% or \$ Thresholds.** Another approach is to limit the Indemnifying Person's liability either by a \$ cap or by a "deductible" borne by the Indemnified Person. A further approach is to limit the Indemnifying Person's liability to cases where the Indemnifying Person's percentage of liability exceeds the Indemnified Person's percentage of liability. For example,

*Notwithstanding the foregoing, Owner's obligation to indemnify the Indemnified Contractor-Related Persons shall apply only where the percentage of negligence of Owner and of its Instrumentalities in contributing to the Indemnified Liability exceeds the negligence of the Contractor and its Instrumentalities.*

**3.18.3 Workers' Compensation and Similar Laws.** This indemnification shall not be limited to damages, compensation or benefits payable under insurance policies, workers' compensation acts, disability benefit acts or other employees' benefit acts. <sup>[46]</sup>

**3.18.4 Special Statutory Exclusions from Indemnity.** <sup>[7]</sup> It is understood and agreed that Subparagraph **3.18.2** above is subject to, and expressly limited by, the terms and conditions of TEX. CIV. PRAC. & REM. CODE ANN. §§ 130.001-130.005 (Vernon Supp. 2003), as amended. Contractor shall not be obligated under Paragraph **3.18** to indemnify or hold harmless Architect or an agent, servant, or employee of Architect from liability or damage that:

**.1**     is caused by or results from:

(A)     defects in plans, designs, or specifications prepared, approved, or used by the Architect; or

(B)     negligence of the Architect in the rendition or conduct of professional duties called for or arising out of the Contract and the plans, designs or specifications that are a part of the Contract; and

**.2**     arises from:

(A)     personal injury or death;

(B)     property injury; or

(C) any other expense that arises from personal injury, death or property injury.

**3.18.5 Severability.** It is agreed with respect to any legal limitations now or hereafter in effect and affecting the validity or enforceability of this indemnity, such legal limitations are made a part of the indemnity and shall operate to amend this indemnity to the minimum extent necessary to bring the provision into conformity with the requirements of such limitations, and as so modified, this indemnity shall continue in full force and effect. <sup>[ 42 ]</sup>

**3.18.6 Choice of Law.** <sup>[ 39 ]</sup> [Insert choice of law provision applicable to indemnity and/or the contract generally]

**3.18.7 No Contribution by Indemnified Person's or its Instrumentalities' Insurance.** This indemnity shall be without regard to and without any right to contribution from any insurance maintained by Indemnified Persons

[, except to the extent of the Indemnified Person's share of Contractual Comparative Responsibility (*add provision allocating liability for joint caused liabilities to the extent of each contributing person's share of responsibility* "**Contractual Comparative Responsibility**")].

**3.18.8 Notice.** Contractor shall promptly advise Owner in writing of any action, administrative or legal proceeding or investigation as to which this indemnification may apply.

**3.18.9 Settlement and Defense Procedure Provision.** <sup>[ 40 ]</sup> The following provision establishes a procedure to be followed to determine if the Indemnifying Person will provide a defense to the claimed liability.

**.1 Counsel.** At the Indemnified Person's option, the Indemnified Person may require the Indemnifying Person to defend any claim covered by this Paragraph **3.18** or the Indemnified Person may conduct its own defense. In any event, the Indemnified Person is entitled to retain its own counsel to advise it regarding any claim covered by this Paragraph **3.18** and all costs associated with such counsel will be an Indemnified Liability covered by the Indemnifying Person's indemnity.

**.2 Notice of Claim.** When it appears to the Indemnified Person that a claim is being made that is covered by Paragraph **3.18**, the Indemnified Person will notify the Indemnifying Person of the claim. However, the Indemnified Person's failure to promptly notify the Indemnifying Person of the claim, or the Indemnified Person's failure to recognize that a claim covered by Paragraph **3.18** is being or has been made, will not affect the Indemnified Person's rights, nor Indemnifying Person's obligations. Upon being notified of a claim, the Indemnifying Person will have 10 days from receipt of Indemnified Person's notice to indicate, in writing, if the Indemnifying Person acknowledges its obligations to indemnify the Indemnified Person pursuant to Paragraph **3.18** and whether the Indemnifying Person will indemnify or assume defense of the claim.

**.3 Settlement.** Without in any way reducing the Indemnifying Person's obligation to defend:



(A) If the Indemnifying Person does not acknowledge its obligation to indemnify, the Indemnified Person can deal with the claim in whatever fashion the Indemnified Person, in its sole discretion, deems appropriate.

(B) If the Indemnifying Person acknowledges its obligation to indemnify, but refuses to defend the claim, the Indemnified Person can assume defense of the claim and dispose of the claim in whatever fashion the Indemnified Person, in its sole discretion, deems appropriate.

(C) If the Indemnifying Person acknowledges its obligation to indemnify, and agrees to defend the claim, and the Indemnified Person elects not to conduct its own defense, the Indemnifying Person will have the authority to dispose of the claim in whatever fashion the Indemnifying Person, consistent with its obligations to the Indemnified Person under this Section, deems appropriate.

(D) If the Indemnifying Person agrees to defend the claim, but the Indemnified Person elects to conduct its own defense, the Indemnified Person must obtain the consent of the Indemnifying Person before any voluntary settlement of the claim.

## ARTICLE 11. INSURANCE AND BONDS.

**11.1 OBLIGATION OF CONTRACTOR.** Contractor shall, at its sole expense, maintain in effect at all times during the full term of its Work under the Contract Documents and as otherwise required under the Contract Documents, insurance coverages with limits not less than those set forth below in the Schedule of Insurance Coverages with insurers licensed to do business in the State of Texas and acceptable to Owner and under forms of policies satisfactory to Owner. None of the requirements contained herein as to types, limits or Owner's approval of insurance coverage to be maintained by Contractor is intended to and shall not in any manner limit, qualify or quantify the liabilities and obligations assumed by Contractor under the Contract Documents or otherwise provided by law. In the event of any failure by Contractor to comply with the provisions of this Article 11, Owner may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to Contractor, purchase such insurance, at Contractor's expense, provided that Owner shall have no obligation to do so and if Owner shall do so, Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

### 11.2 SCHEDULE OF INSURANCE COVERAGES. (Appendix 8)

<u>Coverage</u>	<u>Minimum Amounts and Limits</u>
<b>11.2.1 Worker's Compensation.</b>	
Worker's Compensation <sup>[ 46 ]</sup> <sup>[ 75c ]</sup>	Not less than \$1,000,000
Employer's Liability	Not less than \$1,000,000

The policy shall include a waiver of subrogation in favor of the Indemnified Persons (as defined in the Contract Documents) by blanket provision in the policy (provided such provision is provided to and reviewed by Owner and determined to be acceptable), WC 42 03 04A <sup>[ 47 ]</sup> (Appendix 12) Texas Waiver of Right to Recover From Others Endorsement, or on standard form

WC 00 03 13 Waiver of Our Right to Recover from Others Endorsement (1993 National Council of Compensation Insurance).

### 11.2.2 Commercial General Liability. <sup>[ 75a ]</sup>

Bodily Injury/ Property Damage (Occurrence Basis)	\$1,000,000 combined single limit <sup>[ 75a ]</sup> or equivalent with \$5,000,000 umbrella
Products - Comp./Op Agg.	\$2,000,000
Personal & Adv. Injury	\$1,000,000
Damage to Rented Premises (Any one fire)	\$ 50,000
Med. Expense (Any one person)	\$ 5,000

This policy shall be on a form acceptable to Owner, endorsed to include the Indemnified Persons as additional insureds (specifically naming John Doe DeBaker, DeBaker & Coolidge, L.L.P. and the Building Owner, Crescent Management, L.L.P. (the Project Manager), and their officers and employees, as additional insureds and without exception for the additional insured's sole or contributory negligence) on standard ISO form <sup>[ 45 ]</sup> CG 20 26, unmodified <sup>[ 51 ]</sup> (**Appendix 14**) or other endorsement form acceptable to Owner, endorsed with an ISO form CG 20 37 10 01 to cover liabilities arising after Contractor's operations are complete (**Appendix 22**) if the additional insured endorsement does not otherwise extend to completed operations, contain cross liability and severability of interest endorsements, state that this insurance is primary insurance as regards any other insurance carried by the Indemnified Persons (Owner may endorse its liability policies to provide that they are excess and non-contributing by endorsement form similar to the form attached hereto (**Appendix 19**), and shall include the following coverages:

1. Premises/Operations
2. Independent Contractors
3. Completed Operations for a period of two years following the acceptance of Contractor's Work. <sup>[ 75 ]</sup>
4. Broad Form Contractual Liability specifically in support of, but not limited to, the Indemnity Paragraphs of this Contract <sup>[ 49 ]</sup>
5. Broad Form Property Damage
6. Personal Injury Liability with employee and contractual exclusions removed.

### 11.2.3 Business Automobile Policy. <sup>[ 60 - 61 ] [ 75b ]</sup>

Bodily Injury	\$2,000,000 combined single limit <sup>[ 75 ]</sup>
---------------	---

This policy shall be on a standard form written to cover all owned, hired and non-owned automobiles. The policy shall include and cover the Indemnified Persons as additional insureds with

waiver of subrogation against such persons either by blanket provision in the policy (provided such provision is provided to and reviewed by Owner and determined to be acceptable) or by endorsement by Texas Standard Automobile Endorsement form TE 99 01 B - Additional Insured (**Appendix 10**) and contain a waiver of subrogation in favor of the Indemnified Persons by Texas Standard form TE 20 46 A - Changes in Transfer of Rights of Recovery Against Others to US (Waiver of Subrogation) (**Appendix 11**).<sup>[ 60 - 61 ]</sup>

**11.3 BUILDER'S RISK INSURANCE.** Contractor shall maintain, at its sole expense, "all-risk"<sup>[ 75d ]</sup> builder's risk insurance<sup>[ 67 - 68 ]</sup> as follows:

**11.3.1 Completed Value Form; Full Replacement Cost.** Contractor shall carry completed value form builder's risk property insurance (subject to a deductible per loss not to exceed \$5,000) upon the entire Work for 100% of the full replacement cost value thereof (100% includes additional costs of architectural and engineering services in the event of a loss). This policy shall include the interests of the Owner and the Building Owner and the other Indemnified Persons, Contractor, and Subcontractors in the Work as loss payees, as their interests may appear, and shall be on an "all risk" basis for physical loss or damage including, without limitation, fire, hail, theft, vandalism and malicious mischief and shall include coverage for portions of the Work while it is stored off the site or is in transit. The builder's risk policy shall be endorsed to waive subrogation against the Owner and the Building Owner.<sup>[ 62 - 68 ]</sup>

**11.3.2 Contractor to Pay Premiums.** This policy shall provide, by endorsement or otherwise, that Contractor shall be solely responsible for the payment of all premiums under the policy, and that Owner and the other Indemnified Persons shall have no obligation for the payment thereof.

**11.3.3 Claims Adjusted by Owner.** Any insured loss or claim of loss shall be adjusted by the Owner, and any settlement payments shall be made payable to the Owner as trustee for the insureds, as their interests may appear, subject to the requirements of any applicable mortgage clause. Upon the occurrence of an insured loss or claim of loss, monies received will be held by Owner who shall make distribution in accordance with an agreement to be reached in such event between Owner, and Contractor. If the parties are unable to agree between themselves on the settlement of the loss, such dispute shall be submitted to a court of competent jurisdiction to determine ownership of the disputed amounts but the Work of the Project shall nevertheless progress during any such period of dispute without prejudice to the rights of any party to the dispute.

**11.3.4 Deductible Liability.** The Contractor shall be responsible for any loss within the deductible area of the policy.

## **11.4 EVIDENCE OF INSURANCE AND POLICIES.**

**11.4.1 Certificates.** Evidence of the insurance coverage required to be maintained by the Contractor under this Article 11, represented by Certificates of Insurance issued by the insurance carrier, must be furnished to the Owner prior to Contractor starting Work.<sup>[ 72 ]</sup>

**11.4.2 Insured and Additional Insureds; Waiver of Subrogation.** Policies and the Certificates of Insurance<sup>[ 72 ]</sup> issued in connection therewith shall specify the insured and additional insured status mentioned above in this Article 11, as well as the waivers of subrogation.<sup>[ 68-71 ]</sup> The

liability policies obtained by Contractor shall be endorsed to provide that they are primary and without requirement of contribution by any policies obtained by the Owner or the other additional insureds, with the policies obtained by Owner and the other additional insureds being excess, secondary and non-contributing as to the Contractor's policies. The Owner may endorse its liability policies to reflect that they are not contributing with Contractor's policies. (**Appendix 19**).

**11.4.3 Certificate Holder; Policies and Renewals.** Such Certificates of Insurance shall state that Owner and the Building Owner will be notified in writing 30 days prior to cancellation, material change, or non-renewal of insurance. Contractor shall provide to Owner a certified copy of any and all applicable insurance policies upon request of Owner. Timely renewal certificates will be provided to Owner as the coverage renews. The Certificate of Insurance shall be substantially in the form attached hereto. (**Appendix 8**). Attached to the Certificate of Insurance shall be a completed and executed Attachment to Contractor's Certificate or Proof of Insurance in the form attached hereto. (**Appendix 8**).

**11.4.4 Insurers.** 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 a Standard & Poor Insurance Solvency Review of A-, or better, and be admitted to engage in the business of insurance in Texas. [73]

## **11.5 WAIVERS OF RECOVERY AND SUBROGATION.** [69, 70, 76 78]

**11.5.1 WAIVER AND RELEASE.** [ 17 ] *Anything to the contrary in the Contract Documents notwithstanding, the Owner and Contractor (the "Releasing Persons") waive all rights against [ 77 ] (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, (2) the Architect, Architect's consultants, separate contractors, agents and employees described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, (3) the Building Owner, and its partners, principals and employees, and (4) John Doe DeBaker, M.D. (the "Released Persons"), for liabilities to the extent covered by liability insurance obtained or required to be obtained pursuant to this Article 11 and for damages caused by fire or other perils or other causes of loss to the extent covered by property insurance obtained or required to be obtained pursuant to this Article 11 or other property insurance applicable to the Work or otherwise applicable to the property of any of the Indemnified Persons or the Indemnifying Persons, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary, regardless of whether such liabilities arise in whole or in part out of the negligence or strict liability, in whole or in part of the Released Persons.* [ 70 ]

**11.5.2 Related Persons to Provide Similar Waivers.** The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein.

**11.5.3 Waiver of Subrogation.** The policies shall provide such waivers of subrogation by endorsement or otherwise. [ 47, 61, 62, 65, 67 ]

**11.5.4 Independent of Indemnity Obligation.** A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of

indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

**11.5.5 Availability.** If, by reason of the foregoing waiver, either party shall be unable to obtain any such insurance, such waiver shall be deemed not to have been made by such party. Provided, further, if either party shall be unable to obtain any such insurance without the payment of an additional premium therefor, then, unless the party claiming the benefit of such waiver shall agree to pay such party for the cost of such additional premium within 30 days after notice setting forth such requirement and the amount of the additional premium, such waiver shall be of no force and effect between such party and such claiming party. <sup>[65]</sup>

**11.5.6 Allocation of Cost of Waiver of Subrogation Endorsement.** Each party shall use reasonable efforts to obtain such insurance from a company that does not charge an additional premium or, if that is not possible, one that charges the lowest additional premium. Each party shall give the other party notice at any time when it is unable to obtain insurance with such a waiver of subrogation without the payment of an additional premium and the foregoing waiver shall be effective until 30 days after notice is given.

**11.5.7 Parties' Present Insurance Permits Waivers of Subrogation.** Each party represents that its current insurance policies allow such waiver.

## 11.6 CLAIMS MADE POLICIES.

With respect to any of the insurance policies provided by Contractor pursuant to the Contract Documents which are "*claims made*" policies, in the event at any time any such policies are canceled or not renewed, Contractor shall provide a substitute insurance policy with terms and conditions and in amounts which comply with the terms of the Contract Documents and which provides for retroactive coverage to the date of cancellation or non-renewal to fill any gaps in coverage which may exist due to the cancellation or non-renewal of the prior "claims made" policies. With respect to all "claims made" policies which are renewed, Contractor shall provide coverage retroactive to the date of commencement of the Work in said renewed policy. All said substitute or renewed "claims made" policies shall be maintained in full force and effect for the longer of: (1) two (2) years from the date of completion of the work, or (2) as otherwise required by the Contract Documents. A certificate evidencing continuation of such policies shall be submitted with the final Application for Payment as required by Subparagraph \_\_\_\_\_. Nothing herein shall affect the continuing effect of the indemnity clauses in the Contract Documents.

---

### **Commentary:**

**Hypothetical:** In the hypothetical, the Architect prepared the Construction Contract using its standard AIA forms, the AIA A101 and A201. The architect completed the AIA A101 form by filling the Tenant's name in the blank for the "Owner." Your note from your review of the Architect's AIA form that the indemnity and waiver of subrogation provisions do not pass the express negligence and the fair notice requirements; the insurance provisions do not provide for the Building Owner, the Tenant or other Tenant related persons to be listed as additional insureds on the Contractor's liability policy; and the Contract as drafted by the Architect provides little specification

as to the scope of liability insurance to be maintained by the Contractor and places upon the Owner the obligation to carry the builder's risk insurance.

**Indemnity.** The indemnity in this Addendum is a "broad form" indemnity allocating to the Contractor all Liabilities arising out of the Work due to the negligence and strict liability of the Tenant, the Building Owner, the other Tenant-Related Persons and the Contractor, regardless of the contributory negligence of the Contractor-Related Persons. The indemnity is set out in *conspicuous type* and expressly refers to the negligence and strict liability of the parties complying with the fair notice and express negligence tests.

**Insurance.** The insurance provisions provide for designation of the Indemnified Persons (the Tenant, the Building Owner and the other Tenant related persons) as additional insureds and with waiver of subrogation against the Indemnified Persons (the Tenant, the Building Owner and the other Tenant related persons), without exception for the additional insured's sole or contributory negligence.<sup>[ 56 ]</sup> Specific ISO forms or equivalent are specified in order to assure the terms of coverage and the limits of the exclusions.<sup>[ 45 ]</sup>

This form references the following insurance endorsements in the Appendix as being required endorsements to the Contractor's insurance: **Appendix 10** - TE 99 01B (BAP Texas) Additional Insured,<sup>[ 60 ]</sup> **Appendix 11** TE 20 46A (BAP Texas) Changes In Transfer of Rights of Recovery Against Others To Us (Waiver of Subrogation)<sup>[ 61 ]</sup>, **Appendix 12** WC 42 03 04 A Workers Compensation and Employers Liability Insurance Policy (Waiver of Subrogation),<sup>[ 46-48 ]</sup> **Appendix 13** CGL Endorsement CG 20 2611 85,<sup>[ 51 ]</sup> **Appendix 19** CGL Endorsement - Endorsement to Indemnitee's "Other Insurance" Clause - Occurrence Form<sup>[ 57 - 58 ]</sup>, and **Appendix 22** CGL Endorsement - CG 20 37 10 01 Additional Insured - Owners, Lessees or Contractors – Completed Operations. See the Commentary following each of these forms as to the reasons for specifying each of these forms. Failing to specify coverage forms leaves the selection of the form, and the consequent scope of coverage, up to the insuring party as opposed to the insured party.

Blanket additional insured provisions and blanket waiver of subrogation provisions contained in the Contractor's insuring policy are specified as being permitted if after review they are determined to meet the insurance requirements. Note most blanket provisions do not list all of the parties that should be protected. (e.g., **Appendix 20**).<sup>[ 75 ]</sup>

The Contractor's insurance is specified to be primary as regards any other insurance carried by the Indemnified Persons. Note certain blanket and additional insured endorsements provide that the additional insured's insurance will be primary and contributing unless the contract between the parties requires the insuring party's insurance to be primary (e.g., **Appendices 18-20**).<sup>[ 57-58 ]</sup> In order to effectuate making the Contractor's CGL insurance "primary" and "non-contributing," the Additional Insureds' insurance will likely need to be endorsed to provide that it is not "other insurance" contributing on an allocated basis with the Contractor's CGL Insurance.

See the Commentary following the blanket endorsements and the additional insured endorsements for a discussion of omissions in coverage which may arise out of reliance upon coverage as being provided by a particular blanket form.

**Waiver of Recovery and Waiver of Subrogation.** The waiver of subrogation provision has been extended to include liability insurance in addition to property insurance and provides for waiver of

---

recovery and waiver of the insurer's rights of subrogation regardless of the negligence or strict liability of the Owner, the Contractor and their related parties. The waiver of recovery and waiver of subrogation provisions are set out in *conspicuous type* and expressly refers to the negligence and strict liability of the parties complying with the fair notice and express negligence tests. <sup>[ 59, 61 - 66, 69 - 71]</sup>

### Appendix 3

#### Another Construction Contract (Owner/Tenant form)

[This form favors the Owner and Tenant and assumes that the Contractor is carrying the builder's risk insurance and performance and payment bonds are covered in a separate provision. This provision is based on a similar provision contained in the article presented by Aaron Johnston, Jr., Esq. and Charles E. Comiskey, CPCU, CIC, CPIA, CRM at the 2002 Advanced Real Estate Law Course titled "Risk Management and Insurance Concepts" and at the 2002 Advanced Real Estate Drafting Course titled "Basic Insurance Concepts."]

## ARTICLE 3 CONTRACTOR

### 3.18 INDEMNIFICATION <sup>[1]</sup> AND WAIVERS. <sup>[76]</sup>

#### 3.18.1 Definitions.

**.1 Parties.** <sup>[17]</sup> *The "Contractor Parties" are (A) Contractor, (B) Contractor's officers, members, partners, agents, and employees, and (C) all other persons and entities over whom Contractor has control. The "Owner Parties" with respect to the Property are (1) Crescent Real Estate (the Building Owner) and DeBaker and Coolidge, L.L.P. (the Tenant), (2) any lender whose loan is secured by a lien against the Property or the Tenant's interest in the Property, (3) Crescent Management, L.L.P., its successors and assigns (the "Property Manager"), (4) Joe AIA together with all subsequent architects for the Work (the "Tenant's Architect"), Crescent Office Building Architects (the "Owner's Architect") (collectively, the "Architects"), (5) the following contractors of the Owner: Parking Garage Operator, Security Services Contractor, and the Office Building HVAC Contractor, (6) their respective shareholders, members, partners, affiliates, and subsidiaries, and (7) any officers, directors, employees, agents, independent contractors, and tenants of such persons or entities. A "Beneficiary" is the intended recipient of the benefits of another party's Indemnity, Waiver or obligation to Defend.*

**.2 Claims, Injuries.** *"Claims" means all foreseeable and unforeseeable claims, demands, proceedings, liabilities, damages, (including actual, consequential, and punitive), expenses, Legal Costs, judgments, fines and penalties of any nature or description. "Injury" means (i) harm to, impairment or loss of, or impairment or loss of use of, property, including income, (ii) harm to (including sickness or disease) or death of a person, or (iii) "personal and advertising injury," as such term is defined in Insurance Services Office, Inc. ("ISO") <sup>[45]</sup> form CG 00 01 10 01 "Commercial General Liability Insurance." <sup>[75]</sup> "Legal Costs" means court costs, attorneys' fees, experts' fees or other expenses incurred in investigating, preparing, prosecuting or settling any legal action or proceeding or arbitration, mediation, or other method of alternative dispute resolution.*

**.3 Indemnify, Waive, and Defend.** *"Indemnify" <sup>[2]</sup> means to protect a party against a potential Claim and/or to compensate a party for a Claim actual incurred. "Waive" means to knowingly and voluntarily relinquish a right and/or to release another party from liability in connection with a Claim. "Defend" means to provide and pay for the legal defense of a Beneficiary against a Claim in litigation, arbitration, mediation or other proceedings with counsel reasonably acceptable to such Beneficiary and to pay all costs associated with the preparation or*



prosecution of such defense. “**Arising From**” means directly or indirectly, in whole or in part, (i) occurring in connection with or as a result of, (ii) causing, (iii) resulting in, or (iv) based upon. <sup>[29-34]</sup>

**3.18.2 INDEMNITY<sup>[1]</sup> AS TO PERFORMANCE.** <sup>[12]</sup> Contractor will Indemnify and Defend the Owner Parties against all Claims Arising, or alleged to Arise, From any Contractor Party’s (i) performance of services, (ii) breach of this Contract which does not constitute a Contractor’s Injury, or (iii) violation of or failure to comply with applicable law.

**3.18.3 INDEMNITY<sup>[1]</sup> AND WAIVER<sup>[76]</sup> AS TO INJURIES.** <sup>[27-28]</sup> Contractor agrees to Indemnify and Defend the Owner Parties against, and Waives as to all the Owner Parties, all Claims Arising, <sup>[29 - 34]</sup> or alleged to Arise, From (i) Injuries Arising out of <sup>[29 - 34]</sup> Contractor’s ongoing or completed operations on the Property or (ii) any Injury suffered or caused by a Contractor Party while on the Property, but not arising From Contractor’s ongoing or completed operations.

#### **3.18.4 SCOPE OF INDEMNITIES AND WAIVERS.**

**.1 General.** The Indemnities, Waivers, <sup>[15-16, 24-26, 78]</sup> and obligations to Defend in this Contract are independent of, and will not be limited by each other or any insurance obligations in this Contract whether or not complied with) or damages or benefits payable under workers compensation or other employee benefit acts, and will survive the Contract Expiration Date until all related Claims against the Beneficiaries are fully and finally barred by Applicable law. All Applicable law affecting the validity or enforceability of any Indemnity, Waiver or obligation to Defend contained in this Contract is made a part of such provision and will operate to amend such Indemnity, Waiver or obligation to Defend to the minimum extent necessary to bring the provision into conformity with Applicable Law and cause the provision, as modified, to continue in full force and effect.

**.2 Negligence of Owner Parties.** <sup>[15-16, 24-26, 78]</sup> Contractor’s Indemnity, Waiver and obligation to defend an Owner Party against a Claim will be enforced to the fullest extent permitted by law for the benefit of the applicable Beneficiary thereof, even if the applicable Claim is caused by the active or passive ordinary negligence or sole, joint, concurrent, or comparative ordinary negligence of the Beneficiary, and regardless of whether or not liability without fault or strict liability is imposed or sought to be imposed on the Beneficiary, but will not be enforced to the extent that a court of competent jurisdiction holds in a final judgment that a Claim is caused by the willful misconduct or gross negligence of such Beneficiary.

### **ARTICLE 11. INSURANCE AND BONDS.**

**11.1 CONTRACTOR’S INSURANCE.** Contractor’s insurance obligations are set forth in **Exhibit A** to this Contract. Contractor will, at its sole cost and expense, comply with such requirements beginning on the date this Contract becomes effective and continuing for as long after the expiration or termination of this Contract as any Contractor Party is physically present on the Property. (Commercial general liability insurance and professional liability insurance must remain in force for 2 years after the date of Substantial Completion.) In no event will any Contractor Party commence work on the Property until such time Owner has received evidence of compliance with the insurance requirements for such Contractor Party. (See **Appendix 8**).

**11.2 SUBCONTRACTOR'S INSURANCE.** Insurance similar to that required of Contractor will be provided by or on behalf of all Subcontractors. Contractor will be held responsible for any modifications in the insurance requirements set forth in **Exhibit A** are applied to Subcontractors. Contractor will maintain certificates and evidence of insurance from all Subcontractors, enumerating, among other information, the waivers of subrogation in favor of and additional insured status of the Owner Parties, as required by this Contract. Contractor will make such certificates and evidence of insurance available to Owner Parties upon request.

**11.3 MINIMUM REQUIREMENTS.** The coverages and limits set forth in **Exhibit A** are minimum requirements and not a determination as to all of the coverages and maximum limits that Contractor should carry. The failure of Owner to demand full compliance by Contractor with respect to the minimum coverages outlined in **Exhibit A** will not constitute a Waiver by Owner Parties with respect to Contractor's obligation to maintain such coverages. Contractor will purchase such other insurance policies and/or endorsements or increase the policy limits of any policy set forth on **Exhibit A**, if required by any mortgagee of the Property.

**11.4 SPECIAL REMEDY.** Contractor's failure to obtain and maintain the required insurance will constitute a material breach of, and default under, this Contract. If Contractor fails to remedy such breach within 5 days after notice from an Owner Party, an Owner Party may, in addition to any other remedy available to Owner, at owner's option, purchase such insurance, at Contractor's expense. Contractor will Indemnify the Owner Parties against any Claims arising from Contractor's failure to purchase and/or maintain the insurance coverages required by this Contract.

## Exhibit A

### Contractor's Insurance

#### 11.2.1 Specific Requirements.

Insurance	Coverages	Other Requirements
Worker's Compensation <sup>[75c]</sup>	Statutory Limits (if state has no statutory limit, \$1,000,000)	No "alternative" forms of coverage will be permitted.
Employer's Liability	\$1,000,000 each accident for bodily injury by accident \$1,000,000 each employee for bodily injury by disease	
Commercial General Liability (Occurrence Basis) <sup>[75a]</sup>	\$1,000,000 per occurrence \$2,000,000 general aggregate \$2,000,000 product-completed operations aggregate limit \$1,000,000 personal and advertising injury limit \$50,000 damage to premises rented to you limit \$5,000 medical expense limit	<ol style="list-style-type: none"> <li>1. ISO <sup>[45]</sup> form CG 00 01 07 98, or equivalent.</li> <li>2. Separation of insured language will not be modified.</li> <li>3. Aggregate limit of insurance (per project) endorsement ISO CG 25 03 11 85, or equivalent.</li> <li>4. The contractual liability exclusion with respect to personal injury will be deleted.</li> <li>5. Defense will be provided as an additional benefit and not included within the limit of liability.</li> <li>6. This insurance will be maintained in identical form, and amount, including required endorsements, for at least 2 years following the Date of Substantial Completion.</li> </ol>
Business Automobile Liability (Occurrence Basis) <sup>[75b]</sup>	\$2,000,000 combined single limit	<ol style="list-style-type: none"> <li>1. ISO form CA 00 01 10 01 or equivalent.</li> <li>2. Includes liability arising out of operation of owned, hired and non-owned vehicles.</li> </ol>
Professional Liability	\$2,000,000	<ol style="list-style-type: none"> <li>1. No exclusions for asbestos or pollution liability.</li> <li>2. Maintain for a period of not less than <u>2 years</u> after termination of this Contract</li> </ol>
Umbrella Liability Insurance (Occurrence Basis)	\$5,000,000	<ol style="list-style-type: none"> <li>1. Written on an umbrella basis in excess over and no less broad than the liability coverages referenced above.</li> <li>2. Inception and expiration dates will be the same as commercial general liability insurance.</li> <li>3. Coverage must "drop down" for exhausted aggregate limits under the liability coverages referenced above.</li> <li>4. Aggregate limit of insurance per location endorsement.</li> </ol>

<p>Builder's Risk Property Insurance <sup>[75d]</sup></p>	<p>1. Coverage on a completed value basis.                  2. Amount of coverage: initial Contract Sum, plus \$ _____, subject to subsequent modification of Contract Sum.                  3. Property covered:  <ul style="list-style-type: none"> <li>• Entire Work at Job Site</li> <li>• All structures under construction</li> <li>• All property on the Job Site for installation, including materials and supplies</li> <li>• All property at other locations but intended for use at the Job Site, including materials and supplies.</li> <li>• All property in transit to the Job Site, including materials and supplies</li> <li>• All temporary structures at the Job Site, including scaffolding, falsework and temporary buildings</li> </ul> </p>	<table border="0"> <tr> <td>1. ISO Special form, or equivalent.</td> <td></td> </tr> <tr> <td>2. Required endorsements</td> <td>Minimum Sublimits</td> </tr> <tr> <td>Additional expenses due to delay in completion</td> <td>\$ _____</td> </tr> <tr> <td>Agreed value</td> <td>No sublimit</td> </tr> <tr> <td>Business income/rental value</td> <td>\$ _____</td> </tr> <tr> <td>Agreed penalty</td> <td>\$ _____</td> </tr> <tr> <td>Damage arising from error, omission, or deficiency in design, specifications, workmanship or materials, including collapse</td> <td>No sublimit</td> </tr> <tr> <td>Debris removal additional limit</td> <td>\$1,000,000</td> </tr> <tr> <td>Earthquake</td> <td>\$ _____</td> </tr> <tr> <td>Earthquake sprinkler leakage</td> <td>\$ _____</td> </tr> <tr> <td>Expediting expenses</td> <td>\$ _____</td> </tr> <tr> <td>Flood</td> <td>\$ _____</td> </tr> <tr> <td>Freezing</td> <td>\$1,000,000</td> </tr> <tr> <td>Ordinance or law</td> <td>No Sublimit</td> </tr> <tr> <td>Pollutant clean up and removal</td> <td>\$1,000,000</td> </tr> <tr> <td>Preservation of property</td> <td>No Sublimit</td> </tr> <tr> <td>Replacement cost</td> <td>No Sublimit</td> </tr> <tr> <td>Testing</td> <td>No Sublimit</td> </tr> <tr> <td>3. No protective safeguard warranty permitted</td> <td></td> </tr> <tr> <td>4. Occupancy of up to 15% of covered property to be permitted</td> <td></td> </tr> <tr> <td>5. Deductibles will not exceed the following:</td> <td></td> </tr> <tr> <td>    All risks of direct damage per occurrence</td> <td>\$5,000</td> </tr> <tr> <td>    Delayed opening waiting period</td> <td>5 days</td> </tr> <tr> <td>    Flood, per occurrence</td> <td>\$25,000</td> </tr> <tr> <td>        or excess of NFIP if in flood zone A</td> <td></td> </tr> <tr> <td>    Earthquake and earthquake sprinkler leakage, per occurrence</td> <td>\$25,000</td> </tr> </table>	1. ISO Special form, or equivalent.		2. Required endorsements	Minimum Sublimits	Additional expenses due to delay in completion	\$ _____	Agreed value	No sublimit	Business income/rental value	\$ _____	Agreed penalty	\$ _____	Damage arising from error, omission, or deficiency in design, specifications, workmanship or materials, including collapse	No sublimit	Debris removal additional limit	\$1,000,000	Earthquake	\$ _____	Earthquake sprinkler leakage	\$ _____	Expediting expenses	\$ _____	Flood	\$ _____	Freezing	\$1,000,000	Ordinance or law	No Sublimit	Pollutant clean up and removal	\$1,000,000	Preservation of property	No Sublimit	Replacement cost	No Sublimit	Testing	No Sublimit	3. No protective safeguard warranty permitted		4. Occupancy of up to 15% of covered property to be permitted		5. Deductibles will not exceed the following:		All risks of direct damage per occurrence	\$5,000	Delayed opening waiting period	5 days	Flood, per occurrence	\$25,000	or excess of NFIP if in flood zone A		Earthquake and earthquake sprinkler leakage, per occurrence	\$25,000
1. ISO Special form, or equivalent.																																																						
2. Required endorsements	Minimum Sublimits																																																					
Additional expenses due to delay in completion	\$ _____																																																					
Agreed value	No sublimit																																																					
Business income/rental value	\$ _____																																																					
Agreed penalty	\$ _____																																																					
Damage arising from error, omission, or deficiency in design, specifications, workmanship or materials, including collapse	No sublimit																																																					
Debris removal additional limit	\$1,000,000																																																					
Earthquake	\$ _____																																																					
Earthquake sprinkler leakage	\$ _____																																																					
Expediting expenses	\$ _____																																																					
Flood	\$ _____																																																					
Freezing	\$1,000,000																																																					
Ordinance or law	No Sublimit																																																					
Pollutant clean up and removal	\$1,000,000																																																					
Preservation of property	No Sublimit																																																					
Replacement cost	No Sublimit																																																					
Testing	No Sublimit																																																					
3. No protective safeguard warranty permitted																																																						
4. Occupancy of up to 15% of covered property to be permitted																																																						
5. Deductibles will not exceed the following:																																																						
All risks of direct damage per occurrence	\$5,000																																																					
Delayed opening waiting period	5 days																																																					
Flood, per occurrence	\$25,000																																																					
or excess of NFIP if in flood zone A																																																						
Earthquake and earthquake sprinkler leakage, per occurrence	\$25,000																																																					
<p>Causes of Loss-Special Form (formerly "all risk") Property Insurance <sup>[75d]</sup></p>	<p>100% replacement cost, as modified below, of all of Contractor's equipment and other property</p>	<p>1. ISO form CP 10 30, or equivalent.                  2. Name Owner as "insured as its interest may appear."                  3. Contain only standard printed exclusions.                  4. Waiver of subrogation in favor of Owner                  5. Equipment floater to cover Contractor's equipment.</p>																																																				

**11.2.2 General Insurance Requirements.**

**.1 Policies.** All policies must

(A) 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-, <sup>[73]</sup> or better, and admitted to engage in the business of insurance in the State of Texas; <sup>[73]</sup>

(B) Be endorsed to be primary with the policies of all Owner Parties being excess, secondary and non-contributing; (See **Appendices 17 - 19**) <sup>[57 - 58]</sup>

(C) Be endorsed to provide a waiver of subrogation in favor of the Owner Parties;

(D) With respect to all liability policies except workers' compensation/employer's liability, be endorsed to include the Owner Parties as "additional insureds" (The additional insured

status under the commercial general liability policy will be provided on ISO form CG 20 26 11 85); and (**Appendix 14**)<sup>[51, 56]</sup>

(E) Contain a provision for 30 days' prior written notice by insurance carrier to Owner and its Tenant required for cancellation, non-renewal, or substantial modification.

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

(A) Except as expressly provided above, no deductible or self insured retention in excess of \$10,000 without the prior written approval of Owner and Tenant.

(B) No policy may include an endorsement restricting, limiting or excluding coverage in any manner without the prior written approval of Owner and Tenant.

## **.3 Forms.**

(A) If the forms of policies, endorsements, certificates, or evidence of insurance required by this Exhibit are superseded or discontinued, Owner and Tenant will have the right to require other equivalent forms; and

(B) Any policy or endorsement form other than a form specified in this exhibit must be approved in advance by Owner and Tenant.

## **.4 Evidence of Insurance.** Insurance must be evidenced as follows:

(A) ACORD Form 25 *Certificates of Liability Insurance* fo liability coverages; (**Appendix 8**)<sup>[72]</sup>

(B) ACORD Form 27 *Evidence of Property Insurance* for property coverages; (**Appendix 8**)

(C) Evidence to be delivered to Owner and Tenant prior to commencing operations at the and at least 30 days prior to the expiration of current policies; and

(D) ACORD forms must

(1) Show the Owner Parties as certificate holders (with Owner's mailing address);

(2) Show Contractor as the "Named Insured;"

(3) Show the insurance companies producing each coverage and the policy number and policy date of each coverage;

(4) Name the producer of the certificate (with correct address and telephone number) and have the signature of the authorized representative of the producer;

(5) Specify the additional insured status and/or waivers of subrogation;

- (6) State the amounts of all deductibles and self-insured retentions;
- (7) Show the primary status and aggregate limit per project where required;
- (8) Be accompanied by copies of all required endorsements; and

(9) 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.” (**Appendix 8**)<sup>[72]</sup>

**.5 Copies of Policies.** If requested in writing by Owner or Tenant, Contractor will provide to the requesting person a certified copy of any or all insurance policies or endorsements required by this Contract.

---

#### **Commentary:**

The risk management system set out in this form places upon the Contractor by indemnity and by insurance covenants, broad form responsibility for liabilities to third parties, including other contractors at the Project.

**Indemnity.** This form transfers to the Contractor sole responsibility for Injuries occurring at the Project, whether or not the Injuries are caused in part by others, including by Owner, Tenant or other Owner Parties (*e.g.*, other contractors). (Paragraph **3.2** and **3.3**). Contractor’s indemnity is independent of and not limited by the insurance obligations of the parties under the Contract.

**Insurance.** The transfer to the Contractor of this broad risk of liability is reinforced by requiring the Contractor to add the “Owner Parties” as additional insureds on Contractor’s CGL policies by an ISO form CG 20 26 11 85. (**Appendix 14**)<sup>[51,56]</sup> This endorsement form covers designated persons for Injuries and Loss irrespective of the designated person’s sole or contributory negligence. In essence the endorsement is an insurance policy written for the Owner, the Tenant and the Owner’s and Tenant’s agents, employees and contractors. If the Contractor fails to list each of these persons as additional insureds, then Contractor has violated its insurance covenant and may be liable for the resulting liability, whether or not the liability is an Indemnified Matter.

The Contractor’s insurance is specified to be primary as regards any other insurance carried by the Indemnified Persons. Note certain blanket and additional insured endorsements provide that the additional insured’s insurance will be primary and contributing unless the contract between the parties requires the insuring party’s insurance to be primary (*e.g.*, **Appendices 18-20**).<sup>[57-58]</sup> In order to effectuate making the Contractor’s CGL insurance “primary” and “non-contributing,” the Additional Insureds’ insurance will likely need to be endorsed to provide that it is not “other insurance” contributing on an allocated basis with the Contractor’s CGL Insurance.

Due to the broad form nature of the indemnity, Contractor remains liable without limit for liabilities in excess of the insurance coverage.

A form of Certificate of Insurance is found at **Appendix 8**.

**Release/Waiver.** In addition to Contractor indemnifying Owner, the Tenant, and the Owner's and Tenant's agents and contractors for liabilities falling within the broad scope of the Indemnified Matters, and insuring the Owner, Tenant and their agents and contractors for liabilities falling within the broad scope of the insured liabilities, Contractor "Waives" all "Claims" against Owner, the Tenant and their agents and contractors "Arising From" from "Injury." (Paragraph 3.2)

---

## Appendix 4

### State Bar Form Office Lease Risk Management Provisions Office Lease

#### Terms

Amount of Liability Insurance

Death/bodily injury:

Property:

#### Definitions

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

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

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

#### Clauses and Covenants

##### A. Tenant agrees to—

13. Maintain public <sup>[ 75 ]</sup> liability insurance for the Premises and the conduct of Tenant's business, naming Landlord as an additional insured, <sup>[ 50-56, 75 ]</sup> in the amounts stated in the lease.
14. Maintain insurance on Tenant's personal property.
15. Deliver certificates of insurance <sup>[ 72 ]</sup> to Landlord before the Commencement Date and thereafter when requested.
16. Indemnify, <sup>[ 1 ]</sup> defend, and hold Landlord harmless from any loss, attorney's fees, court and other costs, or claims arising out of use of the Premises. <sup>[ 15-16, 24-26 ]</sup>

##### C. Landlord agrees to—

5. Insure the building [**include if applicable:** and Parking Facility] against all risks of direct physical loss in an amount equal to at least 90 percent of the full replacement cost of the same as of the date of the loss and liability; Tenant will have no claim to any proceeds of Landlord's insurance policy.



### E. Landlord and Tenant agree to the following:

3. *Release of Claims/Subrogation.* <sup>[62-66, 76, 78]</sup> Landlord and Tenant release each other from any claim, by subrogation or otherwise, for any damage to the Premises, the building, [**include if applicable:** the Parking Facility,] or personal property within the building, by reason of fire or the elements, regardless of cause, including negligence of Landlord or Tenant. This release applies only to the extent that it is permitted by law, the damage is covered by insurance proceeds, and the release does not adversely affect any insurance coverage.

4. *Notice to Insurance Companies.* Landlord and Tenant will notify the issuing insurance companies of the release set forth in the preceding paragraph and will have the insurance policies endorsed, if necessary, to prevent invalidation of the insurance coverage.

---

#### **Commentary:** <sup>[75]</sup>

**Hypothetical:** You tried to get the Landlord to use this form, but it said “no.” Instead it replied that it will either execute its “standard” form (**Appendix 5**) or another standard office lease form its lawyer got at last year’s Advanced Real Estate Drafting Course (**Appendix 6**). You attended this year’s course and turned to the form at **Appendix 7**.

**Indemnity.** The indemnity (**A.16**) does not comply with the express negligence and fair notice requirements. Therefore, this provision is not 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 <sup>[15-17, 24-26]</sup> or for injuries to the Tenant’s employees <sup>[27]</sup> arising out of the concurrent negligence of the Landlord. It is not effective as an indemnity against liability to the Landlord arising out of the Tenant’s negligence or comparative responsibility. <sup>[2]</sup>

**Insurance.** The liability insurance provision of the Lease (**A.13**) does not cover in detail the coverages required to be contained in the liability policy (See **Appendices 5, 6, 8 and 9**). The general reference to the Landlord being listed as an additional insured does not specify the scope of the matters to be covered (See **Appendices 5, 6, 13-15, and 22**). <sup>[50-56]</sup> The general reference to the Tenant providing the Landlord with a certificate of insurance (**A.15**) does not specify the items to be covered in the certificate of insurance. (See **Appendices 5 and 6**). <sup>[72]</sup>

**Waiver of Subrogation.** The waiver of subrogation provisions (**E.3**) is both a release of claims between the parties as to property damages by reason of fire or the elements and a covenant (**E.4**) 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. <sup>[78]</sup> However, the release is not written in conspicuous type and does not meet the requirements of the fair notice test. <sup>[78]</sup>

## Appendix 5

### Crescent Office Lease (Landlord form)

[These provisions are taken from the form of Office Lease included in the article titled “Anatomy of an Office Lease” by Debra Wilson, Leasing Manager for Crescent Real Estate Equities Limited Partnership, presented at the 15<sup>th</sup> Annual Real Estate Law Conference (So. Tex. College of Law 1999) as the model form of office lease used in the Houston Center, 909 Fannin, Houston, Texas.]

### **3.18 INDEMNITY.** <sup>[1]</sup>

#### **3.18.1 Definitions.**

**.1 Parties.** The “**Tenant Parties**” are Tenant and its shareholders, members, managers, partners, directors, officers, employees, agents, contractors, sublessees, licensees and invitees. The “**Landlord Parties**” are Landlord, the manager of the Building, Landlord’s Mortgagee(s) and any affiliates or subsidiaries of the foregoing, and all of their respective officers, directors, employees, shareholders, members, partners, agents and contractors. A “**Beneficiary**” is the intended recipient of the benefits of another party’s Indemnity, Waiver or obligation to Defend.

**.2 Claims and Injuries.** “**Claims**” means all damages, losses, injuries, penalties, disbursements, costs, charges, assessments, expenses (including legal, expert and consulting fees and expenses incurred in investigating, defending or prosecuting any allegation, litigation or proceeding), demands, litigation, settlement payments, causes of action (whether in tort or contract, in law, at equity or otherwise) or judgments. “**Insurable Injuries**” refers to “advertising injury,” “bodily injury,” “personal injury” and “property damage” collectively, as such terms are defined in Insurance Services Office, Inc. (“**ISO**”) <sup>[45]</sup> form CG 00 01 10 93 “Commercial General Liability”. “**Tenant’s Insurable Injuries**” are Insurable Injuries occurring (A) in the Premises or (B) outside the Premises and caused or suffered by a Tenant Party.

**.3 Indemnify, Waive and Defend.** “**Indemnify**” means to protect and hold a party harmless from and against a potential Claim and/or to compensate a party for a Claim actually incurred. “**Waive**” means to knowingly and voluntarily relinquish a right and/or to release another party from liability. No Waiver shall occur unless in a written agreement signed by the party against whom the Waiver is claimed. No Waiver in one instance shall be deemed a Waiver in another instance, however similar. No demand for or acceptance of partial payment or performance shall Waive the underlying obligation or breach unless agreed in writing. “**Defend**” means to provide a competent legal defense of a Beneficiary against a Claim with counsel reasonably acceptable (and at no cost) to the Beneficiary.

**3.18.2 Indemnity Regarding Tenant’s Performance.** <sup>[ 12, 17 ]</sup> TO THE FULLEST EXTENT PROVIDED BY PARAGRAPH **3.18.6**, TENANT SHALL INDEMNIFY AND DEFEND THE LANDLORD PARTIES AGAINST ALL CLAIMS ARISING, <sup>[29-33]</sup> OR ALLEGED TO ARISE, FROM THE FOLLOWING: (i) ANY ACT OR OMISSION OF ANY TENANT PARTY, INCLUDING THE CONDUCT OF TENANT’S BUSINESS IN THE PREMISES AND ANY INCREASE IN THE PREMIUM FOR ANY INSURANCE POLICY CARRIED BY LANDLORD RESULTING THEREFROM; OR (ii) ANY MISREPRESENTATION MADE BY TENANT OR ANY GUARANTOR OF TENANT’S OBLIGATIONS IN CONNECTION WITH THIS LEASE.

**3.18.3 Indemnity Regarding Tenant's Insurable Injuries.** TO THE FULLEST EXTENT PROVIDED BY PARAGRAPH 3.8.6, TENANT SHALL INDEMNIFY AND DEFEND THE LANDLORD PARTIES AGAINST ALL CLAIMS ARISING, OR ALLEGED TO ARISE, FROM TENANT'S INSURABLE INJURIES.

**3.18.4 Indemnity Regarding Landlord's Insurable Injuries.** TO THE FULLEST EXTENT PROVIDED BY PARAGRAPH 3.8.6, BUT SUBJECT TO ANY LIMITATIONS CONTAINED ELSE WHERE IN THIS LEASE, INCLUDING PARAGRAPH 23 "LANDLORD'S INTEREST", LANDLORD SHALL INDEMNIFY AND DEFEND THE TENANT PARTIES AGAINST ALL CLAIMS ARISING FROM INSURABLE INJURIES SUFFERED BY THIRD PARTIES IN THE COMMON AREAS OR SERVICE AREAS TO THE EXTENT CAUSED, OR ALLEGED TO HAVE BEEN CAUSED, BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY LANDLORD PARTY, BUT NOT AS TO CLAIMS FOR WHICH THE LANDLORD PARTIES ARE INDEMNIFIED PURSUANT TO PARAGRAPHS 3.18.2 and 3.18.3.

**3.18.5 Waivers.** <sup>[76]</sup> TO THE FULLEST EXTENT PROVIDED BY PARAGRAPH 3.18.6, (i) TENANT WAIVES ALL CLAIMS AGAINST THE LANDLORD PARTIES ARISING, OR ALLEGED TO ARISE, FROM (A) TENANT'S INSURABLE INJURIES, (B) ANY INSURABLE INJURIES TO ANY TENANT PARTY CAUSED BY PARTIES OTHER THAN LANDLORD PARTIES, OR (C) BUSINESS INTERRUPTION OR LOSS OF USE OF THE PREMISES SUFFERED BY TENANT; AND (ii) LANDLORD WAIVES ALL CLAIMS AGAINST THE TENANT PARTIES ARISING, OR ALLEGED TO ARISE, FROM THE DAMAGE TO OR LOSS OF TANGIBLE PROPERTY BELONGING TO A LANDLORD PARTY.

**3.18.6 Scope of Indemnities and Waivers.** ALL INDEMNITIES, WAIVERS AND OBLIGATIONSTO DEFEND, WHEREVER CONTAINED IN THIS LEASE, (i) SHALL BE ENFORCED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW FOR THE BENEFIT OF THE APPLICABLE BENEFICIARY THEREOF, REGARDLESS OF ANY EXTRAORDINARY SHIFTING OF RISKS, AND EVEN IF THE APPLICABLE CLAIM IS CAUSED BY THE ACTIVE OR PASSIVE NEGLIGENCE OR SOLE, JOINT, CONCURRENT OR COMPARATIVE NEGLIGENCE OF SUCH BENEFICIARY, AND REGARDLESS OF WHETHER LIABILITY WITHOUT FAULT OR STRICT LIABILITY IS IMPOSED UPON OR ALLEGED AGAINST SUCH BENEFICIARY, BUT NOT TO THE EXTENT THAT A COURT OF COMPETENT JURISDICTION HOLDS IN A FINAL JUDGMENT THAT A CLAIM IS CAUSED BY THE WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OF SUCH BENEFICIARY; (ii) ARE INDEPENDENT OF, AND SHALL NOT BE LIMITED BY, EACH OTHER OR ANY INSURANCE OBLIGATIONS IN THIS LEASE (WHETHER OR NOT COMPLIED WITH); AND (iii) SHALL SURVIVE THE EXPIRATION DATE UNTIL ALL RELATED CLAIMS AGAINST THE BENEFICIARIES ARE FULLY AND FINALLY BARRED BY APPLICABLE LAW. NOTWITHSTANDING THE POTENTIAL FOR EXTRAORDINARY SHIFTING OF RISK, LANDLORD AND TENANT ACKNOWLEDGE THAT THEY HAVE EXECUTED THIS LEASE IN MATERIAL RELIANCE UPON INCLUSION OF EACH SUCH INDEMNITY AND WAIVER.

**3.18.7 Reliance.** In reliance on Tenant's Indemnities and Waivers in this Lease and Tenant's insurance required by Paragraph 11.2, Landlord shall not carry primary insurance for Tenant's Insurable Injuries. <sup>[57 - 58]</sup> (**Appendices 19 and 20**). Tenant acknowledges that (i) if Landlord had been required to carry primary insurance for Tenant's Insurable Injuries, the Rent payable under this Lease would have been higher; and (ii) Tenant is relying not on Landlord or Landlord's insurance in order to pay Claims arising from Tenant's Insurable Injuries, but rather on (A) the insurance required under Paragraph 11.2 and any additional insurance Tenant has elected to carry as to Claims covered by insurance, (B) Tenant's own funds as to deductibles, self-insured retentions under Tenant's insurance and Claims which exceed Tenant's insurance limits, and (C) third parties (other than Landlord Parties) as to Claims arising from the third party actions not covered by Landlord's Indemnity.

**ARTICLE 11. INSURANCE.** <sup>[ 75 ]</sup>

**11.1 Landlord's Insurance.** Landlord shall, as an Operating Expense, procure and maintain (i) commercial general liability insurance with a combined single limit of at least \$5,000,000 and (ii) special form or all risks property insurance covering the full replacement cost of (A) the shell and core of the Building, (B) and fixtures and leasehold improvements Landlord is required by this Lease to restore, and (C) any equipment and other personal property owned by Landlord and used in connection with the Building.

**11.2 Tenant's Insurance.**

**11.2.1 Required Policies.** Tenant shall, at its sole expense, procure and maintain the following insurance coverages throughout the Term:

**.1** Commercial general liability insurance <sup>[ 75a ]</sup> on ISO <sup>[ 45 ]</sup> Form CG 00 01 10 93 or CG 00 01 06 95 (or, if Tenant has 2 or more locations covered by the policy and the policy contains a general aggregate limit, ISO form amendment "Aggregate Limits of Insurance Per Location" CG 25 04 11 85) in the amounts and with the coverages described in **Exhibit A**. Landlord Parties shall be included as "additional insureds" using ISO additional insured form CG 20 26 11 85, without modification (**Appendix 14**).<sup>[51,56]</sup> A waiver of subrogation in favor of Landlord Parties using ISO form CG 24 04 10 92 (**Appendix 23**) is also required.

**.2** Workers' compensation <sup>[ 75c ]</sup> and employer liability coverage with a waiver of subrogation in favor of the Landlord Parties on endorsement form WC 42 03 04 A (Texas only) (**Appendix 12**) <sup>[ 46-48 ]</sup> or ISO form WC 00 03 13 (all other states) and in the amounts and with the coverages described in **Exhibit A**.

**.3** "Special form" or "all risks" property insurance <sup>[ 75d ]</sup> on ISO form CP 10 30 (or equivalent Business Owner's Policy) in conformity with **Exhibit A** with no exclusions other than standard printed exclusions, including an ordinance or law coverage endorsement and a waiver of subrogation in favor of the Landlord Parties, and covering 100% replacement cost of Tenant's furnishings, trade fixtures, equipment and inventory ("Tenant's FF&E") and all ABS improvements and Alterations to the Premises. The Landlord Parties shall be shown as "loss payees as their interests may appear."

**.4** Business income and extra expense coverage for 6 months' income and expenses with waiver of subrogation in favor of the Landlord Parties.

**11.2.2 Form of Policies and Additional Requirements.** All insurance providers shall maintain ratings of *Best's Insurance Guide A/VIII* or *Standard & Poor Insurance Solvency Review A-*, or better. <sup>[ 73 ]</sup> All carriers must be admitted to engage in the business of insurance in the State. All policies must be primary, with the policies of Landlord and Landlord's Mortgagees being excess, secondary and non-contributing. (**Appendices 17 - 19**) <sup>[ 57 - 58 ]</sup> No cancellation, non-renewal or material modification shall occur without 30 days' prior written notice by the insurance carrier to Landlord and Landlord's Mortgagees. Tenant shall reinstate any aggregate limit which is reduced because of losses paid to below 75% of the limit required by this Lease. No policy shall contain a deductible or self-insured retention in excess of \$10,000 without Landlord's prior written approval.

---

Tenant shall, at its expense, also procure and maintain any other insurance coverages Landlord or Landlord's Mortgagees may require.

**11.2.3 Evidence of Insurance.** <sup>[72]</sup> Commercial general liability and workers' compensation insurance must be evidenced by ACORD form 25 "**Certificate of Insurance**" in the form and substance of **Exhibit A**, and property and business income insurance must be evidenced by ACORD form 27 "Evidence of Property Insurance" in the form and substance of **Exhibit A** (collectively, the "**Certificates**"). <sup>[72]</sup> (Also see alternate form in **Appendix 9**). The Certificates must be delivered with the executed Lease, and new Certificates must be delivered no later than 30 days prior to expiration of the current policies. Copies of endorsements required by this Lease must be attached to the Certificates delivered to Landlord. If requested in writing by Landlord, Tenant shall promptly deliver to Landlord a certified copy of any insurance policies required by this Lease. If the forms of policies, endorsements, certificates or evidence of insurance required by this Paragraph are superseded or no longer available, Landlord shall have the right to require other equivalent or better forms.

**Commentary:**

**Hypothetical:** You tried to get the Landlord to use the State Bar Form (**Appendix 4**), but it said “no.” Instead it said it will either execute its “standard” form (**Appendix 5**) or another standard office lease form its lawyer got at last year’s Advanced Real Estate Drafting Course (**Appendix 6**). You attended this year’s course and turned to the form at **Appendix 7**.

The risk management system set out in this form shifts to the Tenant by indemnity and by insurance covenants, broad form responsibility for liabilities to third parties, including other tenants in the building.

**Indemnity:** As between Landlord and Tenant this form transfers to the Tenant sole responsibility for Injuries occurring in the Leased Premises, whether or not the Injuries are caused in part by others, including by the Landlord, its employees, agents or contractors.

Additionally, as between Landlord and Tenant this form transfers to the Tenant sole responsibility for injuries occurring outside the Leased Premises “caused” by the Tenant or by its contractors or invitees, whether or not the Landlord, its employees, agents or contractors also contributed to the cause of the Injury. Although **3.18.4** indemnifies Tenant against claims arising from Insurable Injuries suffered by third parties in the Common Areas or Service Areas to the extent caused by the negligence of a Landlord Party, excluded from this indemnity are “Claims for which the Landlord Parties are Indemnified pursuant to Paragraphs **3.18.2** and **3.18.3**.” Since **3.18.3** is an indemnity by Tenant of all Insurable Injuries caused in whole or in part by a Tenant Party “outside the Premises,” Tenant has indemnified the Landlord Parties for the Landlord Parties’ contributory negligence. This broad-form extension of the Tenant’s indemnity beyond the Premises shifts to the Tenant liabilities in the Common Areas if they are in part caused by the Tenant, its employees, contractor or invitees, even though the Insurable Injury is caused in part by a Landlord Party (including its contractors or agents, *e.g.*, the Manager, the guard contractor, and the maintenance contractor). This provision shifts from Landlord and its insurance to Tenant and its insurance Insurable Injuries concurrently caused by the Landlord Parties and the Tenant Parties. This shift is objectionable since Tenant is paying for “Landlord’s” insurance through operating expense pass throughs. The form also provides that to the extent that Landlord’s insurance premium is increased despite this risk allocation, Tenant indemnifies Landlord in **3.18.2** for “any increase in the premium for any insurance policy carried by Landlord resulting therefrom.”

Inadvertently Tenant’s indemnity in **3.18.3** fails to indemnify Landlord against claims by Tenant’s employees occurring in the Premises. Tenant’s indemnity is as to “Tenant’s Insurable Injuries.” “Tenant’s Insurable Injuries” are defined in terms of coverage afforded by the ISO CGL policy. The ISO CGL policy excludes from its coverage injuries to the insured’s employees, as such coverage is properly within the scope of workers’ compensation insurance.

The cross-indemnities between Tenant (**3.18.2** and **3.18.4**) and Landlord (**3.18.4**) are delineated in terms of the location of the Insurable Injury (“in the *Premises*,” “outside the *Premises*,” “in the *Common Areas*,” and “in the *Service Areas*”). Inadvertent risk allocations may arise by use of these locational terms as opposed to terms based on care, custody and control (*e.g.*, “common areas”

(bathrooms) may be included within a Tenant's Premises by definition of the term "Premises" on single-floor tenancies even though maintenance is left with the Landlord by other provisions of the lease, areas such as exterior balconies may not be included in the definition of "Premises" but such areas are used exclusively by Tenant and are maintained by Landlord, Landlord-maintained or Landlord's contractor-warranted building components are generally included within the area defined as the Tenant's "Premises" and thus such components may be inadvertently included in the tenant's indemnity and waiver; and the lease may omit from the term "common areas" facilities servicing the Building (*e.g.*, Parking Garages, health clubs) as to which the parties would wish to provide risk allocation provisions.

The Indemnified Liabilities in this form include "loss of use of property," including income, caused by "any party" inside the Premises or caused by Tenant, or by its contractors or invitees outside the Premises, whether or not the Indemnified Liability is caused in part by others, including the Landlord, its employees, agents or contractors.

In addition to the Landlord being indemnified for these Indemnified Matters, Tenant also indemnifies the Landlord's contractors, whether or not the Landlord's contractors in part "caused" the Injury.

Tenant's indemnity is independent of and not limited by the insurance obligations of the parties under the Lease.

**Insurance:** The difference between the specificity of the insurance to be carried by the Tenant (11.2) and the insurance to be carried by the Landlord is striking. (11.1) Tenant's indemnity is broad enough to place upon Tenant liability for the Building and the property of other tenants in the Building arising out of the sole negligence of the Landlord, its employees, agents, and contractors.

The transfer to the Tenant of this broad risk of loss allocation is reinforced by requiring the Tenant to add the "Landlord Parties" as additional insureds on Tenant's CGL policies on an ISO form CG 20 26 11 85. (**Appendix 14**).<sup>[51, 56]</sup> This endorsement form covers designated persons for Injuries and Loss irrespective of the designated person's sole or contributory negligence. In essence the endorsement is an insurance policy written for the Landlord, and the Landlord's agents, employees and contractors. If the Tenant fails to list each of these persons as additional insureds, then Tenant has violated its insurance covenant and may be liable for the resulting liability, whether or not the liability is an Indemnified Matter.

This provision requires Tenant's insurance to be primary and without contribution from any insurance maintained by Landlord.<sup>[57 - 58]</sup> (See **Appendices 17 - 19**). This provision coupled with the additional insured provision attempts to allocate to the Tenant's insurance all losses up to the Tenant's insurance limits. Due to the broad form nature of the indemnity, Tenant remains liable without limit for liabilities in excess of the insurance coverage.

**Waiver/Release of Claims.** In addition to Tenant indemnifying Landlord, and its agents and contractors for liabilities falling within the broad scope of the Indemnified Matters, and insuring the Landlord and its agents and contractors for liabilities falling within the broad scope of the insured liabilities, Tenant "Waives" all "Claims" against Landlord, its agents and contractors "Arising From" from "Injury" or loss of income. (3.18.5) This waiver of Claims is not limited by the proceeds received by Tenant from its insurance and thus is a waiver of unlimited amount. There is

not a corresponding waiver of Landlord's Claims or waiver of the Landlord's insurer's right of subrogation, except as to "damage to or loss of tangible property."



## Appendix 6

### Another Office Lease (Landlord form)

[This form favors the Landlord. This Form is based on a similar provision contained in the articles presented by Aaron Johnston, Jr., Esq. and Charles E. Comiskey, CPCU, CIC, CPIA, CRM at the 2002 Advanced Real Estate Law Course titled “Risk Management and Insurance Concepts” and at the 2002 Advanced Real Estate Drafting Course titled “Basic Insurance Concepts.”]

## ARTICLE 3. INDEMNIFICATION <sup>[1]</sup> AND WAIVERS. <sup>[76]</sup>

### 3.18 INDEMNIFICATION.

#### 3.18.1 Definitions.

**.1 Parties.** <sup>[17]</sup> *The “**Tenant Parties**” are Tenant and its shareholders, members, managers, partners, directors, officers, employees, agents, contractors, sublessees, licensees and invitees. The “**Landlord Parties**” are the Landlord, the Property Manager, Landlord’s Mortgagee(s) and any affiliates or subsidiaries of the foregoing, and all of their respective officers, directors, employees, shareholders, members, partners, agents and contractors. A “**Beneficiary**” is the intended recipient of the benefits of another party’s Indemnity, Waiver or obligation to Defend.*

**.2 Claims, Injuries.** *“**Claims**” means all foreseeable and unforeseeable claims, demands, proceedings, liabilities, damages, (including actual, consequential, and punitive), expenses, Legal Costs, judgments, fines and penalties of any nature or description. “**Injury**” means (i) harm to, impairment or loss of, or impairment or loss of use of, property, including income, (ii) harm to (including sickness or disease) or death of a person, or (iii) “personal and advertising injury,” as such term is defined in Insurance Services Office, Inc. (“**ISO**”) <sup>[45]</sup> form CG 00 01 10 01 “Commercial General Liability Insurance.” “**Legal Costs**” means court costs, attorneys’ fees, experts’ fees or other expenses incurred in investigating, preparing, prosecuting or settling any legal action or proceeding or arbitration, mediation, or other method of alternative dispute resolution.*

**.3 Indemnify, Waive, and Defend.** *“**Indemnify**” <sup>[2]</sup> means to protect a party against a potential Claim and/or to compensate a party for a Claim actual incurred. “**Waive**” means to knowingly and voluntarily relinquish a right and/or to release another party from liability in connection with a Claim. “**Defend**” means to provide and pay for the legal defense of a Beneficiary against a Claim in litigation, arbitration, mediation or other proceedings with counsel reasonably acceptable to such Beneficiary and to pay all costs associated with the preparation or prosecution of such defense. “**Arising From**” <sup>[30-33]</sup> means directly or indirectly, in whole or in part, (i) occurring in connection with or as a result of, (ii) causing, (iii) resulting in, or (iv) based upon.*

**3.18.2 INDEMNITY AND WAIVER.** *Tenant Waives as to the Landlord Parties, and will Indemnify and Defend the Landlord Parties against, all Claims Arising, or alleged to Arise, From (A) Injury suffered by any person and occurring in the Premises; (B) Injury caused by a Tenant Party and occurring outside the Premises; and/or (C) harm to, impairment or loss of, or impairment or loss of use of, Property, including incomes suffered by any party inside the Premises or caused or suffered by a Tenant Party outside the Premises.*

### **3.18.3 SCOPE OF INDEMNITIES AND WAIVERS.**

**.1 General.** *All Indemnities, Waivers, and obligations to Defend, wherever contained in this Lease, (i) are independent of, and will not be limited by, each other or any insurance obligations in this Lease (whether or not complied with) or damages or benefits payable under workers compensation or other employee benefit acts, and (ii) will survive the Expiration Date until all related Claims against the Beneficiaries are fully and finally barred by Applicable Law. All Applicable Law affecting the validity or enforceability of any Indemnity, Waiver or obligation to Defend contained in this Lease is made a part of such provision and will operate to amend such Indemnity, Waiver or obligation to Defend to the minimum extent necessary to bring the provision into conformity with Applicable Law and cause the provision, as modified, to continue in full force and effect.*

**.2 Negligence of Landlord Parties.** <sup>[14 - 27]</sup> *All Indemnities, Waivers and obligations to defend the Landlord Parties contained in Paragraph 3.18.2 will be enforced to the fullest extent permitted by law for the benefit of the applicable Beneficiary thereof, even if the applicable Claim is caused by the active or passive ordinary negligence or sole, joint, concurrent, or comparative ordinary negligence of the Beneficiary, and regardless of whether or not liability without fault or strict liability is imposed or sought to be imposed on the Beneficiary, but will not be enforced to the extent that a court of competent jurisdiction holds in a final judgment that a Claim is caused by the willful misconduct or gross negligence of such Beneficiary.*

## **ARTICLE 11. INSURANCE.** <sup>[75]</sup>

**11.1 TENANT'S INSURANCE.** Tenant will, at its sole expense, procure and maintain the insurance coverages set forth in **Exhibit A**. Tenant will, at its sole cost and expense, comply with such requirements during the Term of the Lease.

**11.2 MINIMUM REQUIREMENTS.** The coverages and limits set forth in **Exhibit A** are minimum requirements and not a determination as to all of the coverages and maximum limits that Tenant should carry. The failure of Landlord to demand full compliance by Tenant with respect to the minimum coverages outlined in **Exhibit A** will not constitute a Waiver by Landlord with respect to Tenant's obligation to maintain such coverages. Tenant will purchase such other insurance policies and/or endorsements or increase the policy limits of any policy set forth on **Exhibit A**, if required by any mortgagee of the Building.

**11.3 SPECIAL REMEDY.** Tenant's failure to obtain and maintain the required insurance will constitute a material breach of, and default under, this Contract. If Tenant fails to remedy such breach within 5 days after notice from Landlord, Landlord may, in addition to any other remedy available to Landlord, at Landlord's option, purchase such insurance, at Tenant's expense. Tenant will Indemnify the Landlord Parties against any Claims arising from Tenant's failure to purchase and/or maintain the insurance coverages required by this Lease.

**Exhibit A****Tenant's Insurance****11.2.1 Specific Requirements.**

<b>Insurance</b>	<b>Coverages</b>	<b>Other Requirements</b>
Worker's Compensation <sup>[ 46-48, 75c ]</sup>	Statutory Limits (if state has no statutory limit, \$1,000,000)	No "alternative" forms of coverage will be permitted.
Employer's Liability	\$1,000,000 each accident for bodily injury by accident \$1,000,000 each employee for	
Commercial General Liability (Occurrence Basis) <sup>[ 49-59, 75a ]</sup>	\$1,000,000 per occurrence \$2,000,000 general aggregate \$2,000,000 product-completed operations aggregate limit \$1,000,000 personal and advertising injury limit \$50,000 damage to premises rented to you limit \$5,000 medical expense limit	<ol style="list-style-type: none"> <li>1. ISO form CG 00 01 07 98, or equivalent.</li> <li>2. Separation of insured language will not be modified.</li> <li>3. Aggregate limit per location endorsement.</li> <li>4. The contractual liability exclusion with respect to personal injury will be deleted.</li> <li>5. Defense will be provided as an additional benefit and not included within the limit of liability.</li> </ol>
Business Automobile Liability (Occurrence Basis) <sup>[ 60-61, 75b ]</sup>	\$2,000,000 combined single limit	<ol style="list-style-type: none"> <li>1. ISO form CA 00 01 10 01 or equivalent.</li> <li>2. Includes liability arising out of operation of owned, hired and non-owned vehicles.</li> </ol>
Umbrella Liability Insurance (Occurrence Basis)	\$5,000,000	<ol style="list-style-type: none"> <li>1. Written on an umbrella basis in excess over and no less broad than the liability coverages referenced above.</li> <li>2. Inception and expiration dates will be the same as commercial general liability insurance.</li> <li>3. Coverage must "drop down" for exhausted aggregate limits under the liability coverages referenced above.</li> <li>4. Aggregate limit of insurance per location endorsement.</li> <li>5. Aggregate limit per location endorsement.</li> <li>6. Coverage must "drop down" for exhausted aggregate limits under commercial general liability insurance.</li> </ol>
Causes of Loss-Special Form (formerly "all risk") Property Insurance <sup>[ 62-67, 75d ]</sup>	100% replacement cost, as modified below, of all of Tenant's furniture, fixtures and equipment and any non-Building Standard leasehold improvements.	<ol style="list-style-type: none"> <li>1. ISO form CP 10 30, or equivalent.</li> <li>2. Name Landlord as "insured as its interest may appear."</li> <li>3. Contain only standard printed exclusions.</li> <li>4. Waiver of subrogation in favor of Landlord Parties.</li> <li>5. Ordinance or law coverage endorsement.</li> <li>6. Equipment floater to cover Tenant's equipment.</li> </ol>
Business Income and Extra Expense Coverage	No less than 6 months of income and ongoing expenses.	<ol style="list-style-type: none"> <li>1. Waiver of subrogation in favor of Landlord Parties.</li> <li>2. Endorsement to cover losses arising from interruption of utilities outside the Leased Premises.</li> </ol>

## 11.2.2 General Insurance Requirements.

### .1 Policies. All policies must

(A) 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; <sup>[73]</sup>

(B) Be endorsed to be primary with the policies of all Landlord Parties being excess, secondary and non-contributing; <sup>[57-58]</sup> (**Appendices 17 - 19**)

(C) Be endorsed to provide a waiver of subrogation in favor of the Landlord Parties;

(D) With respect to all liability policies except workers' compensation/employer's liability, be endorsed to include the Landlord Parties as "additional insureds" (The additional insured status under the commercial general liability policy will be provided on ISO form CG 20 26 11 85) (**Appendix 14**); and

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

### .2 Limits, Deductibles and Retentions.

(A) Except as expressly provided above, no deductible or self insured retention in excess of \$10,000 without the prior written approval of Landlord.

(B) No policy may include an endorsement restricting, limiting or excluding coverage in any manner without the prior written approval of Landlord.

### .3 Forms.

(A) If the forms of policies, endorsements, certificates, or evidence of insurance required by this Exhibit are superseded or discontinued, Landlord will have the right to require other equivalent forms; and

(B) Any policy or endorsement form other than a form specified in this exhibit must be approved in advance by Landlord.

### .4 Evidence of Insurance. Insurance must be evidenced as follows:

(A) ACORD Form 25 *Certificates of Liability Insurance* fo liability coverages; <sup>[72]</sup> (**Appendices 8 and 9**)

(B) ACORD Form 27 *Evidence of Property Insurance* for property coverages;

(C) Evidence to be delivered to Landlord prior to commencing operations at the and at least 30 days prior to the expiration of current policies; and

(D) ACORD forms must

(1) Show the Landlord Parties as certificate holders (with Landlord's mailing address);

(2) Show Tenant as the "Named Insured;"

(3) Show the insurance companies producing each coverage and the policy number and policy date of each coverage;

(4) Name the producer of the certificate (with correct address and telephone number) and have the signature of the authorized representative of the producer;

(5) Specify the additional insured status and/or waivers of subrogation;

(6) State the amounts of all deductibles and self-insured retentions;

(7) Show the primary status and aggregate limit per project where required;

(8) Be accompanied by copies of all required endorsements; and

(9) 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."

**.5 Copies of Policies.** 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.

---

**Commentary:**

**Hypothetical:** You tried to get the Landlord to the State Bar Form (**Appendix 4**), but it said "no." Instead it said it will either execute its "standard" form (**Appendix 5**) or another standard office lease form its lawyer got at last year's Advanced Real Estate Drafting Course (**Appendix 6**). You attended this course and turn to the form at **Appendix 7**.

The risk management system set out in this form places upon the Tenant by indemnity and by insurance covenants, broad form responsibility for liabilities to third parties, including other tenants in the building.

**Indemnity.** [ 16 - 22 ] As between Landlord and Tenant this form transfers to the Tenant sole responsibility for Injuries occurring **in** the Leased Premises, whether or not the Injuries are caused in part by others, including by the Landlord, its employees, agents or contractors.

Additionally, as between Landlord and Tenant this form transfers to the Tenant sole responsibility for injuries occurring **outside** the Leased Premises “caused” by the Tenant or by its contractors or invitees, whether or not the Landlord, its employees, agents or contractors also contributed to the cause of the Injury. Since **3.18.3** is an indemnity by Tenant of all Injuries caused in whole or in part by a Tenant Party “outside the Premises” and “caused” by a Tenant Party “whether in whole or in part,” Tenant has indemnified the Landlord Parties for the Landlord Parties’ contributory negligence. This broad-form extension of the Tenant’s indemnity beyond the Premises shifts to the Tenant liabilities in the Common Areas if they are in part caused by the Tenant, its employees, contractor or invitees, even though the Injury is caused in part by a Landlord Party (including its contractors or agents, e.g., Manager, guard service, maintenance service). This provision shifts from Landlord and its insurance to Tenant and its insurance Injuries concurrently caused by the Landlord Parties and the Tenant Parties. This shift is objectionable since Tenant is paying for “Landlord’s” insurance through operating expense pass throughs.

Inadvertently, Tenant’s indemnity in **3.18.3** fails to indemnify Landlord against claims by Tenant’s employees occurring in the Premises. Tenant’s indemnity is as to “Injuries.” “Injuries” are defined in terms of coverage afforded by the ISO CGL policy. The ISO CGL policy excludes from its coverage injuries to the insured’s employees, as such coverage is properly within the scope of workers compensation insurance.

This form does not contain a cross indemnity by the Landlord of the Tenant as to Injuries occurring in whole or in part due to the acts or omissions of the Landlord Parties. If such an indemnity is to be included care should be taken in defining the “location” of the occurrence of the injury. See Commentary following **Appendix 5**. The cross-indemnities in **Appendix 5** between Tenant (**3.18.2** and **3.18.4**) and Landlord (**3.18.4**) are delineated in terms of the location of the Insurable Injury (“in the *Premises*,” “outside the *Premises*,” “in the *Common Areas*,” and “in the *Service Areas*”). Inadvertent risk allocations may occur by use of location terms. See Commentary following **Appendix 5**.

The Indemnified Liabilities and Released Liabilities include “loss of use of property, including income,” caused by “any party” inside the Premises or caused by Tenant, or by its contractors or invitees outside the Premises, whether or not the Indemnified Liability is caused in part by others, including the Landlord, its employees, agents or contractors.

In addition to the Landlord being indemnified for these Indemnified Matters, Tenant also indemnifies the Landlord’s contractors, whether or not the Landlord’s contractors in part “caused” the Injury.

Tenant’s indemnity is independent of and not limited by the insurance obligations of the parties under the Lease.

**Insurance.** This provision does not provide for either the Landlord or the Tenant to carry property insurance covering the Building, including any tenant improvements. Tenant’s indemnity is broad enough to place upon Tenant liability for the Building and the property of other tenants in the Building arising out of the sole negligence of the Landlord, its employees, agents, and contractors.

The transfer to the Tenant of this broad risk of loss allocation is reinforced by requiring the Tenant to add the “Landlord Parties” as additional insureds on Tenant’s CGL policies on an ISO form CG 20 26 11 85. <sup>[51]</sup> (**Appendix 14**) This endorsement form covers designated persons for Injuries and Loss irrespective of the designated person’s sole or contributory negligence. In essence the endorsement is an insurance policy written for the Landlord, and the Landlord’s agents, employees and contractors. If the Tenant fails to list each of these persons as additional insureds, then Tenant has violated its insurance covenant and may be liable for the resulting liability, whether or not the liability is an Indemnified Matter.

This provision requires Tenant’s insurance to be primary and without contribution from any insurance maintained by Landlord. This provision coupled with the additional insured provision attempts to allocate to the Tenant’s insurance all losses up to the Tenant’s insurance limits. <sup>[55 - 58]</sup> (**Appendices 17 - 19**).

Due to the broad form nature of the indemnity, Tenant remains liable without limit for liabilities in excess of the insurance coverage.

**Waiver/Release.** In addition to Tenant indemnifying Landlord, and its agents and contractors for liabilities falling within the broad scope of the Indemnified Matters, and insuring the Landlord and its agents and contractors for liabilities falling within the broad scope of the insured liabilities, Tenant “Waives” all “Claims” against Landlord, its agents and contractors “Arising From” from “Injury” or loss of income. This form does not contain a corresponding waiver by Landlord of Claims or by its insurers as to claims paid by its insurers.

---

## Appendix 7

### Office Lease – Risk Allocated Based on Modified Contractual Comparative Responsibility

[This form provides allocation of risk between Landlord and Tenant based on comparative responsibility of the parties, except as noted in the Commentary.]

#### ARTICLE 3. COVENANTS.

##### 3.18 INDEMNIFICATION.<sup>[1]</sup>

###### 3.18.1 Definitions.

.1 "**Indemnify**" means to protect, defend, hold harmless, pay and be solely responsible for the "Indemnified Liabilities" (as such term is herein defined).

.2 "**Liabilities**" or "**Claims**" shall include all, whether foreseeable or unforeseeable, claims, damages (including actual, consequential and punitive), losses, fines, penalties, liens, causes of action, suits, judgments, settlements and expenses [including court costs, attorney's fees (including attorney's fees in defending and/or settling a claimed Liability and attorney's fees to collect on this Indemnity), costs of investigation, and expert witnesses] of any nature, kind or description by, through or of any person or entity, including property loss or damage in, on or about the Project, including the Leased Premises, bodily or personal injury, sickness, disease, and/or death (including bodily or personal injury and/or death of employees of an Indemnified Person or of an Indemnifying Person). The terms "**Liabilities**" or "**Claims**" are used interchangeably herein, each including the other.

.3 "**Indemnified Liabilities**" shall be Liabilities arising from Indemnified Matters except solely from Excluded Matters (as such terms are herein defined).

.4 "**Arising out of**" means directly or indirectly, in whole or in part (A) to occur as a result of, (B) to cause, or (C) to result in.

.5 "**Instrumentality**" means by, through or of the Party including (A) the Party itself, (B) its contractors or agents, (C) its invitees and customers; (D) in the case of the Landlord shall include the contractors, agents, invitees and customers of tenants in the Project other than Tenant; and (E) as to each of the persons listed in (A)-(D) the following persons: each of such person's respective partners, and any successors, assigns, heirs, personal representatives, agents, stockholders, officers, directors, employees, and affiliates.

.6 "**Indemnified Persons**" means (A) in the case of the indemnity by the Landlord the following persons (called herein the "**Indemnified Tenant-Related Persons**") the Tenant, Tenant's employees, heirs, personal representatives, devisees, stockholders, members, partners, successors and assigns, and Tenant's subtenants; and (B) in the case of the indemnity by the Tenant the following persons (called herein the "**Indemnified Landlord-Related Persons**"): the Landlord, Landlord's employees, heirs, personal representatives, devisees, stockholders, members, partners, successors and assigns, Landlord's Management Company, and Landlord's Lender.



**.7 "Indemnifying Person"** means (A) the Landlord in the case of the indemnity of the Indemnified Tenant-Related Persons and (B) the Tenant in the case of the indemnity of the Indemnified Landlord-Related Persons.

**.8 "Landlord-Insurable Injury"** means Liabilities (A) to the extent of insurance proceeds are actually received by Landlord or paid for its benefit or for the benefit of the additional insureds and (B) to the extent of insurance coverage (including additional insured endorsements) required to be carried by Landlord in Subparagraph **11.1.2**.

**.9 "Tenant-Insurable Injury"** means Liabilities (A) to the extent of insurance proceeds are actually received by Tenant or paid for its benefit or for the benefit of the additional insureds and (B) to the extent of insurance coverage (including additional insured endorsements) required to be carried by Tenant in Subparagraph **11.1.1**.

**.10 "Landlord-Related Persons "** means the Landlord and its Instrumentalities.

**.11 "Tenant-Related Persons "** means the Tenant and its Instrumentalities.

### **3.18.2 INDEMNIFICATION.**

**1. INDEMNIFICATION BY TENANT.** *Subject to Clause 3.18.2.3, Tenant hereby indemnifies the Indemnified Landlord Related-Persons for all Indemnified Liabilities arising out of, [ 32 - 33 ] or alleged [ 29 ] to have arisen out of, any of the following matters (the "Tenant Indemnified Matters"):*

(A) *breach by Tenant of the Lease, and*<sup>[12]</sup>

(B) *any act, omission, or willful misconduct, of the Tenant-Related Persons, but only to the extent the Indemnified Liability arises out of, or is alleged to have arisen out of, a Tenant-Insurable Injury.*

**2 INDEMNIFICATION BY LANDLORD.** *Subject to Clause 3.18.2.3, Landlord hereby indemnifies the Indemnified Tenant-Related Persons for all Indemnified Liabilities arising out of, or alleged to have arisen out of, any of the following matters (the "Landlord Indemnified Matters"):*

(A) *breach by Landlord of this Lease; and*<sup>[12]</sup>

(B) *any act, omission, or willful misconduct of any of the Landlord-Related Persons, but only to the extent the Indemnified Liability arises out of, or is alleged to have arisen out of, a Landlord-Insurable Injury.*

**3 SCOPE OF INDEMNIFICATION.** *The indemnities in this Section 3.18*

(A) *shall be enforced to the fullest extent permitted by applicable law for the benefit of the applicable Indemnified Person thereof, regardless of any extraordinary shifting of risks, and even if the applicable liability is caused by the active or passive negligence or joint,*

*concurrent or comparative negligence of such Indemnified Person, and regardless of whether liability without fault or strict liability is imposed upon or alleged against such Indemnified Person;*

(B) *are independent of, and shall not be limited by, each other, and shall not limit the insurance obligations of the parties hereto;*

(C) *are **limited** by the insurance obligations in this Lease to the extent the Indemnified Liabilities are an Insurable Injury, except for any deductible, self-insured retentions and self-insurance, as to which the Indemnifying Party's liability continues to the Indemnified Persons;*

(D) *to the extent the Indemnified Liability arises out of the joint, concurrent or comparative negligence, causation, responsibility or fault of the Landlord-Related Persons and the Tenant-Related Persons, whether negligence, strict liability in tort, gross negligence, breach of warranty, express or implied, products liability, breach of the terms of this Lease or willful misconduct of such Indemnified Persons, then the Indemnifying Person's obligation to the Indemnified Persons shall only extend to the **percentage of the total responsibility of the Indemnifying Person in contributing to such Liability**; and*

(E) *shall survive expiration or termination of this Lease until all related claims against the indemnified persons are fully and finally barred by applicable law.*

**3.18.3 Settlement and Defense Procedure Provision.** <sup>[ 40 ]</sup> The following provision establishes a procedure to be followed to determine if the Indemnifying Person will provide a defense to the claimed liability.

**.1 Counsel.** At the Indemnified Person's option, the Indemnified Person may require the Indemnifying Person to defend any Claim covered by Paragraph 3.18 or the Indemnified Person may conduct its own defense. In any event, the Indemnified Person is entitled to retain its own counsel to advise it regarding any Claim covered by Paragraph 3.18 and all costs associated with such counsel will be an Indemnified Liability covered by the Indemnifying Person's indemnity.

**.2 Notice of Claim.** When it appears to the Indemnified Person that a Claim is being made that is covered by Paragraph 3.18, the Indemnified Person will notify the Indemnifying Person of the Claim. However, the Indemnified Person's failure to promptly notify the Indemnifying Person of the Claim, or the Indemnified Person's failure to recognize that a Claim covered by Paragraph 3.18 is being or has been made, will not affect the Indemnified Person's rights, nor Indemnifying Person's obligations. Upon being notified of a Claim, the Indemnifying Person will have 10 days from receipt of Indemnified Person's notice to indicate, in writing, if the Indemnifying Person acknowledges its obligations to indemnify the Indemnified Person pursuant to Paragraph 3.18 and whether the Indemnifying Person will indemnify or assume defense of the Claim.

**.3 Settlement.** Without in any way reducing the Indemnifying Person's obligation to defend:

(A) If the Indemnifying Person does not acknowledge its obligation to indemnify, the Indemnified Person can deal with the Claim in whatever fashion the Indemnified Person, in its sole discretion, deems appropriate.

(B) If the Indemnifying Person acknowledges its obligation to indemnify, but refuses to defend the Claim, the Indemnified Person can assume defense of the Claim and dispose of the Claim in whatever fashion the Indemnified Person, in its sole discretion, deems appropriate.

(C) If the Indemnifying Person acknowledges its obligation to indemnify, and agrees to defend the Claim, and the Indemnified Person elects not to conduct its own defense, the Indemnifying Person will have the authority to dispose of the Claim in whatever fashion the Indemnifying Person, consistent with its obligations to the Indemnified Person under Paragraph 3.18, deems appropriate.

(D) If the Indemnifying Person agrees to defend the Claim, but the Indemnified Person elects to conduct its own defense, the Indemnified Person must obtain the consent of the Indemnifying Person before any voluntary settlement of the Claim.

## ARTICLE 11. INSURANCE. <sup>[ 43-75 ]</sup>

### 11.1 PARTIES' INSURANCE.

**11.1.1 Insurance to be Provided by Tenant.** Tenant will, at its sole expense, procure and maintain the insurance coverages set forth in **Exhibit A**. Tenant will, at its sole cost and expense, comply with such requirements during the Term of the Lease and thereafter to the extent specified herein.

**11.1.2 Insurance to be Provided by Landlord.** Tenant will, at its sole expense, procure and maintain the insurance coverages set forth in **Exhibit B**. Tenant will, at its sole cost and expense, comply with such requirements during the Term of the Lease and thereafter to the extent specified herein.

### 11.2 MINIMUM REQUIREMENTS.

**11.2.1 Tenant.** The coverages and limits set forth in **Exhibit A** are minimum requirements and not a determination as to all of the coverages and maximum limits that Tenant should carry. The failure of Landlord to demand full compliance by Tenant with respect to the minimum coverages outlined in **Exhibit A** will not constitute a Waiver by Landlord with respect to Tenant's obligation to maintain such coverages. Tenant will purchase such other insurance policies and/or endorsements or increase the policy limits of any policy set forth on **Exhibit A**, if required by any mortgagee of the Building.

**11.2.2 Landlord.** The coverages and limits set forth in **Exhibit B** are minimum requirements and not a determination as to all of the coverages and maximum limits that Landlord should carry. The failure of Tenant to demand full compliance by Landlord with respect to the minimum coverages outlined in **Exhibit B** will not constitute a Waiver by Tenant with respect to Landlord's obligation to maintain such coverages.

**11.3 SPECIAL REMEDY.** The party required to maintain insurance by this Lease is referred to herein as a "Providing Party." The Party for whose benefit the Providing Party is providing the insurance is referred to herein as the "Beneficiary." A Providing Party's failure to obtain and

maintain the required insurance will constitute a material breach of, and default under, this Lease. If a Providing Party fails to remedy such breach within 5 days after notice from the Beneficiary, the Beneficiary may, in addition to any other remedy available to Beneficiary, at Beneficiary's option, purchase such insurance, at the Providing Party's expense. The Providing Party will Indemnify the Beneficiary against any Claims arising from the Providing Party's failure to purchase and/or maintain the insurance coverages required by this Lease.

#### **11.4 WAIVERS OF RECOVERY AND SUBROGATION.**

**11.4.1 Covenant to Obtain Endorsement to Policies.** Landlord and Tenant shall each have included in all policies of fire, extended coverage, business interruption and loss of rents insurance, workers' compensation insurance, and CGL insurance respectively obtained by them covering the Leased Premises, the Project, including the Building and contents therein, a waiver by the insurer of all right of subrogation against the other party hereto, and its officers, directors, shareholder, partners, members, and employees in connection with any liability, risk, peril, loss or damage thereby insured against. <sup>[ 47, 61, 62 - 66 ]</sup>

**11.4.2 Endorsement Forms.** The waiver of subrogation on the CGL insurance shall be on an ISO Form CG 24 04 10 93 (or equivalent). (**Appendix 23**). The waiver of subrogation on the workers' compensation insurance shall be on endorsement form WC 42 03 04 A. (**Appendix 12**). Any additional premium for such waiver shall be paid by the named insured.

**11.4.3 RELEASE AND WAIVER OF RECOVERY.** <sup>[ 76, 78 - 81, 59, 62 - 65 ]</sup> *To the full extent permitted by law, Landlord and Tenant each (each respectively a "releasing party") waive all right of recovery against the other, and each party's successors and assigns, such person's respective officers, directors, employees, shareholders and partners, and Tenant's subtenants (the "released persons"), for, and agrees to release the other from liability for, loss or damage to the extent (a) of insurance proceeds actually received by the releasing party or paid for its benefit and (b) such loss or damage which would have been covered by the insurance required to be maintained under this Lease by the party seeking recovery had it maintained the insurance but did not, and in either case even though such loss or damage arises, in whole or in part, out of the negligence or strict liability of the released persons.*

**11.4.4 Deductibles; Self Insurance.** The forgoing release and waiver of recovery does not waive either party's rights against the other for the portion of the covered loss that is within the amount of the deductible or any self-insured retention or self-insurance.

**11.4.5 Effect of Obtaining and Maintaining Insurance.** If, by reason of the foregoing release, either party shall be unable to obtain any insurance required herein, such release shall be deemed not to have been made by such party. Provided, further, if either party shall be unable to obtain any such insurance without the payment of an additional premium therefor, then, unless the party claiming the benefit of such release shall agree to pay such party for the cost of such additional premium within 30 days after notice setting forth such requirement and the amount of the additional premium, such release shall be of no force and effect between such party and such claiming party.

**11.4.6 Existing Insurance Permits Waiver of Subrogation.** Each party represents that its current insurance policies allow the waiver of such carrier's right of subrogation as to the released persons.

## Exhibit A

### Tenant's Insurance

#### 11.2.1 Specific Requirements.

Insurance	Coverages	Other Requirements
Worker's Compensation <sup>[46-48, 75c]</sup>	Statutory Limits (if state has no statutory limit, \$1,000,000)	No "alternative" forms of coverage will be permitted.
Employer's Liability	\$1,000,000 each accident for bodily injury by accident \$1,000,000 each employee for	
Commercial General Liability (Occurrence Basis) <sup>[49-59, 75a]</sup>	\$1,000,000 per occurrence \$2,000,000 general aggregate \$2,000,000 product-completed operations aggregate limit \$1,000,000 personal and advertising injury limit \$50,000 damage to premises rented to you limit \$5,000 medical expense limit	<ol style="list-style-type: none"> <li>1. ISO form CG 00 01 07 98, or equivalent.</li> <li>2. Separation of insured language will not be modified.</li> <li>3. Aggregate limit per location endorsement.</li> <li>4. The contractual liability exclusion with respect to personal injury will be deleted.</li> <li>5. Defense will be provided as an additional benefit and not included within the limit of liability.</li> </ol>
Business Automobile Liability (Occurrence Basis) <sup>[60-61, 75b]</sup>	\$2,000,000 combined single limit	<ol style="list-style-type: none"> <li>1. ISO form CA 00 01 10 01 or equivalent.</li> <li>2. Includes liability arising out of operation of owned, hired and non-owned vehicles.</li> </ol>
Umbrella Liability Insurance (Occurrence Basis)	\$5,000,000	<ol style="list-style-type: none"> <li>1. Written on an umbrella basis in excess over and no less broad than the liability coverages referenced above.</li> <li>2. Inception and expiration dates will be the same as commercial general liability insurance.</li> <li>3. Coverage must "drop down" for exhausted aggregate limits under the liability coverages referenced above.</li> <li>4. Aggregate limit of insurance per location endorsement.</li> <li>5. Aggregate limit per location endorsement.</li> <li>6. Coverage must "drop down" for exhausted aggregate limits under commercial general liability insurance.</li> </ol>
Causes of Loss-Special Form (formerly "all risk") Property Insurance <sup>[67-71, 75d]</sup>	100% replacement cost, as modified below, of all of Tenant's furniture, fixtures and equipment and any non-Building Standard leasehold improvements.	<ol style="list-style-type: none"> <li>1. ISO form CP 10 30, or equivalent.</li> <li>2. Name Landlord as "insured as its interest may appear."</li> <li>3. Contain only standard printed exclusions.</li> <li>4. Waiver of subrogation in favor of Landlord Parties.</li> <li>5. Ordinance or law coverage endorsement.</li> <li>6. Equipment floater to cover Tenant's equipment.</li> </ol>
Business Income and Extra Expense Coverage	No less than 6 months of income and ongoing expenses.	<ol style="list-style-type: none"> <li>1. Waiver of subrogation in favor of Landlord Parties.</li> <li>2. Endorsement to cover losses arising from interruption of utilities outside the Leased Premises.</li> </ol>

<p>Builder's Risk Property Insurance [67-71, 75d]</p>	<p>1. Coverage on a completed value basis.                  2. Amount of coverage: initial Contract Sum, plus \$_____, subject to subsequent modification of Contract Sum.                  3. Property covered:</p> <ul style="list-style-type: none"> <li>• Entire Work at Job Site</li> <li>• All structures under construction</li> <li>• All property on the Job Site for installation, including materials and supplies</li> <li>• All property at other locations but intended for use at the Job Site, including materials and supplies.</li> <li>• All property in transit to the Job Site, including materials and supplies</li> <li>• All temporary structures at the Job Site, including scaffolding, falsework and temporary buildings</li> </ul>	<p>1. ISO Special form, or equivalent.                  2. Required endorsements: Minimum                  Sublimits</p> <p>Additional expenses due to delay in completion                  \$ _____</p> <p>Agreed value: No sublimit                  Business income/rental value                  \$ _____</p> <p>Agreed penalty                  \$ _____</p> <p>Damage arising from error, omission, or deficiency in design, specifications, workmanship or materials, including collapse: No sublimit                  Debris removal additional limit: \$1,000,000                  Earthquake                  \$ _____</p> <p>Earthquake sprinkler leakage: \$ _____                  Expediting expenses: \$ _____                  Flood                  \$ _____</p> <p>Freezing: \$1,000,000                  Ordinance or law: No Sublimit                  Pollutant clean up and removal: \$1,000,000                  Preservation of property: No Sublimit                  Replacement cost: No Sublimit                  Testing: No Sublimit</p> <p>3. No protective safeguard warranty permitted                  4. Occupancy of up to 15% of covered property to be permitted                  5. Deductibles will not exceed the following:</p> <p style="padding-left: 40px;">All risks of direct damage per occurrence: \$5,000                  Delayed opening waiting period: 5 days                  Flood, per occurrence: \$25,000                  or excess of NFIP if in flood zone A                  Earthquake and earthquake sprinkler leakage, per occurrence: \$25,000</p>
---	--	--

**11.2.2 General Insurance Requirements.**

**.1 Policies.** All policies must

(A) 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;

(B) Be endorsed to provide a waiver of subrogation in favor of the Landlord-Related Persons;

(C) With respect to all liability policies, except workers' compensation/employer's liability, be endorsed to include the Landlord-Related Persons as "additional insureds" (The additional insured status under the commercial general liability policy will be provided on ISO form CG 20 26 11 85 or equivalent) modified to exclude(1) "Liabilities to the extent caused in whole or in part by the negligent acts or omissions or willful misconduct of any of the Additional-Insured-Landlord-Related Persons" or (2) Liabilities to the extent caused in whole or in part by the negligent acts or omissions or willful misconduct of a contractor or invitee of Tenant

or of its subtenants occurring in the Common Areas, Support Facilities or Parking Garage (as such areas are defined in the Office Lease); and

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

**.2 Limits, Deductibles and Retentions.**

(A) Except as expressly provided above, no deductible or self insured retention in excess of \$10,000 without the prior written approval of Landlord.

(B) No policy may include an endorsement restricting, limiting or excluding coverage in any manner without the prior written approval of Landlord.

**.3 Forms.**

(A) If the forms of policies, endorsements, certificates, or evidence of insurance required by this Exhibit are superseded or discontinued, Landlord will have the right to require other equivalent forms; and

(B) Any policy or endorsement form other than a form specified in this exhibit must be approved in advance by Landlord.

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

(A) ACORD Form 25 *Certificates of Liability Insurance* fo liability coverages in the form attached hereto as **Exhibit A**;

(B) ACORD Form 27 *Evidence of Property Insurance* for property coverages in the form attached hereto as **Exhibit A**;

(C) Evidence to be delivered to Landlord prior to commencing operations at the and at least 30 days prior to the expiration of current policies; and

(D) ACORD forms must

(1) Show the Landlord Parties as certificate holders (with Landlord's mailing address);

(2) Show Tenant as the "Named Insured;"

(3) Show the insurance companies producing each coverage and the policy number and policy date of each coverage;

(4) Name the producer of the certificate (with correct address and telephone number) and have the signature of the authorized representative of the producer;

(5) Specify the additional insured status and/or waivers of subrogation;

- (6) State the amounts of all deductibles and self-insured retentions;
- (7) Show the primary status and aggregate limit per project where required;
- (8) Be accompanied by copies of all required endorsements; and

(9) 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 certificateholder, 30 days’ prior written notice will be given to the certificate holder by certified mail or registered mail, return receipt requested.”

**.5 Contractors.** Tenant shall also require its Contractor performing the Work for the Tenant Improvements to carry liability insurance meeting the above requirements by Owner of Tenant, except that the Landlord-Related Persons will be listed as additional insureds on an ISO form CG 20 26 11 85, unmodified. (**Appendix 14**). 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.



**Exhibit B****Landlord's Insurance****11.2.2 Specific Requirements.**

<b>Insurance</b>	<b>Coverages</b>	<b>Other Requirements</b>
Worker's Compensation	Statutory Limits (if state has no statutory limit, \$1,000,000)	No "alternative" forms of coverage will be permitted.
Employer's Liability	\$1,000,000 each accident for bodily injury by accident \$1,000,000 each employee for	
Commercial General Liability (Occurrence Basis)	\$5,000,000 per occurrence \$5,000,000 general aggregate \$10,000,000 product-completed operations aggregate limit \$5,000,000 personal and advertising injury limit \$50,000 damage to premises rented to you limit \$5,000 medical expense limit	<ol style="list-style-type: none"> <li>1. ISO form CG 00 01 07 98, or equivalent.</li> <li>2. Separation of insured language will not be modified.</li> <li>3. Aggregate limit per location endorsement.</li> <li>4. The contractual liability exclusion with respect to personal injury will be deleted.</li> <li>5. Defense will be provided as an additional benefit and not included within the limit of liability.</li> </ol>
Business Automobile Liability (Occurrence Basis)	\$2,000,000 combined single limit	<ol style="list-style-type: none"> <li>1. ISO form CA 00 01 10 01 or equivalent.</li> <li>2. Includes liability arising out of operation of owned, hired and non-owned vehicles.</li> </ol>

Umbrella Liability Insurance (Occurrence Basis)	\$50,000,000	<ol style="list-style-type: none"> <li>1. Written on an umbrella basis in excess over and no less broad than the liability coverages referenced above.</li> <li>2. Inception and expiration dates will be the same as commercial general liability insurance.</li> <li>3. Coverage must “drop down” for exhausted aggregate limits under the liability coverages referenced above.</li> <li>4. Aggregate limit of insurance per location endorsement.</li> <li>5. Aggregate limit per location endorsement.</li> <li>6. Coverage must “drop down” for exhausted aggregate limits under commercial general liability insurance.</li> </ol>
Causes of Loss-Special Form (formerly “all risk”) Property Insurance	100% replacement cost, as modified below, of all of Project, including leasehold improvements, both Building Standard, improvements made by Tenant above Building Standard and betterments.	<ol style="list-style-type: none"> <li>1. ISO form CP 10 30, or equivalent.</li> <li>2. Name Landlord and Tenant as “insured as their interest may appear.”</li> <li>3. Contain only standard printed exclusions.</li> <li>4. Waiver of subrogation in favor of Tenant-Related Persons.</li> <li>5. Ordinance or law coverage endorsement.</li> </ol>
Business Income and Extra Expense Coverage	No less than 6 months of income and ongoing expenses.	<ol style="list-style-type: none"> <li>1. Waiver of subrogation in favor of Tenant-Related Persons.</li> <li>2. Endorsement to cover losses arising from interruption of utilities.</li> </ol>

### 11.2.2 General Insurance Requirements.

#### .1 Policies. All policies must

(A) 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;

(B) Be endorsed to provide a waiver of subrogation in favor of the Tenant-Related Persons;

(C) With respect to all liability policies, except workers’ compensation/employer’s liability, be endorsed to include the Tenant-Related Persons as “additional insureds” (The additional insured status under the commercial general liability policy will be

provided on ISO form CG 20 26 11 85 or equivalent) modified to exclude (1) Liabilities to the extent caused in whole or in part by the negligent act or omission or willful misconduct of a Tenant-Related Person in the Leased Premises (as defined in the Office Lease) and (2) Liabilities to the extent caused in whole or in part by the negligent act or omission or willful misconduct of Tenant or of its subtenants in the Common Areas, Support Facilities or Parking Garage (as such areas are defined in the Office Lease) (but not excluding Liabilities to the extent caused in whole or in part by the negligent act or omission or willful misconduct of a contractor or invitee of Tenant or of its subtenants occurring in the Common Areas, Support Facilities or Parking Garage (as such areas are defined in the Office Lease); and (**Appendix 14**)

(D) Contain a provision for 30 days' prior written notice by insurance carrier to Tenant required for cancellation, non-renewal, or substantial modification.

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

(A) Except as expressly provided above, no deductible or self insured retention in excess of \$100,000 without the prior written approval of Tenant.

(B) No policy may include an endorsement restricting, limiting or excluding coverage in any manner without the prior written approval of Tenant.

## **.3 Forms.**

(A) If the forms of policies, endorsements, certificates, or evidence of insurance required by this Exhibit are superseded or discontinued, Tenant will have the right to require other equivalent forms; and

(B) Any policy or endorsement form other than a form specified in this exhibit must be approved in advance by Landlord.

## **.4 Evidence of Insurance.** Insurance must be evidenced as follows:

(A) ACORD Form 25 *Certificates of Liability Insurance* for liability coverages in the form attached hereto as **Exhibit B; (Appendix 9)**

(B) ACORD Form 27 *Evidence of Property Insurance* for property coverages in the form attached hereto as **Exhibit B; (Appendix 9)**

(C) Evidence to be delivered to Tenant prior to Tenant entry on the Project to construct the tenant improvements and at least 30 days prior to the expiration of current policies; and

(D) ACORD forms must

(1) Show the Tenant as certificate holders (with Tenant's mailing address);

(2) Show Landlord as the "Named Insured;"

(3) Show the insurance companies producing each coverage and the policy number and policy date of each coverage;

(4) Name the producer of the certificate (with correct address and telephone number) and have the signature of the authorized representative of the producer;

(5) Specify the additional insured status and/or waivers of subrogation;

(6) State the amounts of all deductibles and self-insured retentions;

(7) Show the primary status and aggregate limit per project where required;

(8) Be accompanied by copies of all required endorsements; and

(9) 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.”

**.5 Landlord’s Agents and Contractor’s Policies; Copies of Policies.** Landlord shall cause its Managing Agent and contractors to add Tenant as an additional insured on all liability insurance policies required of them by Landlord upon which Landlord is listed as an additional insured. The additional insured endorsement will be in the same form as required by Tenant of Landlord. If requested in writing by Tenant, Landlord will provide to Landlord a certified copy of any or all insurance policies or endorsements required by this Lease.

---

#### **Commentary:**

This form provides allocation of risk between Landlord and Tenant based on comparative responsibility of the parties, except as noted below.

**Indemnity.** As opposed to shifting to the Tenant the risk of liabilities for all Insurable Injuries occurring in the Premises or outside of the Premises but caused in whole or in part by the Tenant, or by its agents, contractors, and invitees (**Appendices 5 and 6**), this form allocates injury liability risk between Landlord and Tenant based on the Landlord’s and the Tenant’s comparative responsibility, except as to Insurable Injuries occurring outside the Premises caused in whole or in part by Tenant’s contractors and invitees to the extent such liabilities are covered by or required to be covered by Landlord’s liability insurance (“***Carve Out***”). As to losses arising outside the Leased Premises, the cost of Landlord’s insurance is borne by all tenants of the Project through operating expense pass throughs. Insurable liabilities arising in the Tenant’s Leased Premises and Insurable liabilities arising outside the Leased Premises, except for the Carve Out, are apportioned in this form according to each party’s percentage of responsibility. This allocation overcomes the workers’

comp. bar otherwise protecting an employer from third party over actions. This allocation also aligns the indemnity and insurance in accordance with each party's proportionate responsibility.

**Insurance.** Liability insurance has been also allocated in the same fashion as the indemnity allocation. Landlord's insurance is primary and without contribution from the Tenant's insurance as to liabilities arising outside the Premises to the extent they arise out of Insurable Injuries caused in whole or in part by Tenant's contractor's and invitees. All other liabilities are allocated according to the parties' proportionate responsibility. This risk allocation spreads to the tenants of the Project through operating expense pass throughs the insurance premium costs for insurable injuries occurring in the common areas, the parking garage and other areas and project components with the care, custody and control of the Landlord, even though the injury is caused by contractors and invitees of tenants of the building. The additional insured endorsements are modified to follow the risk management allocations noted above. Otherwise, the designation of one party as an additional insured on the other party's policy possibly could result in insurance coverage for the additional insured's sole negligence or coverage and not be in alignment with the risk management system allocating liability in accordance with each party's proportionate share of responsibility.

This form provides for the forms of Certificate of Insurance for Landlord provided insurance and Tenant provided insurance be attached to the Lease. Attaching specimens of each certificate helps to educate the parties and the insurance agents handling the insurance to understand the risk management system agreed to by the parties. Also, appropriate certificates more likely will be issued. The parties should require that copies of all endorsements referenced in the Certificates of Insurance be delivered with the Certificates. The form of Attachment to Certificate (**Appendix 9**) calls for the endorsements to be attached.

At least 3 insuring parties are involved: Landlord, Tenant and Contractor. As a result 3 groups of insurance certificates and endorsements will be produced: Landlord's Certificate to the Tenant; Tenant's Certificate to the Landlord; and Contractor's Certificate to Landlord/Tenant. Failure to provide specimen forms as attachments to the Lease, leaves lots of room for error and misunderstanding.

**Waiver/Release.** The waiver of recover and waiver of subrogation provision (**11.4.3**) also follows this risk management allocation. The parties waive recovery against each other to the extent that insurance proceeds are paid or would have been paid had the released person carried the insurance required of it by the Lease.

**Appendix 8**  
**Construction Project - Certificates of Liability and Property Insurance**

<b>ACORD™</b>	<b>CERTIFICATE OF LIABILITY INSURANCE</b>	Date (MM/DD/YY) 03/06/03
<b>PRODUCER</b>  SGP Commercial Insurance Summit Global Partners of TX P. O. Box 2291 Houston, TX 78768-2298	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW, EXCEPT AS SPECIFIED.	
<b>INSURED</b>	<b>INSURERS AFFORDING COVERAGE</b>	<b>NAIC #</b>
<b>INSURED</b>  ABC Construction, Inc. P. O. Box 666 Houston, TX 78768-666	INSURER A: Bituminous Fire & Marine Ins.	
	INSURER B: American Mfgs. Mutual Ins. Co.	
	INSURER C:	
	INSURER D:	
	INSURER E:	

**COVERAGES**

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 CONTRACTOR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPRATION DATE (MM/DD/YY)	LIMITS		
A		GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY  <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR  <input checked="" type="checkbox"/> <u>Contractual</u>  <input checked="" type="checkbox"/> <u>XCU Included</u>  GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC	CLP3122976	09/30/02	09/15/03	EACH OCCURRENCE	\$1,000,000	
						DAMAGE TO RENTED PREMISES (Ea occurrence)	\$ 50,000	
						MED EXP (Any one person)	\$ 5,000	
						PERSONAL & ADV INJURY	\$1,000,000	
						GENERAL AGGREGATE	\$	
						PRODUCT-COMP/OP AGG	\$2,000,000	
B		AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS <input type="checkbox"/> _____	CAP3122977	09/30/02	09/15/03	COMBINED SINGLE LIMIT (Ea accident)	\$	
						BODILY INJURY (Per person)	\$	
						BODILY INJURY (Per accident)	\$	
						PROPERTY DAMAGE (Per accident)	\$	
		GARAGE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> _____				AUTO ONLY-EA ACCIDENT	\$	
						OTHER THAN EA ACC	\$	
						AUTO ONLY: AGG	\$	
A		EXCESS LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE  <input type="checkbox"/> DEDUCTIBLE <input checked="" type="checkbox"/> RETENTION \$	CUP2535200  <b>Umbr ella Liability</b>	09/30/02	09/15/03	EACH OCCURRENCE	\$5,000,000	
						AGGREGATE	\$5,000,000	
							\$	
							\$	
							\$	
A		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY  ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?  If yes, describe under SPECIAL PROVISIONS below	WC3122979	09/30/02	09/15/03	<input checked="" type="checkbox"/> WC STATUTORY LIMITS	<input type="checkbox"/> OTHER	\$
						E.L. EACH ACCIDENT		\$1,000,000
						E.L. DISEASE-EA EMPLOYEE		\$1,000,000
						E.L. DISEASE-POLICY LIMIT		\$1,000,000

	OTHER					
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS <b>(See Attached)</b>						
CERTIFICATE HOLDER			CANCELLATION			
Crescent Real Estate 909 Fannin Houston, TX 78768 and  DeBaker and Coolidge, L.L.P. P. O. Box 1234 Houston, TX 78768-1234			SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, <del>BUT FAILURE TO DO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.</del>  AUTHORIZED REPRESENTATIVE			
ACORD 25 (2001/08)			© ACORD CORPORATION 1988			

**Commentary:**

This standard ACORD form has been modified to strike out several provisions on the face of the form that otherwise state that the certificate does not confer any rights on the certificateholder. Certificates of insurance are generally signed by the local agent that has sold the policies. This agent is generally an independent contractor and not an employee of the insurers. Reliance only on the certificate of insurance for the coverages stated is perilous. Requiring the agent to produce the policies and their endorsements is important. These must be examined and approved and further endorsed, if necessary, prior to proceeding with work or occupancy.

**IMPORTANT**

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

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

**DISCLAIMER**

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

---

**Commentary:** The above provisions are contained on the reverse side of the ACORD certificate. Unless these provisions are struck from the certificate a conflict arises with the changes made to the printed-form language on the front side of the certificate.



<b>ACORD</b>		<b>CERTIFICATE OF PROPERTY INSURANCE</b>			Date (MM/DD/YY) <b>03/06/03</b>	
<b>PRODUCER</b>  SGP Commercial Insurance P. O. Box 2291 Houston, TX 78768-2291		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW, EXCEPT AS SPECIFIED.				
<b>INSURED</b>  ABC Constructors, Inc. P. O. Box 666 Houston, TX 78768-666		<b>COMPANIES AFFORDING COVERAGE</b>				
		COMPANY <b>A</b> American Mfgs. Mutual Ins. Co.				
		COMPANY <b>B</b>				
		COMPANY <b>C</b>				
		COMPANY <b>D</b>				
<b>COVERAGES</b>						
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.						
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	COVERED PROPERTY	LIMITS
<b>A</b>	<input type="checkbox"/> <b>PROPERTY</b> Bldrs, Risk	<b>3AE6367380</b>	<b>09/30/02</b>	<b>09/30/03</b>	<input checked="" type="checkbox"/> BUILDING	<b>\$8,000,000</b>
	CAUSES OF LOSS				<input checked="" type="checkbox"/> PERSONAL PROPERTY	<b>\$1,000,000</b>
	<input type="checkbox"/> BASIC				<input checked="" type="checkbox"/> BUSINESS INCOME	<b>\$1,000,000</b>
	<input type="checkbox"/> BROAD				<input checked="" type="checkbox"/> EXTRA EXPENSE	<b>\$1,000,000</b>
	<input checked="" type="checkbox"/> SPECIAL				<input type="checkbox"/> BLANKET BUILDING	\$
	<input type="checkbox"/> EARTHQUAKE				<input type="checkbox"/> BLANKET PERS PROP	\$
	<input type="checkbox"/> FLOOD				<input type="checkbox"/> BLANKET BLDG & PP	\$
	<input checked="" type="checkbox"/> (See Attachment.)					\$
						\$
						\$
	<b>INLAND MARINE</b>					\$
	TYPE OF POLICY					\$
						\$
	CAUSES OF LOSS					\$
	<input type="checkbox"/> NAMED PERILS					\$
	<input type="checkbox"/> OTHER					\$
	<b>CRIME</b>					\$
	TYPE OF POLICY					\$
						\$
	<b>BOILER &amp; MACHINERY</b>					\$
						\$
	<b>OTHER</b>					
LOCATION OF PREMISES/DESCRIPTION OF PROPERTY (See attachment.)						
SPECIAL CONDITIONS/OTHER COVERAGES						

CERTIFICATE HOLDER	CANCELLATION
<p>Crescent Real Estate 909 Fannin Houston, TX 78768</p> <p>DeBaker and Coolidge, L.L.P. P. O. Box 1234 Houston, TX 798768-1234</p> <p>General Electric Commercial Credit 2 Rockefeller Center New York, NY</p> <p>Bank of America, N.A. 3 Banking Center Charlotte, N.C.</p>	<p>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, <del>BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.</del></p> <p>AUTHORIZED REPRESENTATIVE</p>

**Attachment To Contractor's Certificate Or Proof of Insurance**

This Attachment is to Contractor's Certificate or Proof of Insurance that is:

**Dated** (MM/DD/YY): 03/06/03.

**Issued By:** Summit Global Partners  
P.O. Box 2291  
Houston, Texas 78768 2291

**Insured:** ABC Construction, Inc. ("**Tenant's Contractor**")

**Certificate Holders:** DeBaker & Coolidge, L.L.P. ("**Tenant**" or "**Owner**")  
Bank of America, N.A. ("**Tenant's Lender**")  
Crescent Real Estate ("**Building Owner**")  
General Electric Commercial Credit ("**Building Owner's Lender**")

**Policy Types:**

<b>Liability Insurance:</b>	A. Commercial General Liability B. Automobile Liability C. Workers Compensation and Employer's Liability
<b>Property Insurance:</b>	D. Builder's Risk - Causes of Loss - Special Form

**As to Policies Issued By:**

Company A:	<u>Bituminous Fire &amp; Marine Insurance</u>
Company B:	<u>Bituminous Fire &amp; Marine Insurance</u>
Company C:	<u>Bituminous Fire &amp; Marine Insurance</u>
Company D:	<u>American Manufacturers Insurance Company</u>

**Policy Nos.:**

Company A:	<u>CLP3122976</u>	(Commercial General Liability)
Company B:	<u>CAP3122977</u>	(Automobile Liability)
Company C:	<u>WC3122979</u>	(Worker's Compensation/Employer's Liability for Texas)
Company D:	<u>3AE63673805</u>	(Builder's All Risk - Causes of Loss - Special Form)

1. **In Force.** The insurance policies are currently in force.

2. **Notification.** None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificate holders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.

3. **Additional Insureds and Loss Payees.** The following persons: (a) Crescent Real Estate, and its successors and assigns as owner of the Property (the Building Owner), and its directors and employees, (b) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (c) Crescent Management, L.L.P. (the Property Manager), (d) Building Owner HVAC Contractor, (e) Building Owner Security Service, (f) Parking Garage Operator, (g) Building Owner's Architect, (h)

General Electric Commercial Credit (Building Owner's Lender), (i) Bank of America, N.A. (Tenant's Lender), and (j) John Doe DeBaker, M.D., individually ("**Additional Insureds**"), have been added as additional insured to each of the Liability Insurance policies listed herein, under Endorsements making the coverage available to the Additional Insureds primary over insurance available to the Additional Insureds or any self-insurance program of the Additional Insureds and as Loss Payees together with the Contractor and its subcontractors and sub-subcontractors as to the Builder's Risk Policy listed below.

4. **Texas Licensees.** The issuers of the described insurance policies are licensed to do business in Texas.

5. **Waiver of Subrogation.** The issuers of the insurance policies have waived subrogation against (a) Crescent Real Estate, and its successors and assigns as owner of the Property, and its directors and employees, (b) DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, and (c) John Doe DeBaker, individually (the "**Released Persons**").

6. **Contribution Not Required.** The Insurance program of the Additional Insureds shall be excess of this insurance and shall not contribute with it.

7. **Severability of Interest.** This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.

8. **Certificate Holders.** This certificate is issued to DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant of the Property, Bank of America, N.A. (Tenant's Lender), Crescent Real Estate, and its successors and assigns as owner of the Property (Building Owner), and General Electric Commercial Credit (Building Owner's Lender) (collectively, "**Certificate Holders**").

9. **Premises.** For Policies A - C, the Premises is the Office Building, Parking Garage, tenants' leased premises, including the Tenant's Leased Premises, supporting facilities and personal property of Landlord, Tenant and of other tenants of Landlord located at 909 Fannin, Houston, TX described in Lease dated as of March 1, 2003 (copy attached)[the "**Office Lease**"]. For Policy D, the Premises is Suite 123 (including all tenant improvements thereto) under Construction Contract dated as of March 2, 2003 (copy attached), as amended from time to time (the "**Premises**").

10. **Endorsements.** Attached are the following Endorsements to the insurance policies:

<u>Policy (Identify by Co. Ltr.)</u>	<u>Endorsement Form Nos.</u>
A. <u>Bituminous Fire &amp; Marine Insurance Company</u> (Commercial General Liability)	Additional Insured No. <u>GL-2785-TX</u> Waiver of Subrogation No. <u>GL-2785-TX</u>
B. <u>Bituminous Fire &amp; Marine Insurance Company</u> (Automobile Liability)	Additional Insured No. <u>TE 99 01 B</u> Waiver of Subrogation No. <u>TE 20 46 A</u>
C. <u>Bituminous Fire &amp; Marine Insurance Company</u> (Worker's Compensation/ Employer's Liability for Texas only)	Additional Insured No. <u>(not applicable)</u> Waiver of Subrogation No. <u>WC420304A</u>
D. <u>American Manufacturers Company</u> (Builder's Risk - Causes of Loss - Special Form)	Loss Payee No. <u>(ordered)</u> Ordinance/Law Coverage No. _____

Copies of the Endorsements are attached hereto. (**Appendices 10 - 12, & 14**)

Dated Issued: March 06, 2003.

I, the undersigned, attest and warrant to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate and herewith provide acknowledgment of the insurer(s) listed in this certificate that I am legally authorized by that insurer or those insurers to so obligate them. Except as stated above nothing herein shall be held to waive, alter or extend any of the limits, conditions, agreements, or exclusions of the referenced policies.

-----  
Authorized Representative

/S/

\_\_\_\_\_  
Typed Signature

**Appendix 9**

**Office Lease - Certificates of Liability and Property Insurance - Tenant's Insurance**

<b>ACORD™</b>		<b>CERTIFICATE OF LIABILITY INSURANCE</b>	Date (MM/DD/YY) 03/01/06
<b>PRODUCER</b>  New York Medical 1 Rockefeller Plaza New York, NY	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW, EXCEPT AS SPECIFIED.		
<b>INSURED</b> DeBaker and Coolidge, L.L.P. P. O. Box 1234 Houston, TX 78768-1234  <b>INSURED</b>	<b>INSURERS AFFORDING COVERAGE</b>		<b>NAIC #</b>
	INSURER A: No Pay Fidelity		
	INSURER B: Fast Car Fidelity		
	INSURER C:		
	INSURER D:		
		INSURER E:	

**COVERAGES**

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS		
A		<b>GENERAL LIABILITY</b> <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY  <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR  <input type="checkbox"/> _____ <input type="checkbox"/> _____  GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input type="checkbox"/> LOC	CLP1234567	02/01/03	01/31/04	EACH OCCURRENCE	\$1,000,000	
						DAMAGE TO RENTED PREMISES (Ea occurrence)	\$ 50,000	
						MED EXP (Any one person)	\$ 5,000	
						PERSONAL & ADV INJURY	\$1,000,000	
						GENERAL AGGREGATE	\$	
						PRODUCT-COMP/OP AGG	\$2,000,000	
B		<b>AUTOMOBILE LIABILITY</b> <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS <input type="checkbox"/> _____ <input type="checkbox"/> _____	CAP	02/01/03	01/31/04	COMBINED SINGLE LIMIT (Ea accident)	\$2,000,000	
						BODILY INJURY (Per person)	\$	
						BODILY INJURY (Per accident)	\$	
						PROPERTY DAMAGE (Per accident)	\$	
		<b>GARAGE LIABILITY</b> <input type="checkbox"/> ANY AUTO <input type="checkbox"/> _____				AUTO ONLY-EA ACCIDENT	\$	
						OTHER THAN EA ACC_	\$	
						AUTO ONLY: AGG	\$	
A		<b>EXCESS LIABILITY</b> <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE  <input type="checkbox"/> DEDUCTIBLE <input type="checkbox"/> RETENTION \$	123456	02/01/03	01/31/04	EACH OCCURRENCE	\$5,000,000	
						AGGREGATE	\$5,000,000	
							\$	
							\$	
A		<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b>  ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?  If yes, describe under SPECIAL PROVISIONS below	ABCDE	02/01/03	01/31/04	WC STATUTORY LIMITS	OTHER	\$
						E.L. EACH ACCIDENT		\$1,000,000
						E.L. DISEASE-EA EMPLOYEE		\$1,000,000
						E.L. DISEASE-POLICY LIMIT		\$1,000,000
						OTHER		
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS (See Attachment.)								
<b>CERTIFICATE HOLDER</b>				<b>CANCELLATION</b>				

	<p>Crescent Real Estate 909 Fannin Houston, TX 78768</p> <p>General Electric Commercial Credit 2 Rockefeller Plaza New York, NY</p>	<p>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.</p>
		<p>AUTHORIZED REPRESENTATIVE</p>
<p>ACORD 25 (2001/08)</p>		<p>© ACORD CORPORATION 1988</p>

<b>ACORD</b>		<b>CERTIFICATE OF PROPERTY INSURANCE</b>				Date (MM/DD/YY) 03/01/06	
<b>PRODUCER</b>  U. S. Casualty, & Property 1 Rockefeller Plaza New York, NY		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW, EXCEPT AS SPECIFIED.					
<b>INSURED</b>  DeBaker and Coolidge, L.L.P. P. O. Box 1234 Houston, TX 78768-1234		<b>COMPANIES AFFORDING COVERAGE</b>					
		COMPANY <b>A</b> U. S. Casualty & Property					
		COMPANY <b>B</b>					
		COMPANY <b>D</b>					
<b>COVERAGES</b>							
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.							
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE		COVERED PROPERTY	LIMITS
<b>A</b>	<input type="checkbox"/> <b>PROPERTY</b>	CP12345	02/01/03	01/31/04	<input checked="" type="checkbox"/>	BUILDING	\$5,000,000
	CAUSES OF LOSS				<input checked="" type="checkbox"/>	PERSONAL PROPERTY	\$1,000,000
	<input type="checkbox"/> BASIC				<input checked="" type="checkbox"/>	BUSINESS INCOME	\$1,000,000
	<input type="checkbox"/> BROAD				<input checked="" type="checkbox"/>	EXTRA EXPENSE	\$ 500,000
	<input checked="" type="checkbox"/> SPECIAL					BLANKET BUILDING	\$
	<input type="checkbox"/> EARTHQUAKE					BLANKET PERS PROP	\$
	<input type="checkbox"/> FLOOD					BLANKET BLDG & PP	\$
							\$
							\$
							\$
	<input type="checkbox"/> <b>INLAND MARINE</b>						\$
	TYPE OF POLICY						\$
							\$
	CAUSES OF LOSS						\$
	<input type="checkbox"/> NAMED PERILS						\$
	<input type="checkbox"/> OTHER						\$
	<input type="checkbox"/> <b>CRIME</b>						\$
	TYPE OF POLICY						\$
							\$
	<input type="checkbox"/> <b>BOILER &amp; MACHINERY</b>						\$
							\$
	<input type="checkbox"/> <b>OTHER</b>						\$
							\$
LOCATION OF PREMISES/DESCRIPTION OF PROPERTY (See Attachment.)							
SPECIAL CONDITIONS/OTHER COVERAGES							



CERTIFICATE HOLDER	CANCELLATION
Crescent Real Estate 909 Fannin Houston, TX 78768                      and  General Electric Commercial Credit 2 Rockefeller Plaza New York, NY	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.  AUTHORIZED REPRESENTATIVE

**Attachment To Tenant's Certificate Or Proof of Insurance**

This Attachment is to Tenant's Certificate or Proof of Insurance that is:

**Dated** (MM/DD/YY): 03/06/03.

**Issued By:** U.S. Casualty & Property  
1 Rockefeller Plaza  
New York, NY

**Insured:** DeBaker & Coolidge, L.L.P. ("Tenant" or "Owner")

**Certificate Holders:** Crescent Real Estate ("Building Owner")  
General Electric Commercial Credit ("Building Owner's Lender")

**Policy Types:**

<b>Liability Insurance:</b>	A. Commercial General Liability
	B. Automobile Liability
	C. Workers Compensation and Employer's Liability
<b>Property Insurance:</b>	D. Causes of Loss - Special Form

**As to Policies Issued By:**

Company A:	<u>No Pay Fidelity</u>
Company B:	<u>Fast Car Fidelity</u>
Company C:	<u>No Pay Fidelity</u>
Company D:	<u>U.S. Casualty &amp; Property</u>

**Policy Nos.:**

Company A:	<u>CLP12345</u>	(Commercial General Liability)
Company B:	<u>CAP12345</u>	(Automobile Liability)
Company C:	<u>WC12345</u>	(Worker's Compensation/Employer's Liability for Texas)
Company D:	<u>CP12345</u>	(Causes of Loss - Special Form)

**1. In Force.** The insurance policies are currently in force.

**2. Notification.** None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificateholders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.

**3. Additional Insureds and Loss Payees.** The following persons: (a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) \_\_\_\_\_ (the "Building Owner HVAC Contractor"), (d) \_\_\_\_\_ (the "Building Owner Security Service"), (e) \_\_\_\_\_ ("Parking Garage Operator"), (f) \_\_\_\_\_ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender") ("Additional Insureds"), have been added as additional insured to each of the Liability Insurance policies listed herein.

**4. Texas Licensees.** The issuers of the described insurance policies are licensed to do business in Texas.

**5. Waiver of Subrogation.** The issuers of the insurance policies have waived subrogation against (a) Crescent Real Estate, and its successors and assigns as owner of the Property (the “Building Owner”), and its directors and employees, (b) Crescent Management, L.L.P. (the “Property Manager”), (c) \_\_\_\_\_ (the “Building Owner HVAC Contractor”), (d) \_\_\_\_\_ (the “Building Owner Security Service”) , (e) \_\_\_\_\_ (“Parking Garage Operator”), (f) \_\_\_\_\_ (“Building Owner’s Architect”), (g) General Electric Credit Corporation (“Building Owner’s Lender”) (the “**Released Persons**”).

**6. Severability of Interest.** This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.

**7. Certificate Holders.** This certificate is issued to Crescent Real Estate, and its successors and assigns as Building Owner and General Electric Credit Corporation (the Building Owner’s Lender) (“**Certificate Holders**”).

**8. Premises.** For Policies A - D, the Premises is the Office Building, Parking Garage, tenants’ leased premises, including the Tenant’s Leased Premises, supporting facilities and personal property of Landlord, Tenant and of other tenants of Landlord located at 909 Fannin, Houston, TX described in Lease dated as of March 1, 2003 (copy attached)[the “**Office Lease**”]. For Policy D, the Premises is Suite 123 (including all tenant improvements thereto) under Construction Contract dated as of March 2, 2003 (copy attached), as amended from time to time (the “**Premises**”).

**9. Endorsements.** Attached are the following Endorsements to the insurance policies:

<u>Policy</u> (Identify by Co. Ltr.)	<u>Endorsement Form Nos.</u>
A. <u>No Pay Fidelity</u> (Commercial General Liability)	Additional Insured No. <u>GL-2785-TX</u> Waiver of Subrogation No. <u>GL-2785-TX</u>
B. <u>Fast Car Fidelity</u> (Automobile Liability)	Additional Insured No. <u>TE 99 01 B</u> Waiver of Subrogation No. <u>TE 20 46 A</u>
C. <u>No Pay Fidelity</u> (Worker’s Compensation/ Employer’s Liability for Texas only)	Additional Insured No. <u>(not applicable)</u> Waiver of Subrogation No. <u>WC420304A</u>
D. <u>U. S. Casualty &amp; Property</u> (Causes of Loss - Special Form)	Loss Payee No. <u>(ordered)</u> Ordinance/Law Coverage No. _____

**Copies of the Endorsements are attached hereto. (Appendices 10 - 12, & 14)**

Dated Issued: March 06, 2003.

I, the undersigned, attest and warrant to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate and herewith provide acknowledgment of the insurer(s) listed in this certificate that I am legally authorized by that insurer or those insurers to so obligate them. Except as stated above nothing herein shall be held to waive, alter or extend any of the limits, conditions, agreements, or exclusions of the referenced policies.

-----  
Authorized Representative

/S/ \_\_\_\_\_

Typed Signature

**Office Lease - Certificates of Liability and Property Insurance - Landlord's Insurance**

<b>ACORD™ CERTIFICATE OF LIABILITY INSURANCE</b>		Date (MM/DD/YY) 03/01/03
<b>PRODUCER</b>  Crescent Captive 908 Fannin Houston, TX 78768	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW <b>EXCEPT AS SPECIFIED.</b>	
	<b>INSURERS AFFORDING COVERAGE</b>	<b>NAIC #</b>
	INSURER A: U. S. Casualty	
<b>INSURED</b>  Crescent Real Estate 909 Fannin Houston, TX 78768	INSURER B: U. S. Auto	
	INSURER C: U. S. Workers Casualty	
	INSURER D:	
	INSURER E:	

**COVERAGES**

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
<b>A</b>		<b>GENERAL LIABILITY</b> <input type="checkbox"/> COMMERCIAL GENERAL LIABILITY  <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> OCCUR  <input type="checkbox"/> _____ <input type="checkbox"/> _____  GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input type="checkbox"/> LOC	CLP12345	06/30/02	06/39/03	EACH OCCURRENCE	\$5,000,000
	DAMAGE TO RENTED PREMISES (Ea occurrence)	\$1,000,000					
	MED EXP (Any one person)	\$ 5,000					
	PERSONAL & ADV INJURY	\$5,000,000					
	GENERAL AGGREGATE	\$					
	PRODUCT-COMP/OP AGG	\$10,000,000					
<b>B</b>		<b>AUTOMOBILE LIABILITY</b> <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS <input type="checkbox"/> _____ <input type="checkbox"/> _____	CAP12345	06/30/02	06/39/03	COMBINED SINGLE LIMIT (Ea accident)	\$
	BODILY INJURY (Per person)	\$					
	BODILY INJURY (Per accident)	\$					
	PROPERTY DAMAGE (Per accident)	\$					
	AUTO ONLY-EA ACCIDENT	\$					
	OTHER THAN EA ACC	\$					
	AUTO ONLY: AGG	\$					
<b>A</b>		<b>EXCESS LIABILITY</b> <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE  <input type="checkbox"/> DEDUCTIBLE <input type="checkbox"/> RETENTION \$	CUP12345	06/30/02	06/39/03	EACH OCCURRENCE	\$
	AGGREGATE	\$50,000,000					
		\$					
		\$					
<b>C</b>		<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b>  ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?  If yes, describe under SPECIAL PROVISIONS below	WC12345	06/30/02	06/39/03	<input checked="" type="checkbox"/> WC STATUTORY LIMITS	\$
	E.L. EACH ACCIDENT	\$					
	E.L. DISEASE-EA EMPLOYEE	\$					
	E.L. DISEASE-POLICY LIMIT	\$					
		<b>OTHER</b>					

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS (See Attachment.)	
<b>CERTIFICATE HOLDER</b>	<b>CANCELLATION</b>
DeBaker and Coolidge, L.L.P. P. O. Box 1234 Houston, TX 78768-1234 <b>and</b>  Bank of America, N. A. 3 Banking Center Charlotte, N.C.	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, <del>BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.</del>  AUTHORIZED REPRESENTATIVE
ACORD 25 (2001/08)	© ACORD CORPORATION 1988

<b>ACORD</b>		<b>CERTIFICATE OF PROPERTY INSURANCE</b>			Date (MM/DD/YY) <b>07/01/03</b>	
PRODUCER  <b>Crescent Captive</b> 908 Fannin Houston, TX 78768		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.				
INSURED  <b>Crescent Real Estate</b> 909 Fannin Houston, TX 78768		COMPANIES AFFORDING COVERAGE				
		COMPANY A      Crescent Captive & Casualty				
		COMPANY B				
		COMPANY C				
		COMPANY D				
COVERAGES						
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.						
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION	COVERED PROPERTY	LIMITS
<b>A</b>	PROPERTY	CP12344	06/30/02	06/29/03	BUILDING	\$
	CAUSES OF LOSS				PERSONAL PROPERTY	\$
	BASIC				BUSINESS INCOME	\$
	BROAD				EXTRA EXPENSE	\$
	SPECIAL				BLANKET BUILDING	\$
	EARTHQUAKE				BLANKET PERS PROP	\$
	FLOOD				x BLANKET BLDG & PP	<b>≤150,000,000</b>
						\$
						\$
						\$
	INLAND MARINE				\$	
	TYPE OF POLICY				\$	
					\$	
	CAUSES OF LOSS				\$	
	NAMED PERILS				\$	
	OTHER				\$	
	CRIME				\$	
	TYPE OF POLICY				\$	
					\$	
	BOILER & MACHINERY				\$	
					\$	
	OTHER					
LOCATION OF PREMISES/DESCRIPTION OF PROPERTY <b>(See Attachment)</b>						
SPECIAL CONDITIONS/OTHER COVERAGES						

CERTIFICATE HOLDER	CANCELLATION
<p>DeBalcey &amp; Coolidge, L.L.P. P.O. Box 1234 Houston, TX 78768-1234</p> <p>Bank of America, N.A. 3 Banking Center Charlotte, N.C.</p>	<p>SHOULD ANY OF THE ABOVE DESCRIBED POLICES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.</p> <p>AUTHORIZED REPRESENTATIVE</p>



**Attachment To Landlord's Certificate Or Proof of Insurance**

This Attachment is to Landlord's Certificate or Proof of Insurance that is:

**Dated (MM/DD/YY):** 03/01/03.

**Issued By:** Crescent Captive  
908 Fannin  
Houston, Texas 78768

**Insured:** Crescent Real Estate (the "Landlord" or "Building Owner")

**Certificate Holders:** DeBaker & Coolidge, L.L.P. ("Owner" or "Tenant")  
Bank of America, N.A. ("Tenant's Lender")

**Policy Types:**

Liability Insurance:	A. Commercial General Liability
	B. Automobile Liability
	C. Workers Compensation and Employer's Liability
Property Insurance:	D. Causes of Loss - Special Form

**As to Policies Issued By:**

Company A:	<u>U. S. Casualty</u>
Company B:	<u>U. S. Auto</u>
Company C:	<u>U. S. Worker Casualty</u>
Company D:	<u>Crescent Captive &amp; Casualty</u>

**Policy Nos.:**

Company A:	<u>CLP12345</u>	(Commercial General Liability)
Company B:	<u>CAP12345</u>	(Automobile Liability)
Company C:	<u>WC12345</u>	(Worker's Compensation/Employer's Liability for Texas)
Company D:	<u>CP12345</u>	(Causes of Loss - Special Form)

**1. In Force.** The insurance policies are currently in force.

**2. Notification.** None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificate holders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.

**3. Additional Insureds and Loss Payees.** The following persons: (a) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (b) Bank of America, N.A. ("Tenant's Lender"), (c) Joe AIA ("Tenant's Architect"), and (d) John Doe DeBaker, M.D., individually (collectively, "Additional Insureds") have been added as additional insureds to each of the Liability Insurance policies listed herein.

**4. Texas Licensees.** The issuers of the described insurance policies are licensed to do business in Texas.

**5. Waiver of Subrogation.** The issuers of the insurance policies have waived subrogation against (a) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (b) Bank of America, N.A.

("Tenant's Lender"), (c) Joe AIA ("Tenant's Architect"), and (d) John Doe DeBaker, M.D., individually (the "Released Persons").

**6. Severability of Interest.** This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.

**7. Certificate Holders.** This certificate is issued to DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant of the Property and to Bank of America, N.A., Tenant's Lender ("Certificate Holders").

**8. Premises.** For Policies A - D, the Premises is the Office Building, Parking Garage, tenants' leased premises, including the Tenant's Leased Premises, supporting facilities and personal property of Landlord, Tenant and of other tenants of Landlord located at 909 Fannin, Houston, TX described in Lease dated as of March 1, 2003 (copy attached)[the "Office Lease"] (the "Premises").

**9. Endorsements.** Attached are the following Endorsements to the insurance policies:

<u>Policy (Identify by Co. Ltr.)</u>	<u>Endorsement Form Nos.</u>
A. <u>U. S. Casualty</u> (Commercial General Liability)	Additional Insured No. <u>GL-12345 -TX</u> Waiver of Subrogation No. <u>GL-12345 TX</u>
B. <u>U. S. Auto</u> (Automobile Liability)	Additional Insured No. <u>TE 99 01 B</u> Waiver of Subrogation No. <u>TE 20 46 A</u>
C. <u>U. S. Worker Casualty</u> (Worker's Compensation/ Employer's Liability for Texas only)	Additional Insured No. <u>(not applicable)</u> Waiver of Subrogation No. <u>WC420304A</u>
D. <u>Crescent Captive &amp; Casualty</u> (Causes of Loss - Special Form)	Loss Payee No. <u>(ordered)</u> Ordinance/Law Coverage No. _____

**Copies of the Endorsements are attached hereto. (Appendices 10 - 12, & 14)**

Dated Issued: March 01, 2003.

I, the undersigned, attest and warrant to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate and herewith provide acknowledgment of the insurer(s) listed in this certificate that I am legally authorized by that insurer or those insurers to so obligate them. Except as stated above nothing herein shall be held to waive, alter or extend any of the limits, conditions, agreements, or exclusions of the referenced policies.

-----  
Authorized Representative

/S/ \_\_\_\_\_

Typed Signature

**Appendix 10**

**TE 99 01B (BAP Texas) Additional Insured**

This endorsement modifies insurance provided under the following:

**BUSINESS AUTO COVERAGE FORM  
GARAGE COVERAGE FORM  
TRUCKERS COVERAGE FORM**

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

Endorsement Effective: March 6, 2003	Policy Number: CAP 3 122 977
Name Insured: ABC Construction, Inc.	Summit Global Partners  Countersigned by

(Authorized Representative)

The provisions and exclusions that apply to LIABILITY COVERAGE also apply to this endorsement.

**Any person** or organization for whom the insured has agreed by written contract to designate as an additional insured subject to all the provisions and limitations of this policy.

[Enter Name and Address of Additional Insured.]

[(a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) \_\_\_\_\_ (the "Building Owner HVAC Contractor"), (d) \_\_\_\_\_ (the "Building Owner Security Service"), (e) \_\_\_\_\_ ("Parking Garage Operator"), (f) \_\_\_\_\_ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender"), (h) DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, and (i) John Doe DeBaker, M.D., individually]

is an insured, **but only** with respect to legal responsibility for acts or omissions of a person for whom Liability Coverage is afforded under this policy.

The additional insured is not required to pay for any premiums stated in the policy or earned from the policy. Any return premium and any dividend, if applicable, declared by us shall be paid to you.

You are authorized to act for the additional insured in all matters pertaining to this insurance.

We will mail the additional insured notice of any cancellation of this policy. If the cancellation is by us, we will give ten days notice to the additional insured.

The **additional insured** will retain any right of recovery as a claimant under this policy.

**FORM TE 99 01B - ADDITIONAL INSURED**

**Texas Standard Automobile Endorsement Prescribed March 18, 1992**

---

---

**Commentary:** [ 60-61, 75 b ]

**Hypothetical:** This endorsement is being required of the Contractor. It is not as common for this endorsement to be required of the Landlord-Related Persons or the other Tenant-Related Persons. Whether it is required of these other persons will depend on the circumstances.

**Insurance:** BAP policies [ 60-61, 75 b ] contain blanket additional insured provisions. This form is approved for use in Texas. This form can be used to either confirm the existence of a general “any person” additional insured provision in the BAP or to specifically designate persons to be additional insureds. This endorsement also contains a requirement that the insurer notify the additional insured in advance of insurance cancellation.

**Appendix 11**

**TE 20 46A (BAP Texas)  
Changes In Transfer Of Rights  
Of Recovery Against Others To Us  
(Waiver Of Subrogation)**

This endorsement modifies insurance provided under the following:

**BUSINESS AUTO COVERAGE FORM  
GARAGE COVERAGE FORM  
TRUCKERS COVERAGE FORM**

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

Endorsement Effective: March 6, 2003	Policy Number: CAP 3 122 977
Name Insured: ABC Construction, Inc.	Summit Global Partners  Countersigned by

(Authorized Representative)

The CONDITION entitled "TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US" does not apply to \_\_\_\_\_ [e.g., organizations for whom the named insured is operating under a written contract when such contract requires a waiver of subrogation].

Additional Premium \$ \_\_\_\_\_ will be retained by us regardless of any early termination of this endorsement or the policy.  
Premium (included) (1% Blanket)

**FORM TE 20 46A - CHANGES IN TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US  
(WAIVER OF SUBROGATION)**

**Texas Standard Automobile Endorsement  
Prescribed March 18, 1992**

**(Emphasis Added)**

**Commentary:** [ 60-61, 75 b ]

**Hypothetical:** This endorsement is being required of the Contractor. It is not as common for this endorsement to be required of the Landlord-Related Persons or the other Tenant-Related Persons. Whether it is required of these other persons will depend on the circumstances.

**Insurance:** This form is approved for use in Texas. This form is an endorsement to the BAP waiving the insurer's subrogation rights. This form does not require the designation of the parties as to whom the insurer's rights are waived. Note that this form requires that the contract between the contractor and the tenant contain a waiver of subrogation provision.

**Appendix 12**

**WC 42 03 04 A Workers Compensation And  
Employers Liability Insurance Policy**

(Ed. 1-00)

**TEXAS WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS ENDORSEMENT**

This endorsement applies only to the insurance provided by the policy because Texas is shown in Item 3.A. of the Information Page.

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule, but this waiver applies only with respect to bodily injury arising out of the operations described in the Schedule where you are required by a written contract to obtain this waiver from us.

This endorsement shall not operate directly or indirectly to benefit anyone not named in the Schedule.

The premium for this endorsement is shown in the Schedule.

Schedule

1. ( ) Specific Waiver

Name of person or organization

( X ) Blanket Waiver

*Any person or organization for whom the Named Insured has agreed by written contract to furnish this waiver.*

2. Operations. All Texas operations.

3. Premium: Incl.

The premium charge for this endorsement shall be \_\_\_ percent of the premium developed on payroll in connection with work performed for the above person(s) or organization(s) arising out of the operations described.

4. Advance Premium Incl.

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

**(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)**

Endorsement Effective 3/6/03 Policy No. WC3122979 Endorsement No. \_\_\_\_\_

Insured ABC Construction, Inc. Premium -0-

Insurance Company \_\_\_\_\_ Countersigned by /S/ \_\_\_\_\_



---

**Commentary:** [ 46-48, 75c ]

**Hypothetical:** This endorsement has been completed as to the Contractor. The Landlord and the other Landlord-Related Persons will require a similar endorsement to be issued by the Tenant's workers' comp. carrier in their favor. Similarly, the Tenant will wish a similar endorsement to be issued by the Landlord's workers' comp. carrier. The insurance provisions contained in the Construction Contracts and Office Leases (**Appendices 2-3 and 5-9**) require the Indemnifying Person to cause its insurance carrier to issue this endorsement.

**Insurance.** This form is approved for use in Texas. It is an endorsement whereby the workers' compensation carrier waives its rights of subrogation. It requires that the contract between the contractor (employer) and the owner contain a provision requiring the waiver to be obtained.

**Appendix 13****CGL Endorsement - CG 20 10 10 01****Additional Insured – Owners, Lessees or  
Contractors – Scheduled Person or Organization**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

**Name of Person or Organization:** [(a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) \_\_\_\_\_ (the "Building Owner HVAC Contractor"), (d) \_\_\_\_\_ (the "Building Owner Security Service"), (e) \_\_\_\_\_ ("Parking Garage Operator"), (f) \_\_\_\_\_ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender"), (h) DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, (i) Bank of America, N.A. ("Tenant's Lender"); and (j) John Doe DeBaker, M.D., individually]

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

- |   |                   |  |
|---|-------------------|--|
| <p><b>A.</b>     <b>Section II - Who Is An Insured</b> is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability <b><i>arising out of your ongoing operations</i></b> performed for that insured.</p>                                | <p><b>(1)</b></p> | <p>All <b>work</b>, 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 <u>has been completed</u>; or</p> |
| <p><b>B.</b>     With respect to the insurance afforded to these additional insureds, the following exclusion is added:</p> <p><b>2.     Exclusions</b></p> <p style="padding-left: 40px;">This insurance <u>does not apply to</u> "bodily injury" or "property damage" <u>occurring after:</u></p> | <p><b>(2)</b></p> | <p>That portion of "your <b>work</b>" out of which the injury or damage arises <u>has been put to its intended use</u> 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.</p>              |

**Commentary:** [ 49-59, 75 a ]

**Hypothetical:** This endorsement has been completed as to the Contractor. The Landlord and the other Landlord-Related Persons will require a similar endorsement to be issued by the Tenant's insurance carrier in their favor. Similarly, the Tenant will wish a similar endorsement to be issued by the Landlord's insurance carrier. The insurance provisions contained in the Construction Contracts and Office Leases (**Appendices 2-3 and 5-9**) require the Indemnifying Person to cause its insurance carrier to issue the endorsement at **Appendix 14**, or equivalent. As discussed below, this endorsement provides less coverage than the endorsement at **Appendix 14**.

**Insurance.** This endorsement provides additional coverage to the additional insured for an owner on the contractor's CGL policy (or for a contractor on a subcontractor's CGL policy) for "liability *arising out of* the contractor's *ongoing operations* for that insured" (the owner (or for the subcontractor's ongoing operations for the contractor, as the case may be). Liabilities *occurring after* completion of work are not covered. Perhaps because CG 20 10 does not reference coverage for the "acts or omissions of the additional insured itself ("general supervision of the named insured's operations), endorsement CG 20 10 occasionally has been viewed as providing coverage only for the additional insured's vicarious liability in connection with the acts or omissions of the named insured. Such an interpretation restricts the meaning on the phrase "arising out of" to "caused by." See the discussion of the scope of coverage an additional insured's negligence "arising out of the contractor's ongoing *operations*" versus coverage of an additional insured's negligence "arising out of the contractor's *work*" at <sup>[ 56 ]</sup>. Texas courts have been inclined to interpret insurance language broadly against the insurer. The "arising out of" coverage language has been interpreted to include liabilities due to the sole or concurrent negligence of the additional insured. This position recognizes that a contractor's operations can create circumstances out of which a loss occurs without contributing causally to that loss. This is the "but for" argument ("but for" there being construction activities, the liability negligently caused by the additional insured's acts or omissions [*e.g.*, the negligent act of the landlord's security contractor in directing traffic around the contractor's equipment] would not have occurred. While the phrases "your work" and "your ongoing operations" have important meanings in the context of determining coverage of liabilities arising out of injuries occurring after "completed operations," there is no significant difference between them as respects determining the scope of coverage under CG 20 10 prior to completion of operations (whether the injury "arises out of the operations" or "arises out of the work" of the contractor).

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 the endorsement in **Appendix 22**.

---

**Appendix 14****CGL Endorsement - CG 20 26 11 85****Additional Insured–Designated Person or Organization**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

**Name of Person or Organization:** [(a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) \_\_\_\_\_ (the "Building Owner HVAC Contractor"), (d) \_\_\_\_\_ (the "Building Owner Security Service"), (e) \_\_\_\_\_ ("Parking Garage Operator"), (f) \_\_\_\_\_ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender"), (h) DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, (i) Bank of America, N.A. ("Tenant's Lender"), and (j) John Doe DeBaker, M.D., individually.]

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

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability **arising out of** your **operations** or **premises owned by** or rented to you.

---

**Commentary:** [ 49-59, 75ab ]

**Hypothetical:** This endorsement has been completed as an endorsement to the insured Contractor's CGL policy naming the Landlord-Related Persons and the Tenant-Related Persons as additional insureds. The above endorsement covers Insurable Injuries if they arise out of (a) the Contractor's sole negligence, (b) the contributory negligence of the Contractor and any of the Landlord-Related Person and the Tenant-Related Persons, and (c) the sole negligence of a Landlord-Related Person or a Tenant-Related Person. The insurance provisions contained in the Construction Contracts and Office Leases (**Appendices 2-3 and 5-9**) require the Indemnifying Person to cause its insurance carrier to issue this endorsement.

The Landlord and the other Landlord-Related Persons will require a similar endorsement to be issued by the Tenant's CGL insurance carrier in their favor. Similarly, the Tenant will wish a similar endorsement to be issued by the Landlord's CGL insurance carrier.

The CG 20 26 11 85 endorsement form needs to be modified (“**manuscripted**”) for use as an endorsement to either the Landlord's or Tenant's CGL Policy in designating the other party as an additional insured in cases where the risk allocation is other than to shift all risk of Injury Liability to the named insured regardless of fault. In order to allocate the Liabilities on a contractual comparative basis and have the insurance follow the contractual comparative indemnity risk allocation in accordance with **Appendix 7** Office Lease, the following modifications must be made to the face of this endorsement.

**Revision to the Additional Insured Endorsement to the Landlord's CGL policy to designate Tenant-Related Persons as Additional Insureds, except to the extent the Liability is caused in whole or in part by a Tenant-Related Person, unless the Liability arises out of Injuries occurring in the Common Areas, Support Facilities or Parking Garage and are in whole or in part the fault of an invitee or contractor of Tenant**

**Name of Person or Organization:** DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, and John Doe DeBaker, M.D., individually.

*Add the following immediately after the WHO IS AN INSURED sentence:*

“Coverage under this endorsement does not apply to sums an insured shown above is legally obligated to pay to the extent of that insured's percentage share of all insureds' fault, unless the injury giving rise to the liability occurs in the Common Areas, Support Facilities or Parking Garage of the Property (as described in the Office Lease) and arises in whole or in part out of the acts or omissions of an invitee or contractor of an insured shown above, in which case, coverage applies regardless of that insured's fault, in whole or in part.

For purposes of apply coverage under this endorsement, “**fault**” is defined to mean:

A finding establishing the respective parties' percentage of liability, based upon a decree or order issued by a court of competent jurisdiction, or an arbitration or mediation proceeding conducted by an association approved by the state bar in the state hosting the proceeding, or an agreement, stipulation, stipulated judgment or other form of written agreement between the parties and litigants, that 1% or more of the legal obligation to pay incurred by the insured shown above is attributable to the conduct of that insured or others acting on its behalf.

This version of the additional insured endorsement provides coverage to the additional insured Tenant with respect to the named insured's owning Premises a portion of which are leased to the additional insured Tenant, but not for claims to the extent of the additional insured's percentage share of fault, unless the injury giving rise to the liability occurs in the Common Areas, in which case, as to Insurable Injuries arising out of the acts or omissions of an invitee or contractor of Tenant, the additional insured Tenant, is covered regardless of its fault, in whole or in part. In other words, coverage under this endorsement language is limited to claims involving the named insured's sole

fault and claims in which the named and additional insured Tenant are at fault to some degree, but only to the extent of the named insured's fault unless the Insurable Injury occurs in the Common Areas and arises out of the acts or omissions of an invitee or contractor of the Tenant. This coverage matches that provided to an Indemnified Person in a *modified limited* hold harmless indemnity agreement (one where the Indemnified Person is indemnified for Indemnified Liabilities, except to the extent they arise out of the Indemnified Person's negligence unless the Liability arises out of the acts or omissions of an invitee or contractor in the Common Areas).

### **Modified Contractual Comparative Responsibility**

**Revision to the Additional Insured Endorsement to the Tenant's CGL policy to Designate Landlord-Related Persons as Additional Insureds, except to the extent the Liability is caused in whole or in part by a Landlord-Related Person and excluding Liabilities arising out of Injuries occurring in the Common Areas.**

**Name of Person or Organization:** (a) Crescent Real Estate, and its successors and assigns as owner of the Property ("Building Owner"), and its officers, directors, partners, and employees, (b) Crescent Management, L.L.P. ("Property Manager"), (c) \_\_\_\_\_ ("Building Owner HVAC Contractor"), (d) \_\_\_\_\_ ("Building Owner Security Service"), (e) \_\_\_\_\_ ("Parking Garage Operator"), (f) \_\_\_\_\_ ("Building Owner's Architect"), and (g) General Electric Credit Corporation ("Building Owner's Lender").

*Add the following immediately after the WHO IS AN INSURED sentence:*

Coverage under this endorsement does not apply to sums an insured shown above is legally obligated to pay to the extent of that insured's percentage share of all insureds' fault. Also, coverage under this endorsement does not apply to sums an insured shown above is legally obligated to pay if the injury giving rise to the liability occurs in the Common Areas, Support Facilities or Parking Garage of the Property (as described in the Office Lease).

For purposes of apply coverage under this endorsement, "**fault**" is defined to mean:

A finding establishing the respective parties' percentage of liability, based upon a decree or order issued by a court of competent jurisdiction, or an arbitration or mediation proceeding conducted by an association approved by the state bar in the state hosting the proceeding, or an agreement, stipulation, stipulated judgment or other form of written agreement between the parties and litigants, that 1% or more of the legal obligation to pay incurred by the insured shown above is attributable to the conduct of that insured or others acting on its behalf.

This version of the additional insured endorsement provides coverage to the additional insured Landlord-Related Persons with respect to the named insured's leasing the Leased Premises from the additional insured Landlord, but not for claims to the extent of the additional insured's percentage share of fault. In other words, coverage under this endorsement language is limited to claims involving the named insured's sole fault and claims in which the named and additional insureds are at fault to some degree, but only to the extent of the named insured's fault. This coverage matches that provided to an Indemnified Person in a *limited* hold harmless indemnity agreement (one where the Indemnified Person is indemnified for Indemnified Liabilities, except to the extent they arise out of the Indemnified Person's negligence). This insurance allocation is further modified to exclude

coverage of the Landlord-Related Persons for Injuries occurring in the Common Areas (insurance covering Injuries in the Common Areas are to be covered in whole by the Landlord's insurance).

This endorsement as so modified allocates to the Tenant's CGL insurance the risk of Liabilities to the extent the Liabilities are attributable to the Tenant's fault. This endorsement as so modified provides the Landlord-Related Persons with insurance backstopping the Tenant's indemnity as to injuries to the Tenant's employees. Additionally, this endorsement as so modified provides the Landlord-Related Persons with defense of claims coverage.



**Another approach is to exclude from additional insured coverage, coverage for an additional insured's sole fault.**

**Name of Person or Organization:** \_\_\_\_\_.

*Add the following immediately after the WHO IS AN INSURED sentence:*

Coverage under this endorsement does not apply to sums an insured shown above is legally obligated to pay because of that insured's sole fault.

For purposes of apply coverage under this endorsement, "**fault**" is defined to mean:

A finding establishing the respective parties' percentage of liability, based upon a decree or order issued by a court of competent jurisdiction, or an arbitration or mediation proceeding conducted by an association approved by the state bar in the state hosting the proceeding, or an agreement, stipulation, stipulated judgment or other form of written agreement between the parties and litigants, that 90% or more of the legal obligation to pay incurred by the insured shown above is attributable to the conduct of that insured or others acting on its behalf.

This version of the additional insured endorsement provides coverage to the additional insured Landlord-Related Persons with respect to the named insured's operations for the additional insured or arising out of the named insured leasing the Leased Premises from the additional insured Landlord, but not for claims based on the additional insured's sole fault. In other words, coverage under this endorsement language is limited to claims involving the named insured's sole fault and claims in which the named and additional insureds are at fault to some degree. This coverage matches that provided to an Indemnified Person in an *intermediate* hold harmless indemnity agreement (one where the Indemnified Person is indemnified for Indemnified Liabilities, except to the extent they arise out of the Indemnified Person's sole negligence). While the approach represented by the manuscripted endorsement language in this endorsement form tailors additional insured protection to indemnity agreement protection under an intermediate indemnity excluding the Indemnified Person's sole negligence, it does so without making the contract's indemnity agreement any part of the additional insured coverage language. Tying the scope of additional insured coverage directly to the indemnity agreement can create serious problems for the Indemnified Person. If the indemnity agreement is ruled unenforceable, coverage under the additional insured endorsement could be nullified as well, if the two are deemed to be "inextricably tied." Instead of incorporating the underlying indemnity provision into the additional insured coverage language, the additional insured endorsement must be drafted to provide protection equivalent to the indemnity agreement but without tying itself to the indemnity agreement's enforceability.

**Insurance.** This endorsement is the broadest of the ISO Additional Insured Endorsements. It covers the additional insured for liability “arising out of your (the **insured’s**) **operations**” or “**premises owned by or rented to you** (the insured).” It does not contain carve outs for the “**acts or omissions**” of the additional insured as does the manuscripted form in **Appendix 20**. This endorsement form was promulgated for the purpose of adding as insureds to CGL policies entities for which no other specific additional insured endorsement is published by ISO. The form however is used for many situations where a form has been issued, but the additional insured has required this form due to its broad coverage. The scope of coverage is quite broad—liability arising out of the named insured’s operations or premises. If the insurer is willing, it can provide an acceptable method of including completed operations coverage for an additional insured who requires such coverage. Otherwise, completed operations coverage can be added by use of the endorsement form in **Appendix 22**.

See discussion of the scope of coverage an additional insured’s negligence “arising out of the contractor’s ongoing operations” versus coverage of an additional insured’s negligence “arising out of the contractor’s work” at **Footnote** <sup>[56]</sup>.

**Appendix 15****CGL Endorsement - CG 20 11 10 96****Additional Insured–  
Managers or Lessors of Premises**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

1. Designation of **Premises** (Part Leased to You): \_\_\_\_\_.
2. Name of Person or Organization (Additional Insured): \_\_\_\_\_.
3. Additional Premium: \_\_\_\_\_.

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

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

This insurance does **not** apply to:

1. Any “occurrence” which takes place after you cease to be a tenant in that premises.
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

**Commentary:**

**Hypothetical:** This endorsement form has not been chosen by the parties. Instead, the parties have chosen to require the Indemnifying Person to use the endorsement form at **Appendix 14** for the reasons stated in the Commentary following **Appendix 14**.

**Insurance.** See discussion of the scope of coverage an additional insured’s negligence “arising out of” at **Footnote** <sup>[56]</sup>. This endorsement is used most commonly when a landlord is to be listed as an additional insured on the tenant’s liability insurance policy. Coverage is broad as it covers the additional insured’s Liability 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 fo the “ownership” and “maintenance” of the premises, areas in which the landlord could be held liable regardless of any involvement of the tenant.

This endorsement provides a blank line for the description of the “**Premises.**” As noted below, care must be exercised in completing this blank for the reasons mentioned below.

This endorsement contains two significant carve outs. The first is for liabilities that “take place after (the tenant) ceases to be a tenant in that premises.” This carve out excludes coverage for liabilities that technically occur after cessation of the tenancy but relate to acts or omissions during the tenancy.

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 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.

Coverage for Liabilities 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 endorsement in **Appendix 22**.

This endorsement, however, has a major coverage gap. It extends coverage to the additional insured landlord for Liabilities arising out of ownership, maintenance or use “of that part of the premises leased” to the [named insured, tenant]. A coverage gap occurs if the Liability arises out of an act or omission occurring 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.

**Appendix 16****CGL Endorsement - CG 20 24 11 85****Additional Insured—Owners or Other  
Interests from Whom Land Has Been Leased**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

Designation of **Premises** (Part Leased to You): \_\_\_\_\_.

Name of Person or Organization: \_\_\_\_\_.

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

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

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to lease that land;
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

CG 20 24 11 85 [Copyright, Insurance Services Office, Inc., 1984] [**Emphasis added**] Page 1 of 1

**Commentary:**

**Hypothetical.** This form of endorsement was not selected by the parties, as it relates to "land" as opposed to "premises."

**Insurance.** See discussion of the scope of coverage an additional insured's negligence "arising out of" at **Footnote** <sup>[56]</sup>. Coverage is broad as it covers the additional insured's Liability arising out of its "ownership, maintenance or use of that part of the land 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 fo the "ownership" and "maintenance" of the land, areas in which the landlord could be held liable regardless of any involvement of the tenant.

This endorsement provides a blank line for the description of the “**Premises.**” (Note that the blank calls for a description of the “Premises,” but the coverage language refers to the “**land**” leased to the tenant). As noted below, care must be exercised in completing this blank for the reasons mentioned below.

This endorsement contains two significant carve outs. The first is for liabilities that “take place after (the tenant) ceases to lease that land.” This carve out excludes coverage for liabilities that technically occur after cessation of the tenancy but relate to acts or omissions during the tenancy.

The second carve out is for structural alterations, new construction or demolition operations “performed by or on behalf of the person shown in the Schedule (the additional insured—*i.e.*, the landlord).” This carve out excludes protection for liabilities 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.

Coverage for Liabilities 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 endorsement in **Appendix 22**.

This endorsement, however, has a major coverage gap. It extends coverage to the additional insured landlord for Liabilities arising out of ownership, maintenance or use “of that part of the premises leased” to the [named insured, tenant]. A coverage gap occurs if the Liability arises out of an act or omission occurring 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.

---

**Appendix 17****CGL “Other Insurance” Clause  
(1986 Through 1996 Editions of ISO’s CGL 00 01)**

## 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 **any** of the **other insurance**, whether primary, excess, contingent or on any other basis:

- (1) That is Fire, Extended Coverage, Builders Risk, Installation Risk or similar coverage for “your work;”
- (2) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner; or
- (3) If the loss arises out of the maintenance or use of aircraft, “autos” or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I)

When this insurance is excess, we will have no duty under Coverages A or B to defend any claim or “suit” that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured’s rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

## 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.

[Copyright, Insurance Services Office, Inc., 1994] [**Emphasis added**]

**Commentary:** <sup>[ 57-58 ]</sup>

As noted in the Commentary following **Appendix 18**, this Appendix sets out the “other insurance” language contained in ISO CGL insurance forms prior to 1997. Due to this provision and similar provisions contained in most standard form CGL policies, both the Named Insured’s Policy and the Additional Insured’s Policy will be treated as “primary” and contributing to an insured loss on an allocated basis. **Appendix 19** is ISO’s attempt to alter this result.



---

**Appendix 18****1998 ISO CGL 00 01 “Other Insurance” Clause**

## 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 for which you have been added as an additional insured by *attachment of an endorsement*.

[Copyright, Institute Services, Inc., 1997] [**Emphasis added**]

---

**Commentary:** <sup>[ 57-58 ]</sup>

**Appendix 18** is ISO’s most recent version of the standard “other insurance” clause in standard liability insurance policies. Most CGL policies contain an “other insurance” provision like that set out as **Appendix 17**. Insurance containing an “other insurance” provision like the one in **Appendix 17** make the insured’s insurance primary and contributing towards payment of losses also covered by another insured’s insurance, except for insurance of the type listed in **4b** “Excess Insurance” of **Appendix 17**. The 1998 ISO revised “other insurance” clause, if contained in an insured’s policy, provides that the insured’s insurance is **excess** over any insurance coverage afforded the insured by being designated as an “additional insured by *attachment of an endorsement*.” This is ISO’s attempt to make an additional insured’s own CGL insurance excess if it is added to another’s insurance as an additional insured by an endorsement to the other person’s (*e.g.*, an owner added to a contractor’s insurance) as an additional insured by an endorsement. Note, however, that 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 policy to make it excess over the policy which names the additional insured as an additional insured in order to avoid both policies being primary and co-contributing.

**Appendix 19** is a form of endorsement to an insured’s own insurance policy designating it as being excess over insurance available to it as an additional insured. The purpose of this type of endorsement is to keep an insured’s insurance for which it has paid the premium from being called on to be primary and co-contributing with a policy on which it is an additional insured.

---

**Appendix 19**

**CGL Endorsement - Endorsement to Indemnitee's "Other Insurance" Clause Occurrence Form**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART (OCCURRENCE VERSION)

Paragraph 4.b of the COMMERCIAL GENERAL LIABILITY CONDITIONS (SECTION IV) is amended as follows:

b. Excess Insurance

This insurance is **excess** over *any* of the other insurance, whether primary, excess, contingent or on any other basis:

- (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk, or similar coverage for "your work;"
- (2) That is Fire Insurance for premises rented to you; or
- (3) If the loss arises out of the maintenance or use of aircraft, "autos," or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I); or
- (4) That is valid and collectible insurance available to you as an additional insured under a policy issued to:
  - (a) an independent contractor performing work or services for you;
  - (b) a tenant renting or leasing land or premises from you;
  - (c) a lessee of equipment owned by you; or
  - (d) the operator of an oil or gas lease in which you have a nonoperating working interest.

When this insurance is excess, we will have no duty under Coverages A or B to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sums of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

[Copyright 2001 International Risk Management Institute, Inc.] [***Emphasis added***]

---

**Commentary:**

**Appendix 19** is a form of endorsement to an insured's own insurance policy (occurrence form) designating it as being excess over insurance available to it as an additional insured. The purpose of this type of endorsement is to keep an insured's insurance for which it has paid the premium from being called on to be primary and contributing.

**Appendix 20**

**CGL Endorsement - Blanket 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. <input checked="" type="checkbox"/> Partnership and Joint Venture Extension              | F. <input checked="" type="checkbox"/> Personal Injury - Contractual Coverage         |
| B. <input checked="" type="checkbox"/> Blanket Additional Insureds - Construction Contracts | G. <input checked="" type="checkbox"/> Nonemployment Discrimination                   |
| C. <input checked="" type="checkbox"/> Blanket Waiver of Subrogation                        | H. <input checked="" type="checkbox"/> Liquor Liability                               |
| D. <input checked="" type="checkbox"/> Unintentional Failure to Disclose Hazards            | I. <input checked="" type="checkbox"/> Broadened Conditions                           |
| E. <input checked="" type="checkbox"/> Broadened Mobile Equipment                           | J. <input checked="" type="checkbox"/> Blanket Additional Insureds - Equipment Leases |

**A. PARTNERSHIP AND JOINT VENTURE EXTENSION**

The following provision is added to **Section II - WHO IS AN INSURED**.

The last full paragraph which reads as follows:

"No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations."

is deleted and replaced by the following:

5. With respect to the conduct of any past or present joint venture or partnership now shown as a Named Insured in the Declarations and of which you are or were a partner or member, you, and others identified in paragraphs 1 through 3 above, subject to the conditions and limitations contained therein, are insureds, but only with respect to liability arising out of "your work" on behalf of any partnership or joint venture not shown as a Named Insured in the Declarations, provided no other similar liability insurance is available to you for "your work" in connection with your interest in such partnership or joint venture.
6. A partnership or joint venture, now shown as a Named Insured in the Declarations, of which you have 33% or more ownership interest at the time of "bodily injury" or "property damage" caused by an "occurrence" or "personal and advertising injury" caused by an offense, is an insured, provided that no other similar liability insurance is available to that partnership or joint venture.

**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 are performing operations if you 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 work" for the additional insured(s), or
  - b. actions or omissions of the additional insured(s) in connection with their general supervision of "your work."

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

- a. None of the exclusions under **Coverage A** except exclusions (a), (d), (e), (f), (h2), (i), (m) and (o), apply to this insurance.

- 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
  - (2) "Bodily injury" or "property damage" occurring after:
    - (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 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.
  - (4) "Property damage" to:
    - (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) "Your 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 you 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 your 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 you 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 you in connection with your operations as a construction contractor.

Any coverage provided herein will be excess over any other valid and collectable insurance available to the additional insured(s) whether primary, excess, contingent or on any other basis unless you 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.

The limits of liability afforded any additional insured(s) will be limited to those amounts stated in the written contract or agreement and further subject to the limits stated in **SECTION III - LIMITS OF INSURANCE**.

## C. BLANKET WAIVER OF SUBROGATION

**SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS**, Item 8, is replaced with:

**8. Transfer of Rights of Recovery Against Others to Us and Blanket Waiver of Subrogation.**

- a. If the insured has rights to recover all or part of any payment we have made under this Coverage Form, those rights are transferred to us. The insured must do nothing after loss to impair those rights. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.
- b. If required by a written contract executed prior to loss, we waive any right of recovery we may have against any person or organization because of payments we make for injury or damage **arising out of** your **operations** on "your **work**" for that person or organization.

## D. UNINTENTIONAL FAILURE TO DISCLOSE HAZARDS

Although we relied on your representations as to existing and past hazards, if unintentionally you should fail to disclose all such hazards at the inception date of your policy, we will not deny coverage under this Coverage Form because of such failure.

## E. BROADENED MOBILE EQUIPMENT

**SECTION V - DEFINITIONS**. Item 12. "mobile equipment," Part b. is deleted and replaced as follows:

- b. Vehicles maintained for use solely on or next to premises, sites or locations you own, rent or occupy.

## F. PERSONAL INJURY - CONTRACTUAL COVERAGE

**SECTION I, Coverage B**. Item 2. **Exclusion a(5)** is deleted.

## G. NON-EMPLOYMENT DISCRIMINATION

Unless "personal and advertising injury" is excluded from this policy:

- a. **SECTION V - DEFINITIONS**. Item 14. is amended to include:

"Personal and advertising injury" also means embarrassment or humiliation, mental or emotional distress, physical illness, physical impairment, loss of earning capacity or monetary loss, which is caused by "discrimination."

- b. **SECTION V - DEFINITIONS**, is amended to include:

**22.** "Discrimination" means the unlawful treatment of individuals based on race, color, ethnic origin, age, gender or religion.

- c. **SECTION I - COVERAGES. Coverage B. 2. Exclusion**. Item a. is amended to newly include:

- (11) Arising out of "discrimination" directly or indirectly related to the past employment, employment or prospective employment of any person or class of persons by any insured;
- (12) Arising out of "discrimination" by or at your, your agents or your "employees" direction or with your, your agents or your "employees" knowledge or consent;
- (13) Arising out of "discrimination" directly or indirectly related to the sale, rental, lease or sub-lease or prospective sale, rental, lease or sub-lease of any dwelling, permanent lodging or premises by or at the direction of any insured; or
- (14) Fines, penalties, specific performance or injunctions levied or imposed by a governmental entity, or governmental code, law, or statute because of "discrimination."

## H. LIQUOR LIABILITY

**SECTION I - COVERAGES. Coverage A, 2. Exclusions**. Part c. is deleted.

## I. BROADENED CONDITIONS

**SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS** Paragraphs **a.** and **b.** of Part 2., are deleted and replaced with the following:

### 2. Duties in the event of an occurrence, claim or suit:

- a. You must see to it that we are notified of an “occurrence” or an offense which may result in a “claim” as soon as practicable after the “occurrence” has been reported to you, one of your officers or an “employee” designated to give notice to us. Notice should include:
  - (1) How, when and where the “occurrence” or offense took place;
  - (2) The names and addresses of any injured persons or witnesses; and
  - (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.
- b. If a claim is made or “suit” is brought against any insured, you must:
  - (1) Record the specifics of the claim or “suit” and the date received as soon as you, one of your officers, or an “employee” designated to record such information is notified of it; and
  - (2) Notify us in writing as soon as practicable after you, one of your officers, your legal department or an “employee” you designate to give us such notice learns of the claims or “suit.”

**SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS:** The following is added to Part 2.

- e. If you report an “occurrence” to your workers compensation insurer which develops into a liability claim for which coverage is provided by the Coverage Form, failure to report such “occurrence” to us at the time of “occurrence” shall not be deemed in violation of paragraphs **a.**, **b.**, and **c.** above. However, you shall give written notice of this “occurrence” to us as soon as you are made aware of the fact that this “occurrence” may be a liability claim rather than a workers compensation claim.

## J. BLANKET ADDITIONAL INSURED - EQUIPMENT LEASES

**SECTION II - WHO IS AN INSURED** is amended to include any person or organization with whom you agree in a written equipment lease or rental agreement to name as an additional insured with respect to liability arising out of the maintenance, operation, or use by you of the equipment leased to you by such person or organization, subject to the following additional exclusions.

The insurance provided to the additional insured does not apply to:

- a. “Bodily injury” or “property damage” occurring after you cease leasing the equipment.
- b. “Bodily injury” or “property damage” arising out of the sole negligence of the additional insured.
- c. “Property damage” to:
  - (1) Property owned, used or occupied by or rented to the additional insured; or
  - (2) Property in the care, custody or control of the additional insured or over which the additional insured is for any purpose exercising physical control. (**Emphasis added**)

---

---

**Commentary:**

**Hypothetical:** The Contractor’s insurance contains this “blanket” insurance provision. Contractor and Contractor’s insurance agent advise the Landlord and Tenant that since the Contractor has “blanket” insurance for all of its construction activities and no other Landlord or Tenant has had a problem with it, neither should they.

**Insurance.** The blanket additional insured provision contained in this Endorsement as **B**, Section **II 7** designates as the additional insured “any person for whom you are performing operations.” The building owner (landlord) and the employees, officers, directors, successors and assigns of the building owner and the tenant would not be covered. The same omission is contained in the blanket waiver of subrogation provision at **C**, Section **IV 8b**.

Additional endorsements are required to extend these provisions to these additional designees. See **Appendix 13** and **Appendix 14**. Provision B, Section II 7b(3) of the blanket additional insured carves out of the additional insured coverage liabilities “arising out of any act or omission of the additional insured ... other than the general supervision of work performed for the additional insured ....” This carve effectively guts protection for the additional insured. In order for the additional insureds to have this protection endorsements in the form of **Appendix 13** or **Appendix 14** and **Appendix 22** will need to be obtained.

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 contractor and the additional insured requires this coverage to be primary.

The blanket waiver of subrogation provision at C, Section IV 8b provides that it is triggered only if the contract between the contractor and the tenant requires the insurer to waive its rights of subrogation. If the provision in the contract between the contractor and the tenant is not worded as a waiver of the insurer’s subrogation rights (for example, if it is a release of claims between the contractor and the tenant), then the insurer’s rights may not be effectively waived and the insurer may be able to sue the tenant and the tenant related parties for reimbursement of claims paid by the insurer.

**Appendix 21**

**CGL Endorsement - CG 20 33 07 98**

**Additional Insured—Owners, Lessees or  
Contractors—Automatic Status When  
Required in Construction Agreement with You**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. Section II - Who Is An Insured** is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.
- B.** With respect to the insurance afforded these additional insureds, the following additional exclusion applies:
- This insurance does not apply to:
- "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:
1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
  2. Supervisory, inspection, architectural or engineering activities.

**Commentary:**

This is a blanket endorsement attached to an insured contractor's or subcontractor's CGL policy prior to a specific job or request by a beneficiary (the owner, lessee, or contractor, as the case may be) that an additional insured endorsement be added to the insured's policy covering the owner, lessee or contractor as an additional insured. This endorsement automatically makes "owners, lessees or contractors" additional insureds on the insured contractor's or insured subcontractor's CGL policy. This endorsement provides coverage to the additional insured owner, lessee or contractor for liabilities *arising out of* the contractor's *ongoing operations*. Liabilities *occurring after* completion of the insured contractor's or insured subcontractor's work are not covered. See discussion of the scope of coverage of an additional insured's negligence "arising out of the contractor's ongoing operations" versus coverage of an additional insured's negligence "arising out of the contractor's work" at **Footnote** <sup>[56]</sup>. This endorsement provides additional insured coverage only for "any person or organization for whom you are performing operations" and thus does not cover officers, directors, employees, agents, or contractors of these persons. It does not cover other



persons related to the blanket additional insureds, such as its lenders, managing agents, and other tenants in the building.

**Appendix 22**

**CGL Endorsement - 20 37 10 01**

**Additional Insured–Owners, Lessees or  
Contractors–Completed Operations**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

<p><b>Name of Person or Organization:</b></p> <p>[(a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service"), (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender"), (h) DeBaker &amp; Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, and (i) John Doe DeBaker, M.D., individually]</p>
<p><b>Location and Description of Completed Operations:</b></p> <p>[5 Houston Center, 123 Fannin, Suite 123, Houston, Texas in the Building known as the xyz Center.]</p>
<p><b>Additional Premium:</b> \$ _____.</p>

(If no entry appears above, 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 insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" at the location designated and described in the schedule of this endorsement performed for that insured and included in the **"products-completed operations hazard"**.

---

**Commentary:**

This endorsement makes designated persons (*e.g.*, owners, lessees or contractors) additional insureds on the insured contractor's or insured subcontractor's CGL policy. This endorsement provides coverage to the additional insured owner, lessee or contractor for liabilities *arising out of* the contractor's "**work**." The endorsement thus extends coverage to the designated additional insureds for insured liabilities *occurring after* completion of the insured contractor's or insured subcontractor's work. See discussion of the scope of coverage of an additional insured's negligence "arising out of the contractor's ongoing operations" versus coverage of an additional insured's negligence "arising out of the contractor's work" at **Footnote** <sup>[ 56 ]</sup>. This endorsement extends additional insured coverage to the designated persons listed in the Schedule. If a person is not listed, then it is not covered. Care therefore should be exercised in completing the schedule to list all persons for which this coverage is required (*e.g.*, lenders, managing agents, other contractors, officers, directors, and employees, *etc.*).

Appendix 23CGL Waiver of Subrogation Endorsement - CG 24 04 10 92**Waiver of Transfer of Rights or Recovery Against Others To Us**

This endorsement modifies insurance provided under the following:

**SCHEDULE**

Name of Person or Organization: \_\_\_\_\_.

(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.

CG 24 04 10 92

[Copyright, Insurance Services Office, Inc., 1992]

Page 1 of 1

**Commentary:**

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 reassurance 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.

**Appendix 24**

**Owner’s Protective Liability Policy Endorsement - CG 29 88 10 93**

**Waiver of Transfer of Rights or Recovery Against Others To Us**

This endorsement modifies insurance provided under the following:

OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART

**SCHEDULE**

Name of Person or Organization:

.....

(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) 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 “bodily injury” or “property damage” ***arising out of your ongoing operations***. This waiver applies only to the person or organization shown in the Schedule above.

**Commentary:**

This form of endorsement is issued upon request of the Owner/Landlord-Tenant, if the Owner has purchased an Owners and Contractors Protective Liability Policy as opposed to being listed as an additional insured on the Contractor’s CGL policy. See the AIA provisions (11.3) in **Appendix 1** and the Commentary following **Appendix 1**. See the Commentary following **Appendix 23** for a discussion of waivers of subrogation against insureds and additional insureds.

## Footnotes

## Table of Contents

<b>A.</b>	<b>Indemnity</b> .....	[ 1 - 43]
1.	Indemnifying Person .....	[ 4 - 5]
2.	Indemnified Person .....	[ 6 - 7]
3.	Indemnified Liabilities .....	[ 8 - 11]
	a. Claims .....	[ 8]
	b. Liabilities or Damages .....	[ 9 - 10]
	c. Attorney's Fees and Costs .....	[ 11]
4.	Indemnified Matters .....	[12 - 34]
	a. Breach of Contract .....	[ 12]
	b. Vicarious Liability .....	[ 13]
	c. Negligence .....	[14 - 18]
	d. Gross Negligence .....	[19 - 22]
	e. Intentional Torts .....	[ 23]
	f. Strict Liability .....	[24 - 26]
	g. Injuries .....	[27 - 28]
	h. "Acts or Omissions" or "Caused" or "Arising Out Of" .....	[29 - 34]
5.	Excluded Matters and Liabilities .....	[35 - 38]
	a. Gross Negligence .....	[ 35]
	b. Sole Negligence .....	[ 36]
	c. Willful or Knowing Acts or Omissions .....	[ 37]
	d. Indemnified Person's Liability .....	[ 38]
6.	Other Provisions .....	[39 - 43]
	a. Choice of Laws .....	[ 39]
	b. Settlement Authority .....	[ 40]
	c. Assignability .....	[ 41]
	d. Cumulative or Exclusive Remedies .....	[ 42]
	e. Conflicting Provisions .....	[ 43]
7.	Forms .....	[ 44]
<b>B.</b>	<b>Insurance</b> .....	[45 - 75]
1.	Standard Policies .....	[ 45]
2.	Liability Policies .....	[46 - 61]
	a. Workers' Compensation Insurance .....	[46 - 48]
	b. CGL .....	[49 - 59]
	c. Business Auto Policies .....	[60 - 61]
3.	Property Insurance .....	[62 - 71]
	a. Risk of Loss Allocation - Waiver of Subrogation .....	[62 - 66]
	b. Builder's Risk - Risk of Loss Allocation .....	[67 - 71]

---

4.	Insurance Provisions .....	[72 - 75]
a.	Certificates .....	[ 72]
b.	Insurer Ratings .....	[ 73]
c.	Sample Forms .....	[74 - 75]
<b>C.</b>	<b>Releases and Exculpations .....</b>	<b>[76 - 81]</b>
1.	Released Persons .....	[ 77]
2.	Released Matters .....	[ 77]
a.	Negligence .....	[ 78]
b.	Gross Negligence .....	[ 79]
c.	Intentional Torts .....	[ 80]
d.	Unknown Matters .....	[ 81]

Footnotes

1	Elements of Indemnity Provisions
2	“Indemnity”
3	Elements - 1995 Proportionate Responsibility Statute
4	Indemnifying Persons - Status Not Implied
5	Indemnifying Person - Authority to Enter Indemnity Contract
6	Indemnified Persons - Status Not Implied
7	Indemnified Persons - Architects
8	Indemnified Liability - “Claims”
9	Indemnified Liability - “Liabilities” or “Damages”
10	Indemnified Liability - “Punitive Damages”
11	Indemnified Liability - “Attorney’s Fees and Costs”
12	Indemnified Matter - Breach of Contract
13	Indemnified Matter - Vicarious Liability
14	Indemnified Matter - Negligence
15	Express Negligence Test: Negligence of Indemnified Person Must be Expressly covered As An Indemnified Liability
16	Fair Notice Test
17	Fair Notice - <i>Italics</i>
18	Strict Construction
19	Indemnified Matter - “Gross Negligence”
20	Indemnified Matter - “Without Regard” or “Regardless of”
21	Indemnified Matter - “Regardless of Negligence” or “Including, Even If”
22	Indemnified Matter - Contractual Comparative Liability
23	Indemnified Matter - “Intentional Torts”
24	Indemnified Matter - Strict Liability
25	Indemnified Matter - Strict Liability - Products Liability
26	Indemnified Matter - Strict Liability - Environmental Liability
27	Indemnified Matter - Injuries to Employees - Workers’ Comp Bar
28	Indemnified Matter - “Injuries”
29	Indemnified Matter - Causation - Alleged Liability - “Caused”
30	Indemnified Matter - Causation - “Acts or Omissions”
31	Indemnified Matter - Causation - “Acts or Omissions of Employees or Agents”



32	Indemnified Matter - Causation - "Arising Out Of"
33	Indemnified Matter - Causation - "Arising Out Of the Work"
34	Indemnified Matter - Time of Occurrence of Act or Omission
35	Indemnified Matter - Excluded Matter - "Except Gross Negligence"
36	Indemnified Matter - Excluded Matter - "Excepting Only Sole Negligence"
37	Indemnified Matter - Excluded Matter - "Willful or Knowing Acts or Omissions of Indemnified Person"
38	Indemnified Liability - Excluded Liability - Indemnified Person's Liability
39	Choice of Laws.
40	Settlement - No Right to Indemnity When Voluntarily Settle an Indemnified Liability Absent Contractual Settlement Authority
41	Assignability
42	Cumulative or Exclusive Remedy
43	Waiver of Subrogation - Indemnity Conflicts
44	Forms - Indemnity
45	ISO Policies and Endorsements
46	Workers Compensation - Buffer
47	Workers Compensation - Waiver of Subrogation
48	Worker's Comp Insurance - Texas
49	CGL Indemnity Coverage
50	CGL Insurance - Additional Insured - ISO 20 10
51	CGL Insurance - Additional Insureds 20 26
52	CGL Additional Insured - Defense
53	Insurer's Duties to Insured
54	CGL Additional Insured - "Personal Injury" Coverage
55	CGL Additional Insured - Excess Liability Coverage
56	Coverage for Additional Insured's Negligence; Additional Insured's Sole Negligence
57	CGL Insured's - "Other Insurance"
58	CGL "Other Insurance" - Insured's Endorsement
59	CGL Insurance - Waiver of Subrogation - Pre-loss Waiver
60	BAP Insurance
61	BAP Insurance - Waiver of Subrogation
62	Property Insurance - Waiver of Subrogation
63	Waiver of Subrogation - Scope of Insurer's Claims Waived

64	Waiver of Subrogation - Waiver Limited to Risks or Insurance Proceeds
65	Waiver of Subrogation - Verification of Effect of Waivers on Insurance Coverage and Cost of Insurance Coverage
66	Waiver of Subrogation - Conflicts - Leases - Return of Premises
67	Property Insurance - Construction - Builder's Risk Insurance - Waiver of Subrogation
68	Property Insurance - Construction - AIA - Risk Allocation
69	Property Insurance - Construction - AIA - Waiver of Subrogation - Fair Notice Test
70	Property Insurance - Construction - AIA - Waiver of Subrogation - Express Negligence Test
71	Property Insurance - Construction - AIA - Waiver of Subrogation
72	Certificate of Insurance
73	Best's Rating System
74	Insurance Provisions
75	Common Errors and Problems
76	Releases and Exculpation
77	Released Persons
78	Released Matters - Negligence - Fair Notice and Express Negligence Tests
79	Released Matters - Gross Negligence
80	Released Matters - Intentional Torts
81	Released Matters - Unknown Matters

### A. Indemnity.

[<sup>1</sup>] **Elements of Indemnity Provisions.** An indemnity is comprised of the following five components:

1. The "indemnitors" (the "*Indemnifying Persons*");
2. The "indemnitees" (the "*Indemnified Persons*");
3. The liabilities which are indemnified against resulting from the Indemnified Matters (the "*Indemnified Liabilities*");
4. The indemnified events, acts or omissions (the "*Indemnified Matters*"); and
5. The excluded matters or excluded liabilities (the "*Excluded Matters or Liabilities*").

[<sup>2</sup>] "**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.

[<sup>3</sup>] **Elements - 1995 Proportionate Responsibility Statute.** In 1997 the 74th Texas Legislature enacted significant "tort reform" amendments to Chapter 33 of the Civil Practice & Remedies Code (referred to herein as the "**1995 Proportionate Responsibility Statute**" or the "**1995 Statute**"). Holman, Gallagher and Boudreaux, *Contribution and Indemnity and Complex Settlement Agreements*, INSURANCE LAW SEMINAR D (UNIV. HOU. 1996). The 1995 Proportionate Responsibility Statute is applicable to any cause of action based on tort. § 33.002 of the 1995 Statute. The inclusive nature of the 1995 Statute is indicated by § 33.003--"Determination of Percentage of Responsibility" which provides that

The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these: ..."

The 1995 Statute continues the "tort reform" scheme codified in 1987 (the "**1987 Statute**") as § 33.013(a) "Amount of Liability" the Civil Practice & Remedies Code unchanged. Section 33.013(a) provides that

Except as provided in Subsections (b) and (c), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's *percentage of responsibility* with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.

This is the general rule apportioning liability in accordance with each liable defendant's portion of responsibility. The 1995 Statute allows for "joint and several liability" in the following limited cases:

**(1) Defendants With Greater than 50% Responsibility.** Section 33.013(b) of the 1995 Statute amended the 1987 Statute to raise the threshold for the imposition of joint and several liability from 10% responsibility to "greater than 50%" responsibility. A liable defendant who the trier of fact determines is greater than 50% responsible for the harm, is jointly and severally liable for the damages with other liable defendants. In raising the threshold for imposition of joint and several liability, the 1995 Statute eliminated the requirement that the responsibility of the defendant in a negligence action be greater than the percentage of responsibility attributed to the claimant due to the 51% Bar Rule. The 1995 Statute eliminated from the imposition of joint and several liability the provision in the 1987 Statute in § 33.013(c)(1) which imposed joint and several liability in cases where the defendant's percentage of liability was more than 10% and the plaintiff was "innocent" (no percentage of responsibility assessed to the plaintiff).

**(2) Toxic Torts Greater than 15 % of the Responsibility.** Section 33.013(c) of the 1995 Statute imposes joint and several liability on a defendant if the percentage of responsibility attributable to the defendant is "greater than 15%" and is caused by the depositing, discharge, or release into the environment of any hazardous or harmful substance, or if the claimant's personal injury, property damage, death or other harm resulted from a toxic tort.

**(3) Penal Code.** The 1995 Statute also adds § 33.002(b), providing for joint and several liability for a defendant who, with specific intent to do harm to others, acts in concert with another person to engage in conduct under certain listed Sections of the Penal Code (*e.g.*, § 32.46 securing execution of a document by deception; § 19.02 murder).

**(4) 51% Bar Rule Applicable to Cases under 1995 Statute.** The 1995 Statute provides for a 51% Bar Rule similar to the 1987 Statute. Section 33.001 provides that a "claimant may not recover damages if his percentage of responsibility is greater than 50 percent." The 1995 Statute, however, **eliminates** the distinction previously applicable to mixed theory cases which applied a 60% Bar Rule. The 1987 Statute did not bar a claimant's recovery in a mixed theory case where at least one defendant was found liable based upon strict liability or breach of a UCC warranty, unless the claimant was at least 60% responsible.

### 1. Indemnifying Persons.

[<sup>4</sup>] **Indemnifying Persons - Status Not Implied.** In *Jones v. San Angelo Nat. Bank*, 518 S.W.2d 622 (Tex. Civ. App.--Beaumont 1974, *writ ref'd n.r.e.*) the court found that a corporation was not an Indemnifying Person and refused to require the corporation to make contribution to a shareholder for one-half the amount paid by such shareholder to the other shareholder in connection with the paying shareholder's satisfaction of a debt of the corporation pursuant to a corporate dissolution agreement.

**Multiple Indemnifying Persons: Rights of Contribution.** When two persons separately indemnify a third party, then as between themselves, each is liable for only half. *Hobbs v. Teledyne Movable Offshore, Inc.*, 632 F.2d 1238, 1241 (5th Cir. Unit A 1980)--applying Louisiana law.

**Indemnifying an Indemnifying Person: No Right of Contribution.** The court in *Campbell v. Sonat Offshore Drilling, Inc.*, 27 F.3d 185 (5th Cir. 1994) rejected the argument of Frank's Casing Crews and Rental Tools that it could obtain contribution from Union Texas Petroleum in a case where both Frank's and Union had indemnity agreements naming a liable third party (Sonat Offshore Drilling) as an Indemnified Person. In an earlier case, *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992) ("*Campbell I*") the court found that Frank was obligated to indemnify Sonat Offshore Drilling for an injury sustained by Frank's employee (Campbell). In this second case ("*Campbell II*") Frank was attempting to share its liability with Union Texas Petroleum since both Frank and Union Texas Petroleum had indemnified Sonat for injuries to Frank's employees. The court in *Campbell II* found, however, that Frank's indemnity, which was contained in its contract with Union Texas Petroleum, expressly provided that Frank indemnified *both* Sonat and Union Texas Petroleum for injuries to Frank's employee. Union Texas Petroleum did not have to make contribution despite its separate indemnity undertaking in the contract between Union Texas Petroleum and Sonat. These cases involved injuries sustained by Campbell, an employee of Frank's Casing Crews and Rental Tools, who was injured while transferring onto the jack-up drilling vessel owned by Sonat Offshore Drilling. Union Texas Petroleum had chartered Sonat's vessel and had agreed to indemnify Sonat for such injuries (the UTP/Sonat Contract). Frank's had agreed to indemnify Union Texas Petroleum and Sonat against liability for injuries to Frank's employees in its contract with UTP (the UTP/Frank's Contract). *Also see Foreman v. Exxon Corp.*, 770 F.2d 490, 498 n.13 (5th Cir. 1985) and *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. Unit A 1981).

[<sup>5</sup>] **Indemnifying Person - Authority to Enter Indemnity Contract.** In *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), the Texas Supreme Court refused to enforce an indemnification clause contained in a delivery receipt for leased equipment. The receipt was signed by an employee of the contractor who did not have actual or apparent authority to bind the contractor and the contractor did not have actual knowledge of the terms set forth in the receipt prior to signature.

### 2. Indemnified Person.

[<sup>6</sup>] **Indemnified Persons - Status Not Implied.** The importance of specifically designating in the indemnity clause all of the persons intended to be Indemnified Persons is emphasized by *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907 (Tex.App.--Amarillo 1997, *no writ*) where the court found that a **consultant** was not an Indemnified

Person within the listing of indemnity clause covering the “Operator, its officers, directors, employees and joint owners”. Other provisions of the IADC Drilling Bid Proposal and Daywork Drilling Contract specifically listed “consultants”. For example, the provision defining “daywork” stated that “For purposes hereof the term ‘daywork’ means ... under the direction, supervision and control of Operator (which term is deemed to include an employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations).”

[<sup>7</sup>] **Indemnified Persons - Architects.** Contractual indemnity for malpractice by architects and engineers is void. Only insurance companies may indemnify architects and engineers for malpractice pursuant to professional liability policies. TEX. CIV. PRAC. & REM. CODE ANN. §§ 130.001-005 (Vernon Supp. 2003). This statute does not prevent a negligent contractor from indemnifying a non-negligent architect. *Foster, Henry, Henry, & Thorpe, Inc. v. J. T. Const. Co., Inc.*, 808 S.W.2d 139 (Tex. App.--El Paso 1991, *writ denied*). This Section was amended effective September 1, 2001, to also provide that:

A covenant or promise in, in connection with, or collateral to a construction contract other than a contract for a single family or multifamily residence is void and unenforceable if the covenant or promise provides for a registered architect or licensed engineer whose engineering or architectural design services are the subject of the construction contract to indemnify or hold harmless an owner or owner’s agent or employee from liability for damage that is caused by or results from the negligence of an owner or an owner’s agent or employee.

### 3. Indemnified Liabilities.

#### a. Claims.

[<sup>8</sup>] **Indemnified Liability - “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:

#### **Provision:**

...[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.

#### b. Liabilities or Damages.

[<sup>9</sup>] **Indemnified Liability - “Liabilities” or “Damages.”** 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).

[<sup>10</sup>] **Indemnified Liability - “Punitive 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).

c. Attorney's Fees and Costs.

[<sup>11</sup>] **Indemnified Liability - "Attorney's Fees and Costs." Must First Pass Express Negligence Test to be Indemnified for Defense Costs.** 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. Racial-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. Racial-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. [14<sup>th</sup> 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, Human a, could not obtain indemnity for its defense costs.

4. **Indemnified Matters.**

a. **Breach of Contract.**

[<sup>12</sup>] **Indemnified Matter - Breach of Contract. Contractual Obligations.** For example, it is not against public policy for a withdrawing officer to indemnify a purchasing shareholder for I.R.S. penalties subsequently imposed on a corporation and its shareholders. *Tubb v. Bartlett*, 862 S.W.2d 740, 751 (Tex. App.--El Paso 1993, writ denied). Also, an indemnity can cover **economic damages** to arise in the future to third persons due to the contractual arrangements between contract parties. Such indemnities are not governed by the express negligence or similar doctrine (if they do not involve indemnification against one's future negligence). *Transcontinental Gas Pipeline Corp. v. Texaco*, 35 S.W.3d 658 (Tex.App.-Houston [1<sup>st</sup> Dist.] 2000, no writ). However, shifting of risk from one contracting party to another contracting party is neither an indemnity nor a release and need not meet the fair notice and express negligence tests otherwise applicable to "extraordinary" shifting of risk. *Green International v. Solis*, 951 S.W.2d 384 (Tex. 1997) ("**no-damages-for-delay**" provision in a construction contract that shifted to a subcontractor the economic damages arising out of the risk of a project's delay was enforceable by the contractor, even though the contractor may have caused the delay, if the potential for delay was contemplated by the parties, or if the delay was not for an unreasonable period of time that would justify the subcontractor in abandoning the contract, or if the contractor did not engage in active interference or wrongful conduct). Perhaps the result might have been different in *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex.App.-Houston [14<sup>th</sup> Dist.] 2000, no writ) involving an injury to an employee of Foodmaker a/k/a Jack in the Box if the indemnity had covered damages arising out of its breach of contract. In *Foodmaker* there was some evidence that Griffin did not respond to service calls to fix a grease receptacle that it furnished Foodmaker. A Foodmaker employee was injured when he slipped on a greasy ladder attempting to pour hot french fry grease into a ventilator slot 6'10" above the ground. The proper slot was broken. The court said,

Assuming, without deciding, that Griffin did not respond to one or more service requests in a timely manner, such conduct might constitute a breach of its service contract with Foodmaker but it is not evidence of negligence. The duty to pick up the grease steams solely from the parties' contract.

In *DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2001, no writ), the court of appeals found that the following provision **was not** enforceable to shift DDD's negligence to Veritas, but did not prevent DDD from recovery from Veritas on a claim that Veritas breached its contract to perform its services in a good and workmanlike manner:

**Provision:**

Section V-Operations:

Veritas shall **indemnify**, defend, ... [DDD] for all claims, damages, causes of actions, and liabilities resulting from **Veritas' failure to conduct seismic operations in an orderly and workmanlike manner...**

Section X-Liability Indemnity:

Veritas shall protect, **indemnify**, defend and save [DDD], ... harmless from and against all claims, ... and causes of action ... asserted by third parties on account of ... damage to property of such third parties, which ... damage is the result of the **negligent act or omission**, breach of this Basic Agreement or the Supplemental Agreement, or willful misconduct **of Veritas** ... Likewise, [DDD] shall protect, indemnify, defend and save Veritas, ... harmless from and against all claims, ... causes of action ... asserted by third parties on account of ... damage to property of such third parties, which ... damage is the result of the negligent act or omission or willful misconduct of [DDD] ...

Suit was brought by Vickers, a landowner, against DDD, which was the lessee on an oil and gas lease covering Vickers' land, for property damages sustained by Vickers due to the cutting down of numerous oak and mesquite trees. DDD had hired Veritas to conduct seismic services on the Vickers' land. Veritas subcontracted with Brush Cutters to conduct

brush clearing operations. DDD brought suit against Veritas seeking a declaratory judgment that Veritas is obligated to defend and indemnify DDD against claims based on damage to Vickers' land caused by Veritas' negligence. The court of appeals sustained the trial court's granting of summary judgment against enforcement of the indemnity provision. The court of appeals found that DDD's action was an attempt to have Veritas indemnify DDD for DDD's negligence. However, the court reversed the trial court and remanded the matter for further proceedings regarding Veritas' obligations under the indemnity provisions to defend and indemnify DDD against third party claims not based on DDD's negligence. Vickers had sued DDD for (1) breach of duty to manage and administer the lease, (2) breach of contract, (3) negligence, (4) malicious trespass, (5) negligent misrepresentations, (6) breach of fiduciary duty, (7) gross negligence, and (8) intentional tort.

**b. Vicarious Liability.**

[<sup>13</sup>] **Indemnified Matter - Vicarious Liability. Common Law Exposure to Vicarious Liabilities.** The common law imposed "vicarious" liability, sometimes called "imputed negligence", on persons in certain circumstances through the doctrine of *respondeat superior*, under which a master (employer) is liable for the torts of its servants. The *respondeat superior* doctrine imposes liability on the employer even though the employer did not contribute to the servant's negligent act. The independent contractor rule evolved as a means to combat the harshness of the general common law rule. Under the independent contractor exception a person is not liable for the negligence of its independent contractors. However, numerous exceptions evolved to the independent contractor exception resulting in the risk of the reimposition of liability even though the work is performed by independent contractors.

**(1) Employer-Employee v. Employer-Independent Contractor Relationships.** As distinguished from the "employer-employee" relationship, the "employer-independent contractor" relationship exists in situations where the employer hires a third person to perform some act, but does not retain control of the means and methods used by the independent contractor to perform the act. Additionally, such independent contractors are generally specially skilled to perform the particular task. 44 TEX. JUR. 3d 227, *Independent Contractors* (1996).

**(2) Exceptions to the Independent Contractor Rule.** Numerous exceptions evolved to the independent contractor rule to the point that the "exceptions swallowed the rule." W. P. Keeton, PROSSER AND KEETON ON THE LAW OF TORTS, § 71 (5th Ed. 1984).

**(a) Liability to Third Parties for Acts of an Independent Contractor.** As codified in the RESTATEMENT (SECOND) OF TORTS, §§ 410-429, a person is not liable for the acts or omissions of the independent contractor unless such person has been independently negligent. The following exceptions to this non-liability rule are recognized in Texas:

**(i) Negligent Hiring.** A person is liable for the negligent hiring of the contractor. 44 TEX. JUR. 3d 283, *Independent contractors* §56 *In general, selection of Incompetent Contractor* (1996); *Simonton v. Perry*, 62 S.W. 1090 (Tex. Civ. App. 1901); *Webb v. Justice Life Ins. Co.*, 563 S.W.2d 347 (Tex. Civ. App.--Dallas, 1978, *no writ*).

**(ii) Work Unlawful or Creates Nuisance.** Where the performance of the work contracted for is unlawful, or creates a nuisance, the employer may be responsible for injuries to third parties caused by the contractor. 44 TEX. JUR. 3d 291, *Independent Contractors*, §56 *Unlawful Work* (1996).

**(ii) Project Necessarily Causes Loss or Injury.** The employer may not, to escape liability, contract for the project, the necessary or probable effect of which would be to injure others. 44 TEX. JUR. 3d, *Independent Contractors* § 68 *Project necessarily causes loss or injury* 293 (1996).

**(iv) Duties Imposed by Statute.** If the prosecution of a project involves or results in a violation of a duty imposed by statute on the employer, the mere fact that the work was performed by a contractor will not relieve the employer from liability. 44 TEX. JUR. 3d, *Independent Contractors* (1996). So for instance the court held in *Sanchez v. M Bank of El Paso*, 836 S.W.2d 151 (Tex. 1992) that the bank could not escape liability for the breach of the peace and wrongful repossession actions of its independent contractor in repossessing plaintiff's bank financed automobile in violation of the requirements of TEX. BUS. & COMM. CODE § 9.503 (Vernon Supp. 2003).



(v) **Exercise of Public Franchise.** Where the work of a contractor involves the exercise of a franchise granted the employer, the latter must answer for the torts of the contractor and see to the proper execution of the granted power. 44 TEX. JUR. 3d 296, *Independent Contractors* §72 *Exercise of public franchise*(1996).

(iv) **Inherently Dangerous Work.** A person employing an independent contractor to do an inherently dangerous work should see to it that the work is performed with such degree of care as is appropriate to the circumstances, or that all reasonable precautions be taken during its performance, so that third persons may be effectually protected against injury. The employer cannot delegate his duty of care to an independent contractor so as to relieve himself of his duty and the liability for the nonperformance of the duty. Thus, the employer may be held responsible to third persons for injuries that are the proximate results of the inherently dangerous nature of the work contracted for, whether the contractor's act was done negligently or otherwise. 44 TEX. JUR. 3d 297, *Independent Contractors* § 73 *Inherently dangerous work* (1996).

(b) **Liability for Injuries to Employees of an Independent Contractor.** The most frequently encountered exceptions to the independent contractor rule are situations where the courts have imposed liability upon a person to the employees of an independent contractor. The following exceptions are recognized in Texas:

(i) **Premises Liability--Safe Work Place.** A person is liable if it "does not provide a safe work place". Actually, this statement of the rule is too broad. More accurately phrased, the rule requires the owner or occupier to exercise ordinary care to keep the premises in reasonably safe condition so that the employee of the independent contractor will not be injured. *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985); 59 TEX. JUR. 3d 168, *Premises Liability* §25 *Duty owed business invitee* and § 43 *Failure to provide safe place to work* 270 (1996).

*See, for instance, Stablein v. Dow Chemical Co.*, 885 S.W.2d 502 (Tex. App.—El Paso 1994, *no writ*) where the court found that the premises owner was not liable for injuries to an employee of a subcontractor (cafeteria worker employed by a cafeteria services contractor working at the Dow plant). The condition encountered by the employee (a crate in the food freezer) was not a dangerous condition peculiar to the work being performed by the contractor. The contract with the contractor recognized that Dow did not retain control over the method of the contractor performing its work. The injury arose out of an activity conducted by the employee in the course and scope of the employee's employment by the contractor. Dow's duty to the employee was that owed by an occupier of land to a business invitee--to warn the contractor and its employees of any hidden dangers existing on the premises.

The court of appeals in *Schley v. Structural Metals, Inc.*, 595 S.W.2d 572 (Tex. Civ. App.--Waco 1979, *writ ref'd n.r.e.*) held that the abolition of the "no duty" rule in occupier-invitee cases, in light of the adoption of the Comparative Negligence and Contribution Statute in 1973 (discussed *infra*), necessarily set aside the rule that the knowledge of the independent contractor relieved the owner or occupier of land of any duty to protect or warn the employees of the independent contractor of dangers on the premises (even "open and obvious dangers").

An employer may be liable for injuries suffered by the employee of an independent contractor as a result of a defective appliance furnished by him. 44 TEX. JUR.3d, *Independent Contractors*, § 48 *Furnishing dangerous appliances* 275 (1996).

Similarly, a contractor in control of the premises owes a duty to the employees of its subcontractor similar to the duty owed by the owner to the contractor as to the premises. 44 TEX. JUR.3d 276, *Independent Contractors*, § 49 *General contractors* (1996).

Liability is imposed upon the employer of the contractor in cases where the independent contractor's work involves a dangerous condition on the owner's premises which causes injury to the contractor's employees. The exception is summarized in the RESTATEMENT (SECOND) OF TORTS (1966) as follows:

**413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor.** One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer:

- (a) fails to provide in the contract that the contractor shall take such precautions, or

- (b) fails to exercise reasonable care to provide some other manner for the taking of such precautions.

**416. Work Dangerous in Absence of Special Precautions.** One who employs an independent contractor to do work which the employer should recognize is likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

**4.22. Work on Buildings and Other Structures on Land.** A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure:

- (a) While the possessor has retained possession of the land during the progress of the work, or
- (b) After he has resumed possession of the land upon its completion.

**427. Negligence as to Danger Inherent in the Work.** One who employs an independent contractor to do the work involving a special danger to others which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

The introductory comments to these rules offers the following rationale:

The rules stated in the following §§ 416-429, unlike those stated in the preceding §§ 410-415, do not rest upon any personal negligence of the employer. They are rules of **vicarious liability**, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of a servant.

(ii) **Retention of Control by Employer.** Liability is imposed on the employer of the contractor where the employer retains control of the manner and means of the independent contractor's performance of its work.

Section 414 of the RESTATEMENT (SECOND) OF TORTS (1966) states the common law rule as follows:

**414. Negligence in Exercising Control Retained by Employer.** 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 control with reasonable care.

Comment c. to § 414 notes that in order to succeed in a cause of action against an employer, the plaintiff must prove: (1) the owner- occupier retained control and supervision of the details of the work to the extent that the independent contractor was no longer free to do the job its own way, and (2) such retained control contributed to the incident.

Similarly, Comment c. states the following as to the liability of a contractor for injuries to employees of its subcontractor:

It is not enough that (the employer) has merely a general right to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, to prescribe alterations or deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to his operative detail. There must be such retention of a right of supervision that the contractor was not free to work his own way.

(iii) **Borrowed Servant Doctrine.** Another exception is the "borrowed servant" doctrine. Under the borrowed servant doctrine the employer of the independent contractor becomes the employer of the independent contractor's employees. Sometimes the employer is called the "special employer" under these circumstances. The following factors have been used by the courts to find a "borrowed servant" relationship: (1) the right of the special employer to control the details of the employee's performance *USF & G v. Goodson*, 568 S.W.2d 443 (Tex. Civ. App.-- Texarkana 1978, *writ ref'd n.r.e.*), but a contractual retention of control is not necessary, if actual control is exercised *Exxon Corp. v. Perez*, 842 S.W.2d 629 (Tex. 1992); (2) if the "special employer" pays the amount of the premiums for workers compensation insurance to the employer *Marshall v. Toys-R-Us Ntyex, Inc.*, 825 S.W.2d 193 (Tex. App.--Houston [4th Dist.] 1992, *writ denied*); (3) the right to hire and discharge, the obligation to pay wages, the carrying of the worker on the social security and income tax withholding rolls of the special employer; and (4) the furnishing of tools to the employee.

c. **Negligence–Extraordinary Shifting of Risk.**

[<sup>14</sup>] **Indemnified Matter - Negligence.** Indemnity against "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). 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)."

[<sup>15</sup>] **Express Negligence Test: Negligence of Indemnified Person Must be Expressly Covered As An Indemnified Liability.** 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.

**“Contractual Comparative Negligence”: Negligence of Indemnifying Person Must be Expressly Covered as an Indemnified Liability.** The supreme court in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987) also rejected Ethyl's interpretation that the indemnity clause indemnified Ethyl against Daniel's 10% concurring negligence. After the court rejected Ethyl's claim for indemnification for Ethyl's 90% negligence, Ethyl sought contribution or indemnification for Daniel's 10%. 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.

[<sup>16</sup>] **Fair Notice Test.** 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 [11<sup>th</sup> Dist.] 2000, *writ ref'd*) finding an indemnity to be conspicuous that was set forth in "enlarged, all capital lettering. The lettering is dark, boldface type so that it contrasts with the lighter, smaller type of the remaining contractual paragraphs... The indemnity provision... is directly above the signature line. A reasonable person's attention is attracted to the indemnity provision when looking at the contract.. The indemnity provision is on the back page (of a 1 page document), but the contract itself specifically directs the reader's attention to the paragraph in which is it contained. On the front of the contract, just above the signature line for Herman's is the directive: "**ATTENTION IS DIRECTED TO THE WARRANTY, LIMIT OF LIABILITY AND OTHER CONDITIONS ON REVERSE SIDE.**" See Greer and Collier, *The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas After Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 SO. TEX. L. REV. 243 (1994). *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978) **upheld** a provision on reverse side of purchase order where front side contained reference in large red print, partly in bold, incorporating provisions on reverse side; *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990) upheld an indemnity provision contained on front of one page contract in separate paragraph; *Dresser Industries v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) **struck down** indemnity located on back of work order, in a series of uniformly numbered paragraphs, with no heading and with no contrasting type; *K & S Oil Well Service, Inc. v. Cabot Corp., Inc.*, 491 S.W.2d 733, 737-38 (Tex. Civ. App.–Corpus Christi 1973, *writ ref'd n.r.e.*) struck down indemnity hidden on reverse of contract in paragraph headed "warranty;" *Rourke v. Garza*, 511 S.W.2d 331, 334 (Tex. Civ. App.–Houston [1st Dist.] 1974), *aff'd* 530 S.W.2d 794 (Tex. 1975); *Safeway Scaffold Co. of Houston, Inc. v. Safeway Steel Products, Inc.*, 570 S.W.2d 225, 228 (Tex. Civ. App.–Houston [1st Dist.] 1978, *writ ref'd n.r.e.*); *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2000, *writ ref'd*)- indemnity not conspicuous if in same size and type as the balance of a 1 page document; *Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503 (Tex.App.–Texarkana 1999, *writ denied*)-indemnity provision not conspicuous if in same size and type and without a separate heading identifying the paragraph was an indemnity in a 22 paragraph, 13 page document, also court not persuaded that the conspicuousness requirement applied only to "**forms.**" An indemnity provision was held **not** to meet the conspicuousness requirement in *U.S. Rentals, Inc. v. Mundy Service Corp.*, 901 S.W.2d 789 (Tex. App.–Houston [14<sup>th</sup> 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.

**Actual Notice.** The conspicuousness requirement is not applicable when the Indemnified Person establishes that the Indemnifying Person possesses actual notice or knowledge of the indemnity agreement. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993), *citing generally Cate v. Dover Corp.*, 790 S.W.2d 550, 561 (Tex. 1990). See *McGehee v. Certaineed Corp.*, 101 F.3d 1078 (5th Cir. (Tex.) 1996) remanding case for trial on actual knowledge of inclusion of an inconspicuous indemnity; *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d 119 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2000, *no writ*)-admission that signing party read the agreement sufficient to establish actual notice; *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978),

overruled on other grounds by *Dresser Indus., Inc.*, 853 S.W.2d at 509; *Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503 (Tex.App.–Texarkana 1999, *no writ*).

**Failure to Read No Excuse.** It has been held that the failure of an owner to call the attention of the contractor to an indemnity provision in a construction contract did not excuse the contractor from the indemnity provision absent proof of fraud, overreaching or mutual mistake. *Gulf Oil Corp. v. Spence & Howe Constr. Co.*, 356 S.W.2d 382 (Tex. Civ. App.–Houston 1962, *writ ref'd n.r.e.*), *aff'd* 365 S.W.2d 631 (Tex. 1963).

[<sup>17</sup>] **Fair Notice - *Italics*.** Greer and Collier recommend against the use of *italics* as the sole means of making an indemnity look conspicuous. 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, 265-67 (1994) citing *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776, 783-84 (E.D. Wis. 1982); *De Lamar Motor Co. v. White*, 460 S.W.2d 802, 804 (Ark. 1970) and J. White & R. Summers, UNIFORM COMMERCIAL CODE, PRACTITIONER'S EDITION 574, 575 (3d ed. 1988).

[<sup>18</sup>] **Strict Construction.** After the court has determined that an indemnity is intended, the doctrine of *strictissimi juris* or strict construction is used to prevent liability under the indemnity contract from being extended beyond the terms of the contract. Courts have stated that the Indemnifying Person is entitled to have the indemnity contract strictly construed in the Indemnifying Person's favor. *Smith v. Scott*, 261 S.W. 1089 (Tex. Civ. App.–Amarillo 1924, *no writ*); *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963); and other cases discussed below. Courts examine the "event" to determine whether it is within the scope of Indemnified Matters. Many times a contract containing an indemnity provision will also contain a duty provision or other covenant which conflicts with the indemnity provision. In such cases, the indemnity is strictly construed and effect is first given to the conflicting provision. In *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208 (Tex. 1980), the supreme court found that there were conflicting provisions in the contract containing an indemnification provision. Damages resulted from an explosion of a pipe line that transported propane to Kodak's facility. The contract contained both a provision requiring the Indemnifying Person to hold the oil company harmless from the oil company's own negligence, and a provision which placed responsibility for pipe line breakages on the oil company.

#### d. Gross Negligence.

[<sup>19</sup>] **Indemnified Matter – "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). 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).

**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. [12<sup>th</sup> Dist.] 2001, no writ) where the court assumed without discussion that negligence of the Indemnified Party included its gross negligence.

[<sup>20</sup>] **Indemnified Matter - "Without Regard" or "Regardless of."** 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.)

[<sup>21</sup>] **Indemnified Matter - "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:

**Provision:**

(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:

**Provision:**

**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:

**Provision:**

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

**Provision:**

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.)

[<sup>22</sup>] **Indemnified Matter - Contractual Comparative Liability.** *Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.3d 340 (Tex.App.-Tyler 2001, *no writ*) where the court found that Sieber & Calicutt was at least equally negligent as was La Gloria and therefore La Gloria was entitled to recover indemnity of one-half of the amount it paid in settlement of a wrongful death suit brought on behalf of one of its deceased employees. The indemnity provision limited Sieber & Calicutt's indemnity to its proportionate share of liability if its liability was equal to or less than La Gloria's liability. The La Gloria indemnity provision reads as follows:

**Provision:**

Contractor (Sieber & Calicutt) agrees to hold harmless and unconditionally indemnify La Gloria, its directors, officers, agents, representatives and employees against and for all liability, costs and expenses, claims and damages which La Gloria at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons or property or both, of Contractor, its subcontractors and suppliers, or to the persons or property of La Gloria, its subcontractors and suppliers, arising in any manner from the Work performed hereunder, including but not limited to any negligent act or omission of La Gloria, its directors, officers, agents, representatives or employees, provided however, that if the negligence of La Gloria shall be found to be greater than or equal to the comparative negligence of the Contractor, then the Contractor shall only be liable to La Gloria to the extent of the Contractor's own negligence.

*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:

**Provision:**

(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.

**e. Intentional Torts.**

[<sup>23</sup>] **Indemnified Matter - "Intentional Torts."** 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.

**f. Strict Liability.**

[<sup>24</sup>] **Indemnified Matter - Strict Liability.** 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.

[<sup>25</sup>] **Indemnified Matter - Strict Liability - Products Liability.** 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:

**Provision:**

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.

[ <sup>26</sup> ] **Indemnified Matter - Strict Liability - Environmental Liability.** The Fifth Circuit has addressed indemnifications for strict liability under environmental protection laws in *Fina, Inc. v. ARCO*, 200 F.3d 266 (5<sup>th</sup> 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.

**g. Injuries.**

[<sup>27</sup>] **Indemnified Matter - Injuries to Employees - Workers' Comp Bar.** A contractual indemnity by the employer of the Indemnified 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 "Workers' 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 1996), 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*).

*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:

**Provision:**

(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.

[<sup>28</sup>] **Indemnified Matters - "Injuries." Silence as to Coverage of "Injuries" May Mean No Indemnity.** 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*).

**Indemnified Matter - Indemnity as to Injuries To "Indemnifying Person's Employees" - Overcoming the Workers Comp Bar.** The Texas Supreme Court in *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990) construed the following reference to injuries or deaths "**to persons**" to be specific enough to overcome the Workers' Compensation Bar in holding that an employer had contractually assumed liability to indemnify a third party (Enserch) for liabilities arising out of the concurrent negligence of the third party (the third party's negligent supervision of the employer's work):

**Provision:**

(Christie) assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death **to persons** ... incidental to the performance of this contract by (Christie)...  
(Court's emphasis in bold.)

The supreme court found that this language was sufficient to refer to employees of the Indemnifying Person (Christie) and therefore met the requirements of the Texas Workers' Compensation Act that permits "an express agreement in writing assuming liability" by an employer for injuries to its employees. The court cited with approval the court of appeals' decision in *Verson Allsteel Press Co. v. Carrier Corp.*, 718 S.W.2d 300 (Tex. App.--Tyler 1985, *writ ref'd n.r.e.*) which held the following similar language sufficient to overcome the Workers' Compensation Bar:

**Provision:**

(Carrier) ... covenants to indemnify and hold harmless Verson ... from and against any and all loss, damage, expense, claims, suits or liability which Verson or any of its employees may sustain or incur ... for or by reason of any injury to or death of **any person or persons** or damage to any property, arising out of ... any claimed inadequate or insufficient safeguards or safety devices. (*Enserch* court's emphasis.)  
*Id.* at 301.

The supreme court in *Enserch* distinguished the following provision in *Port Royal Dev. v. Braselton Constr. Co.*, 716 S.W.2d 630, 632 (Tex. App.--Corpus Christi 1986, *writ ref'd n.r.e.*) on the grounds that the language expressly stated that the Indemnifying Person would not indemnify the Indemnified Person for the Indemnified Person's own negligence:

**Provision:**

The subcontractor agreed to indemnify the contractor from liability for or on a account of injury to or death of person or persons ... occurring by reason of or arising out of the act or (negligence) of **Subcontractor** ... **except the act or (negligence) of the Contractor** in connection with performance of this Contract.  
(Emphasis added by *Enserch* court.)

The Indemnified Matters did not include injuries to an employee of the Indemnifying Person due to the negligence of the Indemnified Person.

In *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200, 210 (Tex. Civ. App.--Houston 1959), *rev'd on other grounds*, 325 S.W.2d 126 (Tex. 1959), and *vacated on other grounds*, 326 S.W.2d 915 (Tex. Civ. App.--Houston 1959, *no writ*), the court of appeals found that a subcontractor was required to indemnify a contractor for contractor's negligent acts that injured the subcontractor's employees pursuant to indemnity which specifically included injuries to subcontractor's employees; the subcontractor's employees were considered to be "business invitees" in the portion of the construction site where injury occurred.

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 the following indemnity provision did **not** cover injuries to an employee of Flour Daniel, a contractor employed by Texas Utilities, the Indemnified Person. 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.

**Provision:**

[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 [Texas Utilities].

[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.

**Indemnity as to “Indemnifying Person’s Employees” Does Not Cover Injuries to Indemnifying Person’s Independent Contractors.** It has been held that an indemnity provision which clearly limited a contractor's obligation to indemnify the property owner for injuries sustained by the contractor's and its subcontractor's "*employees*" did **not** cover an injury sustained by a person while serving as an independent contractor, notwithstanding that the individual was hired, as well as paid, by the contractor. *Ideal Lease Service, Inc. v. Amoco Production Co.*, 662 S.W.2d 951 (Tex. 1983).

**Indemnity as to Injuries to “Indemnifying Person’s Agents and Contractors” Does Not Cover Injuries to Indemnifying Person.** An indemnity provision whereby a contractor indemnified a railroad against liability for injuries to the contractor's agents and employees, but did not mention injuries to the contractor, did not indemnify against injuries to the contractor. The Indemnified Matters did not include injuries to the Indemnifying Person, the contractor. *International G.N.R. Co. v. Lucas*, 70 S.W.2d 226 (Tex. Civ. App.--Texarkana 1934), *rev'd on other grounds* 99 S.W.2d 297 (Tex. Comm. 1936), *later app.*, 123 S.W.2d 760 (Tex. Civ. App.--Eastland 1938, *writ ref'd*), *cert. denied* 308 U.S. 573 (1939) *and aff'd in part and rev'd in part on other grounds* 100 S.W.2d 97 (Tex. Comm. 1937).

**Indemnity as to Injuries To “Indemnified Person’s Employees.”** In one case, an indemnity provision in a lease whereby the lessee undertook to indemnify the lessor against liabilities arising out of injuries to "**persons whomsoever**" has been construed broadly by a court to include the employees of the indemnified lessor. *Gulf, C. & S. F. R. Co. v. McBride*, 309 S.W.2d 846, *rev'd on other grounds*, 322 S.W.2d 492 (Tex. 1958). *Also see Faulk Management Services v. Lufkin Industries, Inc.*, 905 S.W.2d 476 (Tex. App.--Beaumont 1995, *writ denied*).

**h. “Acts or Omissions” or “Caused” or “Arising Out of”.**

[<sup>29</sup>] **Indemnified Matter - Alleged Liability - “Caused.”** *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.

[<sup>30</sup>] **Indemnified Matter - Causation - “Acts or Omissions.”** *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239 (Tex. 1987 *per curiam*). In a *per curiam* opinion, and without hearing oral argument, the Texas Supreme Court upheld the trial court's granting summary judgment to the Indemnifying Person (the contractor) on the basis that the **indemnity provision was unenforceable as a matter of law**. The court found the following provision **failed** expressly to indemnify the plant owner for injuries to employees of the contractor due to either party's negligence.

**Provision:**

Contractor (Gulf Coast) agrees to indemnify and save owner (Owens-Illinois) harmless from any and all loss sustained by owner ... from any liability or expense on account of property damage or personal injury

... sustained by any person or persons, including but not limited to employees of ... contractor ... arising out of ... the performance or non-performance of work hereunder by contractor ... or by any act or omission of contractor, its subcontractor(s), and their respective employees and agents while on owner's premises .... (Emphasis added by author.)

Although the agreement specifies the contractor's duty to indemnify the owner for claims resulting from the contractor's acts, it fails to state, with equal specificity, the obligation to indemnify for claims resulting from acts of other parties (*i.e.*, owner) and does not expressly refer to the negligence of either the owner or the contractor as an Indemnified Matter.

*Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 758 S.W.2d 843, 844 (Tex. App.--Corpus Christi 1988), *rev'd*, 768 S.W.2d 724 (Tex. 1989). In this case, the employee of the contractor (PPI) sued the owner (ARCO) for injuries sustained while working on the owner's drilling platform. ARCO impleaded the contractor seeking indemnification from the contractor under the indemnification provision in the contract between ARCO and the contractor. The court held the language "any negligent act of ARCO" was sufficient to define the parties' intent. The court found the following provision met the express negligence standard:

**Provision:**

Contractor (PPI) agrees to hold harmless and unconditionally indemnify company (ARCO) against and for all liability, costs, expenses, claims and damages which (ARCO) may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons, or property or both of (PPI), or of the workmen of either party, or of any other parties, or to the property of (ARCO) in any matter arising from the work performed hereunder, including but not limited to any negligent act or omission of (ARCO), its officers, agents or employees. ... (Emphasis added by author.)

[<sup>31</sup>] **Indemnified Matter - Causation - "Acts or Omissions of Employees or Agents."** Adding "**employees**" or "**agents**" to the list of Indemnified Persons may capture damages not otherwise awarded against the Indemnified Person in its capacity as employer. See *Fort Worth Elevators, Co. v. Russell*, 70 S.W.2d 397, 406 (Tex. 1934), *overruled on other grounds by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712 (Tex. 1987)-a corporation may be liable in punitive damages for gross negligence only if the corporation itself commits gross negligence. Because a corporation can "act only through agents of some character," *Fort Worth Elevators*, 70 S.W.2d 402, courts have developed tests for distinguishing between acts that are solely attributable to agents or employees and acts that are directly attributable to the corporation. See *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387 (Tex. 1997). A corporation is liable for punitive damages if it authorizes or ratifies an agent's gross negligence or if it is grossly negligent in hiring an unfit agent; See *King v. McGuff*, 234 S.W.2d 403 (Tex. 1950)-adopting RESTATEMENT OF TORTS § 909; *Purvis v. Prattco, Inc.*, 595 S.W.2d 103, 104 (Tex. 1980)-citing the RESTATEMENT (SECOND) OF TORTS § 909, which is unchanged from the original RESTATEMENT OF TORTS § 909; or if it commits gross negligence through the acts or omissions of a "vice principal" See *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 389 (Tex. 1997). A "vice principal" encompasses: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or a division of the business. *Hamerly Oaks*, 958 S.W.2d 391.

[<sup>32</sup>] **Indemnified Matter - Causation - "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 [4<sup>th</sup> 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 (5<sup>th</sup> Cir. 1998) (quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5<sup>th</sup> 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 (9<sup>th</sup> 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

**Provision:**

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.

**Indemnified Matter - “Arising Out Of” - “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 (5<sup>th</sup> 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 (5<sup>th</sup> 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:

**Provision:**

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).

[<sup>33</sup>] **Indemnified Matter - Causation - “Arising Out Of the Work.”** Indemnity provisions seek to tie the indemnified liability in some fashion to relationship between the Indemnified Person and the Indemnifying Person. The most common means of connection is to state that the liabilities indemnified “**arise out of**” some aspect of the relationship, such as indemnifying an owner, as the Indemnified Party, for bodily injuries or deaths “**arising out of the Work**” of a contractor.

“**Arising Out Of**” -“**Job Site.**” 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.

[<sup>34</sup>] **Indemnified Matter - Time of Occurrence of Act or Omission.** 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 (5<sup>th</sup> 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.

## 5. Excluded Matters or Liabilities.

### a. Gross Negligence.

[<sup>35</sup>] **Indemnified Matter - Excluded Matter - "Except 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.

#### **Provision:**

[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.

### b. Sole Negligence.

[<sup>36</sup>] **Indemnified Matter - Excluded Matter - "Excepting Only Sole Negligence."** 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.

#### **Provision:**

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).

**Provision:**

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.

**Provisions:**

[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).

c. Willful or Knowing Acts or Omissions.

[<sup>37</sup>] **Indemnified Matter - Excluded Matter - "Willful or Knowing Acts or Omissions of Indemnified Person."** 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).

d. Indemnified Person's Liability.

[<sup>38</sup>] **Indemnified Liability - Excluded Liability - 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.*

6. Other Provisions.

a. Choice of Laws.

[<sup>39</sup>] **Choice of Laws. No Express Choice of Laws Provision.** In *Maxus Exploration Co., f/k/a Diamond Shamrock Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50 (Tex. 1991), the Texas Supreme Court had to determine whether Kansas law or Texas law applied absent an express choice of laws provision in a contract containing indemnity provisions. The court determined that the laws of Kansas were to be applied to the indemnity clause to determine if it was enforceable. The supreme court referred to the following statement in the Restatement as controlling the determination of the appropriate state's laws to govern an indemnity in contracts containing no choice of laws provision:

The existence of a contractual right to indemnity, and the rights created thereby, are determined by the law selected by application of the rules of §§ 187-188. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 173, Comment b (1971).

The Restatement sets forth the following general rule in Restatement § 188(1) to be applied in cases where the parties have not themselves chosen what law governs their agreement:

The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the **most significant relationship** to the transaction and the parties under the principles stated in § 6.

Section 188(2) lists the contacts comprising the relationship between transactions and locale ordinarily to be taken into account in applying the principles in § 6. These include:

- (a) the place of contracting,
- (b) the place of negotiation,
- (c) **the place of performance,**
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

The court, quoting *DeSantis*, found that as to service contracts "[a]s a rule, (the fact that the services are almost entirely in a particular state) that factor alone is conclusive in determining what state's law is to apply." *DeSantis v. Wackenhut Corp.*, 793 S.W.2d at 679 (Tex. 1990). Section 196 of the Restatement states

The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, *by the local law of the state where the contract requires that the services, be rendered, unless, with respect to the particular issue, some other state has a **more significant relationship** under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.*

The court noted that in some instances, it is more appropriate to consider the disputed contractual issue separately from the contract as a whole. RESTATEMENT (SECOND) OF CONFLICT OF LAWS Title C, Particular Issues, at 631-32 (1971) states

... most issues involving a contract will usually be governed by a single law, (occasionally) an approach directed to the particular issue, rather than to the kind of contract involved, will provide a more helpful basis for the decision of a choice-of-law question.

The court noted that even assuming that the indemnity obligations should be considered separately from the contract as to the determination of the applicable state rules, the indemnity obligations were performable for the most part in Kansas. Therefore, pursuant to § 196 relating to conflicts of laws in service contracts, the court determined that the law of the state of Kansas was to be used, unless some other state (Texas) had a more significant relationship to the transaction and the parties under the principles in § 6 of the Restatement. Section 6 provides that absent a statutory directive concerning the law to be applied in a case, the following seven factors are relevant:

- 1) the needs of the interstate and international systems,
- 2) the relevant policies of the forum,
- 3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- 4) the protection of justified expectations,
- 5) the basic policies underlying the particular field of law,
- 6) certainty, predictability and uniformity of result, and
- 7) ease in the determination and application of the law to be applied.

The court declined to express its opinion on whether the particular provision in question would violate the Texas Oilfield Anti-Indemnity Statute, assuming Texas law applied. Since the court concluded that the Texas statute was not designed to have extraterritorial reach and Kansas had no public policy against such indemnity provisions, the court held that *on balance* the factors required the application of Kansas law.

**Express Choice of Laws Provision.** The Texas Supreme Court has adopted the principles set forth in § 187 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) in order to determine if a choice of laws provision is to be enforced. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990). See Weiner and Ale, *Making Choice of Law a Contact Sport: Contractual Choices of Law in Texas*, 54 TEX. B.J. 262 (Mar. 1991) for an analysis of the *DeSantis* opinion and for suggestions for maximizing the chance that a contractual choice of laws provision will be enforced by a Texas court. If the law of another state is chosen and the contract is for the sale, lease, exchange, or other disposition of goods for the price, rental, or consideration of \$50,000 or less, any element of the execution of the contract occurred in Texas and a party is a resident of Texas or is an entity created under the laws of Texas, then the boldface type, capital letters, or other conspicuous manner requirements of TEX. BUS. & COMM. CODE ANN. § 35.52 (Vernon Supp. Pamphlet 2003) will apply.

Under the Restatement rule, the choice of laws provision will be upheld unless all the factors in Restatement § 187(2)(b) are met; namely, (a) some other state's law would apply had the parties not made a choice; (b) that other state has a materially greater interest than does the chosen state in the enforceability of the contractual provisions at issue; and (c) the contractual provisions at issue violates a fundamental policy of that other state.

New Mexico has upheld a provision choosing Texas law to apply to an indemnity that indemnified against the Indemnified Person's negligence, even though such an indemnity would not be enforceable under New Mexico law. The New Mexico court found that the provision did not violate a fundamental public policy of the State of New Mexico even

though New Mexico statutes prohibited a similar contractual indemnity for contracts governed by New Mexico law. The court found that the same public policy could be upheld (promotion of safety) by upholding the indemnity since the Indemnifying Party also was required to obtain insurance supporting its indemnity. *Regan v. McGee Drilling Corp.*, 933 P.2d 867 (New. Mex. 1997) ("it is said that courts should invoke this public policy exception only in 'extremely limited' circumstances.... Otherwise, since every law is an expression of a state's public policy, the forum law would always prevail unless the foreign law were identical, and the exception would swallow the rule (rule-the rights of the parties to a contract are primarily determined by the terms of the contract)").

**b. Settlement Authority.**

[<sup>40</sup>] **Settlement - 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 Indemnified Person to offer to undertake the defense of the claim and that the Indemnifying 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:

**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 [14<sup>th</sup> 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. [14<sup>th</sup> 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. [14<sup>th</sup> 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 1966, *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).

**c. Assignability.**

[<sup>41</sup>] **Assignability.** The ability to assign an indemnity or to include within the scope of an indemnity subsequent property owners is a valuable right that can add value to a property. A typical contract containing an indemnity may contain a standard "successor and assign" provision. Consideration should be given to whether this provision extends to the indemnity obligation. For example, an environmental indemnity from a major oil company in connection with the sale of the company's decommissioned oil refinery can be like an insurance policy against otherwise uninsurable environmental risks.

**d. Cumulative or Exclusive Remedy.**

[<sup>42</sup>] **Cumulative or Exclusive Remedy.** The indemnity should address whether its rights are exclusive of any other remedy available to the Indemnified Person. It might be argued that an indemnity was intended to be the exclusive remedy afforded to the Indemnified Person as to a particular risk. The wording of the indemnity will be strictly construed and might not cover a subsequently occurring risk, unless expressly covered (*e.g.*, change of law or change in classification of a substance to a hazardous substance in the case of an environmental indemnity).

**e. Conflicting Provisions.**

[<sup>43</sup>] **Waiver of Subrogation - Indemnity Conflicts.** A provision whereby a tenant indemnifies the landlord for loss arising out of the tenant's negligence is in conflict with the waiver of subrogation provision. The indemnity provision in such case needs to exclude the loss covered by the waiver of subrogation provision.

**7. Forms.**

[<sup>44</sup>] **Indemnity.** The indemnity is a broad form indemnity covering the negligence and strict liability of both the Named Indemnified Person, the Additional Indemnified Persons and the Indemnifying Person. The waiver of subrogation has been extended to include liability insurance and is regardless of the negligence or strict liability of the Named Indemnified Person, the Indemnifying Person and their related parties. Both the indemnity and the release and waiver of subrogation provisions are set out in conspicuous type.

**B. Insurance.**

**1. Standard Policies.**

[<sup>45</sup>] **ISO Policies and Endorsements.** 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 **Appendix 16** to this article called "CG 20 26 11 85":

CG	20	26	11 85
The “CG” prefix in the endorsement’s designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as “GL” in connection with its <i>comprehensive</i> general liability forms.	The first set of numbers identifies the “group” to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number “20” refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group—in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled “Additional Insured–Designated Person or Organization.” A copy of Endorsement CG 20 26 11 85 is found in this article as <b><u>Appendix 14</u></b> .	The final four numbers in the endorsement designation identify the endorsement’s edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is “11 85” or November 1985. 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 07 98. Many of the <i>endorsement</i> forms were revised at the same time as the coverage forms and also bear a 07 98 edition date.

The following is the ISO CGL Form Categories grouped by function:

Category Name	Category Number
Coverage Forms and Amendatory Endorsements	00
State Amendatory Endorsements	01 and 26
Termination and Suspension Endorsements	02
Deductible Endorsements	03
Additional Coverage Endorsements	04
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

## 2. Liability Policies.

### a. Workers' Compensation Insurance.

[<sup>46</sup>] **Workers Compensation - Buffer.** 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.

[<sup>47</sup>] **Workers Compensation - Waiver of Subrogation.** It is not generally appropriate (except in borrowed servant, dual employment or leased employee situations) for one party to a contract to require the other party to name the other party as an additional insured on its workers compensation and employers liability policy. This would result in the other party being covered for injuries to its employees under the insured's worker's compensation policy. As discussed elsewhere in this Article, the concern raised by the risk of third-party actions by an injured employee of an insured employer against a related party (*e.g.*, suit by an injured employee of a contractor against the premises owner, or suit by an injured employee of a subcontractor against the contractor, or suit by an injured employee of a tenant against the landlord) can be addressed by indemnification by the employer and designation of the related party as an additional insured. In order to avoid the workers compensation carrier suing the Indemnified Person to obtain contribution and reimbursement for amounts paid by the carrier to the employee, the parties should obtain a waiver of subrogation endorsement in favor of the Indemnified Persons. The right of a workers compensation insurer to subrogate against a third party who may have caused an employee injury is recognized by statute. TEX. LABOR CODE § 417.001 (Vernon 1996). In most states, workers compensation insurance is written on the 1992 edition of the Workers Compensation and Employers Liability Insurance Policy form (**WC 00 00 01 A**) developed by the National Council on Compensation Insurance ("*NCCI*"). This form is *silent* with respect to a pre-loss waiver by employer. Therefore, a waiver of subrogation executed prior to a loss should prevent the insurer from subrogating against the third party, even without an endorsement to the policy.

[<sup>48</sup>] **Worker's Comp Insurance - Texas WC 42 03 04 A Waiver of Our Right to Recover from Others.** This form is approved for use in Texas. It is an endorsement whereby the workers' compensation carrier waives its rights of subrogation. It requires that the contract between the contractor (employer) and the owner contain a provision requiring the waiver to be obtained.

### b. CGL.

[<sup>49</sup>] **CGL Indemnity Coverage.** "Contractual Liability" coverage is contained in the CGL policy as an exception to an exclusion from coverage. The exclusion provides:

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. An "**Insured Contract**" is defined as: ...6. that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you assume the tort liability of another party to pay for "**Bodily Injury**" or "**Property Damage**" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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. 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.

[<sup>50</sup>] **a. Vicarious Liability.** Additional insured status typically affords the additional insured protection against vicarious liability arising out of the named insured's acts **but depending on the insurance covenant or the policy language** may cover the additional insured's own negligence. As such, it supplements the protection afforded by the indemnity provisions. Richmond, *The Additional Problems of Additional Insureds*, 33 TORT & INS. L. J. 945 (1998); Richmond and Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds*, 44 DRAKE L. REV. 781 (1996); Sigmier and Reilly, *Coverage for Independent Negligence of Additional Insureds*, FOR THE DEFENSE (Ap. 1995); Beck, *Ethical Issues in Joint Representation Under Subcontract Requirements for Defense and Additional Insured Status*, THE CONSTRUCTION LAWYER 25 (Jan. 1995). For example, listing the owner on the contractor's CGL Policy, or the contractor on its subcontractor's CGL Policy, will afford the owner liability protection. However, whether a covenant to list a person as an additional insured on the insured's liability policy or additional insured status provides coverage for the additional insured's negligence could well depend upon language of the insurance covenant and the insurance policy. When such language is silent or ambiguous, courts may look to the indemnity language and other language in the contract and custom and practice to determine the intention of the parties. Also, the language of the insurance policy, additional insured endorsement and certificate of insurance will be examined to determine the scope of the insurance coverage.

**b. Getty Round 2: Express Negligence Doctrine Not Applicable to Insurance Covenant - Additional Insured's Sole Negligence May Be Covered by Additional Insured Endorsement.** 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.

**Cause of Action Against Insurance Purchaser for Failure to List Other Party as Additional Insured.** 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 its 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.

**Cause of Action Against Insurers.** 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).

**c. Scope of Additional Insured Endorsement.** The scope of coverage of an additional insured endorsement is defined by the words of the policy and the endorsement to the policy. The Insurance Services Office, Inc. ("*ISO*"), a trade

organization to which most national insurers belong, has promulgated numerous additional insured endorsements for use nationally.

See Footnote [ 45 ] for a List of ISO Additional Insured Endorsements for a listing of these commonly used endorsements. See the following most commonly used additional insured endorsement forms in the Appendix:

1. **Appendix 13 - CG 20 10 10 01 Additional Insured-Owners, Lessees or Contractors-Scheduled Person or Organization.**
2. **Appendix 15 - CG 20 11 01 96 Additional Insured-Managers or Lessors of Premises.**
3. **Appendix 16 - CG 20 24 11 85 Additional Insured-Owners or Other Interests from Whom Land Has Been Leased.**
4. **Appendix 14 - CG 20 26 11 85 Additional Insured-Designated Person or Organization.**
5. **Appendix 21 - CG 20 33 07 98 Additional Insured - Owners, Lessees, or Contractors - Automatic When Required in Construction Agreement With You.**
6. **Appendix 22 - CG 20 37 10 01 Additional Insured - Owners, Lessees or Contractors - Completed Operations.**

**d. Coverage for Additional Insured's Negligence; Additional Insured's Sole Negligence.** A Houston Court of Appeals held that the insurance covenant to obtain an additional insured endorsement reviewed by the court did not evidence an intent to cover the sole negligence of an additional insured. In *Emery Air Freight Corp. v. General Transport Systems, Inc.*, 933 S.W.2d 312 (Tex. App.--Houston [14th Dist.] 1996, *no writ*), the court found that the following additional insured provision did **not** cover a liability that arose out of the sole negligence of the additional insured:

**Provision:**

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.

This provision was contained in a Cartage Agreement, an agreement whereby GTS agreed to provide local delivery services in Beaumont for Emery, a national freight service. Apparently, the Beaumont facility from which GTS provided the delivery service was "owned or operated" by Emery, but the Cartage Agreement provided that GTS had exclusive charge and control of the services being performed. See footnote 1 in the opinion. The trial court however determined that Emery was solely liable for the injury sustained by one of GTS's employees at the Beaumont facility. This suit was

brought by Emery against GTS to reimburse Emery for the monies awarded to the injured employee. Emery sought to recover against GTS for failing to cause GTS's liability insurance to list Emery as an additional insured.

The court of appeals noted that the Texas Supreme Court had twice previously, in *Getty Oil Co. v. Insurance Co. of North America (Getty II)* discussed immediately above) and *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.* (discussed previously), dealt with the interaction of an indemnity clause and an insurance clause in a contract. The Fireman's Fund contract had a liability insurance clause which required the contractor to obtain liability insurance in order to "**protect** the Owner ... against all liabilities, claims, or demands for injuries or damages to any person or property growing out of the performance of work under this specification." *Fireman's Fund*, 490 S.W.2d at 821. Another clause, appearing later in the contract, indemnified the owner from claims arising from the contractor's performance (with the exception of those claims arising out of the owner's negligence). The *Fireman's Fund* court addressed whether the language of the insurance clause reflected an intention for the contractor to carry insurance covering the owner's negligent acts. The court noted that the above-quoted language from the insurance clause was "**insufficient to clearly** indicate an intention to protect the contractor-indemnitee against liability for damages caused solely by the latter's (the owner's) own negligence." *Id.* at 822. Noting that "all of the relevant provisions of a contract should be considered in arriving at its intent and meaning," the *Fireman's Fund* court observed that other sentences in the insurance provision required liability insurance covering only the contractor's agents, employees, and vehicles. It also noted that the indemnity provision specifically excepted any assumption of the owner's negligence by the contractor. The *Fireman's Fund* court held that

(W)e cannot agree ... that the requirement in Section 12 that Wallace carry certain liability insurance for the protection of General Motors evidenced an intention to cover negligent acts of the latter. While the meaning of the contract provisions relating to liability insurance are not clear, the most reasonable construction is that they were to **assure performance of the indemnification agreement** as entered into by the parties. Such provisions are often required to guard against the insolvency of the indemnitor, and they should not be considered as evidence of intent to broaden the contractual indemnity obligation.

*Fireman's Fund*, 490 S.W.2d 818, 823 (Tex. 1972).

The court of appeals in *Emery* noted that the Texas Supreme Court in *Getty* had determined that the additional insured provision being litigated in *Getty* was a free-standing obligation, which required by its language an extension of coverage "whether or not required [by the other provisions of the contract]" and was in addition to the requirement in the indemnity provision that contained an internal provision for insurance to support the indemnity. *Getty*, at 804, 806.

The court of appeals noted that the supreme court in *Getty* declined to extend the express negligence rule to insurance agreements, and concluded that

As such, an insurance agreement which stands alone can shift the risk of insuring against one party's own negligence to another party without a specific expression of intent, even though an indemnity clause cannot.

This case, then, requires a **two-step analysis.** First, we must determine whether the indemnity clause satisfies the express negligence rule, thereby indemnifying appellant (Emery) against its own negligence. Second, we must determine whether the insurance clause merely supports the indemnity clause or stands alone, representing an independent obligation.

The court of appeals 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 Cartage Agreement 'is that they were to assure the performance of the indemnity agreement as entered into by the parties.'" [The court borrowed such language from the court in *Fireman's Fund*]. 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 provision does not require coverage "whether or not required" by other clauses; and

(3) the insurance clause does not **expressly cover negligence**, nor did the indemnity clause, because of the application of the express negligence rule.

Another court of appeals has found that the "additional insured" endorsement to a CGL did **not** cover the negligence of the additional insured, but only the negligence of the "first named insured" (the contractor). *Granite Construction Co., Inc. v. Bituminous Ins. Cos.*, 832 S.W.2d 427 (Tex.App.--Amarillo 1992, *no writ*). Granite sought coverage for a lawsuit brought by an employee of a contractor hired by Granite to haul asphalt from its construction site. Granite had agreed by contract to load the trucks and the contractor's responsibility was to haul the asphalt after Granite loaded the trucks. Granite was named as an "additional insured" in the contractor's CGL policy. The endorsement limited Granite's coverage as follows:

**Provision:**

Liability arising out of operations performed for such insured (Granite) by or on behalf of the named insured (the contractor).

In the negligence suit the employee alleged that Granite had negligently loaded its truck in such a manner that the truck overturned and injured him. Granite sought coverage under the additional insured endorsement, contending that the employee's injuries "arose out of" hauling operations performed for Granite by the contractor. The court disagreed, holding that the claim against Granite arose out of Granite's loading operations and not out of operations performed by the contractor, the only operations for which Granite was insured. *Id.*, 430. The court also rejected Granite's argument that the employee's claim was covered because of the certificate of insurance naming it as an insured for all of its work in Texas. The court held that the certificate itself did not manifest the coverage afforded Granite, rather it merely evidenced Granite's status as an insured. *Id.*, at 429.

The Texas Supreme Court has recently given a broad construction to the phrase "**arising out of**" in a case involving the construction of an automobile policy. In *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999), while attempting to get into his parents' truck through the sliding rear window, a boy accidentally touched a loaded shotgun on a gun rack mounted over the window and shot a man sitting in an adjacent parked car. The relevant insurance policy provided coverage for injuries *arising out of* the use of a motor vehicle. The court held:

For liability to "**arise out of**" the use of a motor vehicle, a **causal connection or relation** must exist between the accident or injury and the use of the motor vehicle.

*Id.* at 156. While the direct cause of the injury stemmed from the boy's conduct in touching the gun, the court concluded that the man's injury "arose out of" the use of the truck because the injury-producing act and its purpose were an integral part of the use of the vehicle. *Id.* at 158-59. The court noted that the vehicle must be more than the "locational setting" for the injury. *See id.* at 156.

The First Court of Appeals considered "**arising out of**" in the context of an additional-insured provision covering liabilities arising out of the "**operations**" of the named insured in *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.App. [1<sup>st</sup> Dist.] 1999, *writ den'd*). In *Admiral*, a company hired to service an oil and gas facility named the facility's owner as an additional insured for liability arising out of the service company's "operations." While one of the service company's (the named insured's) employees was unloading tools on the premises of the additional insured, a compressor on the property exploded. The employee, injured as a result of the explosion, sued the facility's owner, and the owner sought a declaration that he was covered as an additional insured under the policy. The court of appeals followed what it considered the "majority view" from federal courts and courts in other jurisdictions construing similar endorsements:

[F]or liability to "**arise out of operations**" of a named insured it is not necessary for the named insured's acts to have "caused" the accident; rather it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured. (Emphasis added)

The Third Court of Appeals has also found that an additional insured's negligence is covered by an additional insured endorsement covering liabilities "*arising out of [the named insured's] work*" in *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App.-Austin [3<sup>rd</sup> Dist.] 1999, *no writ*). McCarthy, a general contractor, hired Crouch/Fisk Electric

Company and Crouch Electric Company to provide electrical services for a Motorola construction project McCarthy was managing. An employee of Crouch (the named insured) was injured as he walked down a slippery incline on premises owned by McCarthy (the additional insured). Walking down the incline to get tools to perform Crouch's work was an integral part of its work of McCarthy. Crouch/Fisk and Crouch Electric purchased separate commercial general liability insurance policies from Continental Lloyds Insurance Company ("CLIC") and American Casualty Company of Reading, Pennsylvania ("ACC"). McCarthy was added to both policies by endorsement as an additional insured. The additional insured endorsements read as follows:

**Provisions:**

CLIC Additional Insured Endorsement

WHO IS AN INSURED ... the person or organization shown in the Schedule (McCarthy), but only with respect to liability *arising out of* "your work" (Crouch's) for that insured (McCarthy) by or for you (Crouch). [emphasis added]

ACC Additional Insured Endorsement

The insurance provided to the additional insured is limited as follows: 1. That person or organization [McCarthy] is only an additional insured with respect to liability *arising out of*: ... b. "Your work" for that additional insured (McCarthy) by or for you (Crouch). [emphasis added]

The insurance companies argued that "arising out of" means coming *directly* from the negligence of Crouch, the contractor, and could not arise in a case where only the owner was negligent. The court of appeals found that coverage occurs where there is a **causal connection** between the liability and the named insured's work, even though only the additional insured is negligent. The employee's injury occurred while he was on the construction site for the purpose of carrying out Crouch's work for McCarthy. Thus, there was a causal connection between the injury and Crouch's performance of its work for McCarthy; accordingly, McCarthy's liability for the injury "arose out of" Crouch's work for McCarthy. The court noted

As he was walking down this incline to go to the equipment trailer, Wilson 'fell on the muddy, slippery surface.' These allegations show that walking down the incline to get tools to perform its job was an integral part of Crouch's work for McCarthy. Thus, the accident occurred while Wilson was on the construction site for the purpose of carrying out Crouch's contract with McCarthy. There was more than a mere locational relationship between the injury and Wilson's presence on the site. Wilson's injury occurred while he was carrying out a necessary part of his job for Crouch. Therefore, there is a **causal connection** between Wilson's injury and Crouch's performance of its work for McCarthy and the liability "arose out of" Crouch's work for McCarthy.

The court rejected the insurance company's attempt to limit coverage to cases where the named insured also was negligent. The court held

The insurance companies offer a competing interpretation for the phrase "arising out of" that they claim is equally reasonable and thus creates an ambiguity. Their interpretation would limit the interpretation of "arising out of" to mean coming *directly* from; *i.e.*, for liability to arise out of Crouch's work for McCarthy, the liability must stem *directly* from Crouch's negligence and cannot extend to negligence caused solely by McCarthy. Post-*Lindsey*, however, such a restrictive interpretation no longer appears reasonable in Texas and cannot be used to create ambiguity. However, were we to consider the phrase "arising out of" ambiguous, we would apply the familiar rules that construe the policy against the insurer and reach the same result.

The court of appeals in *Highland Park v. Trinity Universal Ins. Co.*, 36 S.W.3d 916 (Ct.App. [5<sup>th</sup> Dist.] Dallas, 2001, *no writ*) also was called upon to construe an "arising out of 'your work'" additional insured provision. James Watkins, a plumber employed by Ward Brothers, was injured on the Highland Park Shopping Center premises owned by Henry S. Miller Interests, Inc. while riding a Man-Lift in Highland Park's parking garage. Trinity Universal refused to defend Highland Park in the suit brought by Watkins in which he alleged that the Man-Lift was unsafe. Based on



*McCarthy* and *Trident NGL*, the court found that the additional insured endorsement covered Highland Park's sole negligence because the liability arose out of the work of the named insured on the additional insured's premises.

The Fifth Circuit applying Texas law followed *Trident NGL* as opposed to *Granite* in *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5<sup>th</sup> Cir. 2000). This case involved two contractors (Air Equipment and Flournoy Drilling Co.) performing services for the same party (Swift Energy Co.). Air Equipment was both a contractor of Swift Energy and a contractor performing services for Flournoy. Air Equipment's employee (Lozano) was injured on Swift Energy's well site while performing services for Flournoy. Swift Energy was an additional insured on Air Equipment's liability policy pursuant to the following policy provision that designated as additional insured persons

**Provision:**

**SCHEDULE. Name of person or organization:**

Any person or organization for whom the named insured has agreed by written "insured contract" to designate as an additional insured subject to all provisions and limitations of this policy....

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability *arising out of your ongoing operations* performed for that insured. (emphasis added)

The contract between Swift Energy and Air Equipment contained a mutual indemnity provision, required each party to carry liability insurance to support the indemnified liability under each party's indemnity, and required each party to add the other to its liability policy "for liabilities and indemnities assumed by" the indemnifying party. Mid-Continent argued that Air Equipment's employee was injured while performing work for Flournoy and not for Swift and therefore although Swift was an additional insured under Air Equipment's policy, the injury was not a liability covered by Air Equipment's indemnity to Swift and consequently was not a liability covered pursuant to the "insured contract" provisions of Air Equipment's policy with respect to Swift's additional insured status thereunder. Mid-Continent also argued that the indemnity contract between Air Equipment and Swift was unenforceable under the Texas Oilfield Anti-Indemnity Act ("*TOAIA*") on various grounds. TEX. CIV. PRAC. § REM. CODE ANN. § 127.003 (Vernon 1997).

The court reject Mid-Continent's arguments finding that Mid-Continent asked the wrong question.

We emphasize that Mid-Continent's first argument does not require us to determine whether Swift was entitled to indemnity under the indemnity provision of the MSA (the contract between Swift and Air Equipment). Rather, it requires us to answer the different question of whether Swift should be denied coverage as an additional insured under the Policy because the MSA is not an "insured contract." The presumptions involved in these different contexts are diametrically opposed. ... under Texas law indemnity agreements are strictly construed in favor of the indemnitor (here, Air Equipment)... By contrast, insurance policies are strictly construed in favor of coverage (for Swift)...It does appear that Lozano was injured while on Swift's premises for the purpose of helping to perform Air Equipment's business. This is the exact factual scenario present in *Admiral*. In sum, while we are not required to decide whether *Granite* and *Admiral* are distinguishable, if they are, *Admiral* would govern under these facts.

The court also reasoned that even if the liability arose out of Air Equipment's operations for Flournoy, they also arose out of Air Equipment's operations for Swift, since Flournoy was Swift's contractor.

The Fifth Circuit in *Mid-Continent Casualty Co. v. Chevron Pipe Line*, \_\_\_ F.3d \_\_\_ (5<sup>th</sup> Cir. 2000) construed an "arising out of your **work**" additional insured endorsement as covering injuries to a named insured's employee performing services for the additional insured on the additional insured's premises. The court noted

The Mid-Continent endorsement and those in *Granite* and *Admiral* are not identical. Mid-Continent uses "liability arising out of 'your (PMI's) **work**'", defined by the policy as the named insured's [PMI's] work or operations, while the *Granite* and *Admiral* endorsements, respectively, used "liability arising out of **operations** performed ... by or on behalf of the named insured", ... and "liability arising out of the named insured's operations" *Admiral*, 988 S.W.2d at 454 (emphasis added). On the other hand, the pertinent

language in the two additional insured endorsements at issue in *McCarthy* is identical to that in *Mid-Continent's*. See *McCarthy*, 7 S.W.3d at 727 n. 4. .... To the extent that there is a conflict in the approach taken by *Granite* and *Admiral* in interpreting the endorsement, e.g., fault-based versus activity-based, we agree with CPL that our affirming the coverage-for-CPL -ruling does *not* require us to resolve such conflict. We are persuaded that, in the light of *Granite's* focus on the word “operations” in the endorsement, which it considered in conjunction with the parties’ division of operations in its services contract, there is *no* need here to reach the same non-coverage holding. First, the word “operations” does *not* appear in the *Mid-Continent* endorsement; rather, it uses “your **work**”, which, per its policy definition as *work or operations*, may indicate that broader coverage was intended; second, the underlying services contract does *not* divide responsibilities between CPL and PMI *vis-a-vis* PMI’s work; and finally, based on the finding in the *Fant* action that PMI controlled *Fant's* work at CPL, his injury, at least in part, “arose out of” PMI’s work for CPL. [Emphasis added]

### Majority Rule: Out of State

**Cases Finding Coverage of Additional Insured’s Negligence.** The following cases have upheld coverage of an additional insured’s negligence: *Marathon Ashland Pipe Line v. Maryland Casualty*, 243 F.3d 1232 (10<sup>th</sup> Cir. 2001)(under Wyoming law “ongoing operations for insured” type additional insured endorsement covers the “natural consequence” of the named insured’s act hiring its employee and includes the negligence of the additional insured; court noted that WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged 2000) at page 1576 defines “ongoing” as “that [which] is going on; that [which] is actually in progress: and at page 1581 defines “operations” as “a doing or performing esp[ecially] of action); *Fireman’s Fund Ins. Co. v. Atlantic Richfield Co.*, \_\_\_\_ (Cal.App. 4<sup>th</sup> 2001)(finding that **ISO CG 20 10 10 01 Additional Insured-Owners, Lessee or Contractors (See Appendix 25)** which covers an additional insured for liabilities arising out of the work of the named insured covered the additional insured’s sole negligence [failure to maintain a step] because the accident happened while the injured employee was performing work for the additional insured); *Meadow Valley Contractors v. Transcontinental Ins. Co.*, 27 P.3d 594 (UT 2001)(“liability arising out of your work” endorsement covered additional insured’s sole negligence since it “originated from, was incident to, and was in connection with” the work of the named insured); *Philadelphia Electric Co. v. Nationwide Mutual Ins. Co.*, 721 F.Supp. 740 (E.D. PA. 1989)-found additional insured endorsement for “any work performed by (insured)” as broad enough to cover additional insured’s negligence (indemnity was generally worded indemnity with exclusion for indemnitee’s sole negligence); *Rupp v. American Crystal Sugar Co.*, 465 N.W.2d 614, 617 (N.D. 1991)-court held “there could be no purpose for the insurance provision other than to protect (the owner) from the consequences of its own negligent acts”; *Clark v. B & D Inspection Service*, 896 F.2d 105 (5th Cir. 1990)-construed the following policy language: “as an additional insured, any person or organization when required to be so named but only as respects operations of the named insured” as including additional insured’s negligence finding that “the policy language addresses the factual context in which the liability of the named insured arises, not the legal theory on which it is based.”; *Woods v. Dravo Basic Materials Co.*, 887 F.2d 618 (5th Cir. 1989)-insurance covenant to “cover all risks”; *Valentine v. Aetna Ins. Co.*, 564 F.2d 292 (9th Cir. 1977); *Jokich v. Union Oil Co.*, 574 N.E.2d 214 (Ill. 1991)-insurance covenant provided that it was not limited by the coverage of the indemnity (indemnity provision was a limited indemnity excluding the Indemnified Person’s sole negligence); *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993); *Saavedra v. Murphy Oil U.S.A., Inc.*, 93 F.2d 1104 (5th Cir. 1991); *Charter Oak Fire Ins. Co. v. Trustees of Columbia University*, 604 N.Y.S.2d 55 (1993); and *Transamerica Ins. Group v. Turner Constr. Co.*, 601 N.E.2d 473 (1992).

**Minority Rule: Out-of-State Cases Finding Additional Insured Not Covered for Own Negligence.** *Consolidation Coal Co. v. Liberty Mutual Ins. Co.*, 406 F.Supp 1292 (W.D.Pa. 1976)-insurance covenant limited additional insured’s coverage to “but only with respect to acts or omissions of the named insured in connection with the named insured’s operations”; *First Ins. Co. v. State*, 665 P.2d 648 (Ha. 1983)-additional insured endorsement contained an exclusion of coverage for “...bodily injury or property damage arising out of any act or omission of the additional insured or any of his employees, other than general supervision of work performed for the additional insured by the named insured”; *National Union Fire Ins. Co. v. Glenview Park District*, 632 N.E.2d 1039 (Ill. 1994)-policy provided coverage “...with respect to operations performed by or on behalf of the Named Insured” but then stated that the coverage “... shall not apply to damages arising out of the negligence of the Additional Insured(s)...”

A number of courts have held that the “additional insured” is only covered for liability resulting from the negligence of the named insured (i.e., only for vicarious liability), and not the additional insured’s own negligence. *Harbor Ins. Co. v. Lewis*, 562 F.Supp. 800 (E.D. Pa. 1983); *Travelers Ind. Co. v. Hanover Ins. Co.*, 470 F.Supp. 630 (E.D. Va. 1979); *National Union Fire Ins. Co. v. Glenview Park District*, 632 N.E.2d 1039 (1994); *Federal Ins. Co. v. Commerce &*

*Industry Ins. Co.*, 589 N.Y.S.2d 439, 187 A.D.2d 278 (1992), *appeal den'd*, 599 N.Y.S.2d 804, 616 N.E.2d 159 (1993); *Scottish & York Int'l Ins. Group v. Ensign Ins. Co.*, 709 P.2d 397 (Wash. App. 1985).

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

**Provision:**

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!

**e. Express Exclusion of Additional Insured's Negligence.** The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6<sup>th</sup> Cir. 2000) in which the 6<sup>th</sup> 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.

**Provisions.**

**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.**

**f. Listing as Additional Insured Without Indemnity Agreement.** There are important considerations to be remembered when evaluating relying solely upon listing a party as an additional insured without a backup contractual indemnity agreement. The policy may be canceled with or without the additional insured's knowledge; the insurer may become insolvent; and policy limits and exclusions from coverage may limit the protection.

**g. Cause of Action Against Insurance Purchaser for Failure to List Other Party as Additional Insured.** A party that breaches its contractual obligation to list the other party as an additional insured is liable for all damages suffered as a result by the non-listed party, including attorney's fees incurred by the non-listed party in defending a claim 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 [14<sup>th</sup> 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. Crown was sued by Coastal's employee, who was injured when the truck he was refueling on Crown's premises caught fire due to Crown's negligent maintenance of Crown's gas refueling equipment. The insurance provision did not refer to an additional insured designation but provided for Coastal to obtain insurance protecting Crown.

**Provision:**

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.

**h. Additional Insured's "Other Insurance".** The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under someone else's policy rather than having to rely upon one's own policy. Additional insured Indemnified Person's 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 conflict by amendment to the Indemnified Person's policy. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969). **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. But the 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).

**i. Persons Listed.** A disadvantage of being an "additional insured" as opposed to a "named insured" is that additional insured status does not provide coverage for the officers, directors, and partners of the additional insured, unless specifically listed individually as additional insureds. An additional insured provision covering "employees" of the additional insured does not cover a "volunteer" assisting the additional insured. *Sturgill v. Kubosh Ins. Co. of America*, \_\_ S.W.2d \_\_ (Tex. App.-Houston [1st Dist.] Nov. 14, 1996) 1996 WL 665552.

[<sup>51</sup>] **a. CGL Insurance - Additional Insured - ISO 20 10.** This endorsement provides coverage to the additional insured for an owner on the contractor's CGL policy (or for a contractor on a subcontractor's CGL policy) for liability **arising out of** the contractor's **ongoing operations** for the owner (or for the subcontractor's ongoing operations for the contractor, as the case may be). Liabilities **occurring after** completion of work are not covered.

**b. CGL Insurance - Additional Insured - ISO 20 26.** This endorsement is the broadest of the ISO Additional Insured Endorsements. It covers the additional insured for liability "arising out of your (the insured's) operations or premises owned by or rented to you (the insured). It does not contain carve outs for the "acts or omissions" of the additional insured.

**c. CGL Insurance - Additional Insured - ISO 20 11 - Managers or Lessors of Premises.**

**d. CGL Insurance - Additional Insured - ISO 20 24 - Owners or Other Interests from Whom Land Has Been Leased.**

[ <sup>52</sup> ] **CGL Insurance - Additional Insured - ISO 20 33 - Owners, Lessees, or Contractors - Automatic When Required in Construction Agreement With You.**

[ <sup>53</sup> ] **CGL Additional Insured - Defense.** Subject to scope of liability coverage set out in the Additional Insured Endorsement, the insured's CGL policy provides the additional insured with rights to a defense.

**Insurer's Duties to 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) (Vernon 1981) violation.

[ <sup>54</sup> ] **CGL Additional Insured - "Personal Injury" Coverage.** The ISO CGL Policy extends "personal injury" coverage to additional insureds.

[ <sup>55</sup> ] **CGL Additional Insured - Excess Liability Coverage.** The wording of the excess liability or umbrella policy will need to be examined to determine if it covers an additional insured. Frequently, excess or umbrella policies provide automatic coverage of additional insureds as "insureds" under the primary policy.

[ <sup>56</sup> ] **CGL Insurance - Additional Insured - ISO 20 37 - Owners, Lessees or Contractors - Completed Operations.**

[ <sup>57</sup> ] **CGL Insured's - "Other Insurance."** **Appendix 18** is ISO's most recent version of the standard "other insurance" clause in standard liability insurance policies. Most CGL policies contain an "other insurance" provision like that set out as **Appendix 17**. Insurance containing an "other insurance" provision like the one in **Appendix 17** make the insured's insurance primary and contributing towards payment of losses also covered by another insured's insurance, except for insurance of the type listed in **4b** "Excess Insurance" of **Appendix 17**. The 1998 ISO revised "other insurance" clause, if contained in an insured's policy, provides that the insured's insurance is **excess** over any insurance coverage afforded the insured by being designated as an "additional insured by *attachment of an endorsement*." This is ISO's attempt to make an additional insured's own CGL insurance excess if it is added to another's insurance as an additional insured by an endorsement to the other person's (e.g., an owner added to a contractor's insurance) as an additional insured by an endorsement. Note, however, that 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 policy to make it excess over the policy which names the additional insured as an additional insured in order to avoid both policies being primary and co-contributing.

[ <sup>58</sup> ] **CGL "Other Insurance" - Insured's Endorsement.** **Appendix 19** is a form of endorsement to an insured's own insurance policy (occurrence form) designating it as being excess over insurance available to it as an additional insured. The purpose of this type of endorsement is to keep an insured's insurance for which it has paid the premium from being called on to be primary and co-contributing with a policy on which it is an additional insured.

[ <sup>59</sup> ] **CGL Insurance - Waiver of Subrogation - Pre-loss Waiver.** The standard form CGL policy, the ISO commercial general liability form CG 00 01, is silent as to pre-loss waivers, although it expressly prohibits post-loss waivers.

**c. Business Auto Policies.**

[ <sup>60</sup> ] **BAP Insurance.** Business Auto Policies ("BAP") contain blanket additional insured provisions. This form is approved for use in Texas. This form can be used either to confirm the existence of a general "*any person*" additional insured provision in the BAP or specifically to designate persons to be additional insureds. This endorsement also contains a requirement that the insurer notify the additional insured in advance of insurance cancellation.

[<sup>61</sup>] **BAP Insurance - Waiver of Subrogation.** This form is approved for use in Texas. This form is an endorsement to the BAP waiving the insurer's subrogation rights. This form does not require the designation of the parties as to whom the insurer's rights are waived. Note that this form requires that the contract between the contractor and the owner contain a waiver of subrogation provision in order for the insurer to have waived its rights of subrogation. If the contract does not contain a contractual waiver of the insurer's right of subrogation, this form does not waive the insurer's right of subrogation.

### 3. Property Insurance.

#### a. Risk of Loss Allocation - Waiver of Subrogation.

[<sup>62</sup>] **Waiver of Subrogation.** Many commercial property policies and inland marine policies include subrogation clauses that imply permission to grant pre-loss waiver. However, some forms may specifically deny the insured the right to waive subrogation. The ISO form expressly recognizes the right of the insured to waive subrogation.

[<sup>63</sup>] **Waiver of Subrogation - Scope of Insurer's Claims Waived.** Care should be taken in drafting the scope of the waiver of subrogation. A waiver of subrogation as to "the premises" does not include the tenant's furniture, equipment, machinery, goods or supplies which the tenant might bring on to the premises. *See International Medical Sales, Inc. v. Prudential Ins. Co. of America*, 690 S.W.2d 84 (Tex. Civ. App.--Dallas 1985, *no writ*).

[<sup>64</sup>] **Waiver of Subrogation - Waiver Limited to Risks or Insurance Proceeds.** 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.

[<sup>65</sup>] **Waiver of Subrogation - Verification of Effect of Waivers on Insurance Coverage and Cost of Insurance Coverage.** Before the parties agree to waivers of recovery or subrogation, they should verify that their respective insurance policies will not be voided due to the waiver. Also, the parties should determine, in advance, if the waivers will impact the cost of coverage. Confirmation of endorsement reflecting contractual indemnity, waiver of subrogation and additional insured/loss payee should be verified as a condition of extending the waivers.

[<sup>66</sup>] **Waiver of Subrogation - Leases - Landlord and Tenant Relationship.** 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 or 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.

**Rationale for Waivers of 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.

**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.

**b. Builder's Risk - Risk of Loss Allocation.**

[<sup>67</sup>] **Property Insurance - Construction - Builder's Risk Insurance- Waiver of Subrogation.** Builders risk insurance is written on a variety of forms. Therefore, it is important to determine whether the policy prohibits waiver of subrogation. The typical mutual waiver of subrogation in the owner-contractor construction contract form may invalidate the builder's risk coverage. The following is the **ISO Builders Risk Coverage Form CP 00 20 10 91** provision:

4. Waiver of Recovery Against Others

You may not waive your rights to recover damages from an architect, engineer or building trades contractor or subcontractor with respect to the described premises except as agreed to in writing by us. This provision supersedes any provision to the contrary in the TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US Commercial Property Conditions.

[<sup>68</sup>] **Property Insurance - Construction - AIA - Risk Allocation.** Waivers of subrogation in the AIA system are designed to shift to the owner and its property insurance carrier the risk of loss to the project during construction. Such provisions are a valid risk allocation for the following reasons: (1) They avoid disruption and disputes between the parties involved in the construction project; (2) They allow the parties to identify and allocate the risks associated with the project; and (3) They allow one party to contract to provide the property insurance for all risks associated with the project for all parties. Under the AIA documents, the owner is responsible for obtaining the type and amounts of property coverage.

[<sup>69</sup>] **Property Insurance - Construction - AIA - Waiver of Subrogation - Fair Notice Test.** The AIA Waiver of Subrogation provision is drafted as a waiver of recovery. However, this provision does not meet the fair notice requirements for releases articulated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) in order to release liabilities arising out of the Released Party's negligence. The provision is neither conspicuous nor does it expressly refer to the negligence of the party being released.

[<sup>70</sup>] **Property Insurance - Construction - AIA - Waiver of Subrogation - Express Negligence Test.** The waiver should expressly cover loss due to the negligence of the other party. Although no Texas case has yet addressed whether the waiver of subrogation clause must meet the fair notice requirements, such clauses are exculpation clauses identical in effect as those held unenforceable for failing to meet the fair notice requirements, including the express negligence test, in *Dresser Industries, Inc. v. Page Petroleum, Inc.* 853 S.W.2d 505 (Tex. 1993). If so, then **most waiver of subrogation clauses in standard use are not enforceable as written!**

[<sup>71</sup>] **Property Insurance - Construction - AIA - Waiver of Subrogation.** The form of waiver of subrogation contained in the AIA documents is a "**waiver of recovery**" between the parties (e.g., the owner and the contractor in Paragraph 11.3.7 to the **AIA A201 General Conditions of the Contract for Construction**), but also is a waiver of recovery by the parties against "any of their subcontractors, sub-subcontractors, agents and employees" and requires that these third parties similarly provide a waiver of recovery against all such parties to the project.

The waiver of subrogation contained in the AIA A201 waives recovery between the parties to the extent covered by property insurance applicable to the Work. This provision does not expressly address loss within the deductible, loss above the amount of property insurance or uninsured losses.

This provision does not waive claims or subrogation as to liabilities arising out of bodily or personal injuries.

Since releases are construed by courts narrowly, the AIA waiver of subrogation language has been interpreted narrowly. In *SSDW Co. v. Brisk Waterproofing Co.*, 556 N.E.2d 1097 (N.Y. 1990), a New York court held that the waiver clause found in the AIA Construction Projects of a Limited Scope form applied only to damages occurring to areas within the limits of the "**work**" and not to the parts of the building outside the "work". *Also see Public Employees Mutual Ins. Co. v. Sellen Constr. Co.*, 740 P.2d 913 (Wash. App. 1987).



The **time period covered** by the "waiver" has been the subject of litigation. In *Automobile Ins. Co. v. United H.R.B.*, 876 S.W.2d 791 (Mo. App. 1994) an insurer of the owner brought a subrogation action against a contractor for property damaged caused by a fire that occurred five months after final payment had been made to the contractor and after the owner had exclusive control of the premises. The court found an ambiguity between the AIA provisions. The contractor took the position that it had an insurable interest in the property as long as the owner maintained the insurance policy in effect at the time the work was being done. The court, however, held that the waiver of subrogation provision no longer applied after final payment because the contractor no longer had an insurable interest in "the work."

**Provision: Par. 11.3.7 AIA Document A201**

The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub- subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein.

**3. Insurance Provisions.**

**a. Certificates.**

[<sup>72</sup>] **Certificate of Insurance.** 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*).

**Provision: Certificate does not create coverage.**

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

**Provision: Certificate does not state prior claims on limits.**

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.

**Provision: No duty to notify certificate holder.**

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.

**b. Insurer Ratings.**

[<sup>73</sup>] **Best's Rating System.** 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."

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

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

Rating modifiers of "u" for "Under Review" or "q" for "Qualified" sometimes appear with a Best's Rating. For companies that are not rated are designated "NR-1" for "insufficient data" and "NR-2" for "insufficient size and/or operating experience."

**c. Sample.**

[ <sup>74</sup> ] **Insurance Provisions.** The insurance provisions provide for designation of the Named Indemnified Person and its related parties as additional insureds and with waiver of subrogation against the Named Indemnified Person and its

related parties, without exception for the additional insured's sole or contributory negligence. Specific ISO forms or equivalent are specified in order to assure terms of coverage and the limits of the exclusions. Blanket additional insured provisions and blanket waiver of subrogation provisions contained in the insuring policy are specified as being permitted, if after review they are determined to meet the insurance requirements. Note most blanket provisions do not list all of the parties that should be protected.

The Indemnifying Person's insurance is specified to be primary as regards any other insurance carried by the Indemnified Person and its related parties. Note certain blanket and additional insured endorsements provide that the additional insured's insurance will be primary and contributing unless the contract between the parties requires the insuring party's insurance to be primary. See the footnotes to the blanket and additional insured endorsements.

[ <sup>75</sup> ] **Common Errors and Problems.**

**a. CGL 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
- Broad form property damage endorsement
- Personal and advertising injury liability endorsement
- Host liquor liability endorsement

This terminology should be avoided in modern contracts.

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.

<b>Antiquated Terminology</b>	<b>Current Terminology</b>
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, coninsured	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.

### "Named Insured" versus "Additional Insured"

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.

"*Named Insured*" is not a defined coverage term of the CGL policy, nor is it extensively used in CGL policy language. The term appears only in the following four sections of the policy.

1. The policy condition pertaining to premium audit (where the "*first Named Insured*") is given specific rights and duties with respect to the payment and reimbursement of policy premiums)
2. The policy condition pertaining to separation of insureds (in which it is stipulated that insurance applies "as if each Named Insured were the only Named Insured")
3. The provision that newly acquired organizations may qualify as named insureds, and that past partnerships, joint ventures, and limited liability companies must be listed as named insureds in order for coverage to apply to them.
4. The provision of notice of cancellation and nonrenewal to the "first Named Insured"

Named insureds frequently are referred to in the CGL policy, however, under the title "*you*," as explained in the policy's introductory language.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.

Therefore, a CGL named insured is a person or organization listed as such in the policy declarations or qualifying otherwise for that status (as in the case of a newly acquired organization.) When more than one named insured is listed in the declarations, the first of those listed entities acquires certain rights and duties as the "first Named Insured."

Other parties having insured (but not *named* insured) status under the CGL policy include partners in a named insured partnership, members of a named insured joint venture; executive officers, directors, stockholders, and—with certain exceptions—employees of a named insured corporation; the named insured's legal representative if the named insured dies; the named insured's real estate manager; and *any entity added to the policy as an insured by endorsement*. All of these insureds have slightly different rights and duties from those conferred on the policy's named insureds.

Additional insureds have less stringent obligations with respect to reporting occurrences that might give rise to a claim under the policy. Certain CGL policy exclusions apply only to the named insured. For instance, the policy's property damage exclusion applies to damage to property owned by, rented by, occupied by, or loaned to the *named* insured ("you"), but it applies to damage to personal property in the care, custody, or control of "the insured." That is, it applies with respect to *each* insured's liability for personal property in that insured's care, custody, or control. The *named* insured's officers, directors, and employees qualify as insureds themselves, but not the officers, directors, or employees of additional insureds.

Aside from these differences, basic general liability coverage depends upon the language of the CGL insuring agreement and its references to "the insured." The language reads as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

An entity named as an additional insured in an endorsement to the CGL policy is as much "the insured" in the context of this insuring agreement as is the named insured who purchased the policy.

Occasionally one party to a contract will require that it be added as an *additional named* insured to the liability policy of another contracting party. Such requests often have their origins in a time when named insured status (but not all categories of insured status) carried with it a right to be notified if the policy was going to be canceled. (Cancellation of an indemnitor's insurance is obviously a matter of vital concern to an indemnitee.) Standard CGL forms currently in use guarantee notice of cancellation only to "the first named insured" identified in the policy declarations, not to all named insureds. Therefore, the most commonly perceived advantage of named insured status under a general liability policy no longer exists.

<b>CGL POLICY PROVISIONS NAMED INSURED VERSUS INSURED</b>		
<b>Named Insured</b>	<b>Insured</b>	<b>Policy Provisions</b>
		<b>Insuring Agreement</b>
	✓	Pay on behalf of
		<b>Exclusions</b>
	✓	Intentional injury from the standpoint of
	✓	Obligation to pay damages by reason of contractual liability <sup>1</sup>
	✓	Liquor liability <sup>2</sup>
	✓	Obligations under workers compensation and other laws
	✓	Employers liability
	✓	Except for liability assumed under contract by <sup>3</sup>
✓	✓	Environmental pollution by
	✓	Watercraft, aircraft and autos <sup>4</sup>
	✓	Transportation of mobile equipment by auto of
✓		Property damage to owned, rented or occupied property of
✓		Property sold, given away or abandoned of
✓		Property loaned to
	✓	Personal property in care, custody or control of <sup>5</sup>
✓		That particular part of any real property being worked on by
✓		That particular part of property to be restored because of the work of
✓		Property damage to product of
✓		Property damage to work of
		Property damage to impaired property detailing with:
✓		a product of
✓		a delay or failure to perform a contract by
		Damages incurred for the:
✓		recall of products of
✓		work

<sup>1</sup>The exception to this exclusion is an "insured contract" as defined. However, part f. of "insured contract" specifically applies to contracts pertaining to the named insured's (your) business and under which the named insured (you) assumes the tort liability of another.

<sup>2</sup>The policy makes the exclusion applicable to any insured, but the exception to the exclusion only applies if the named insured (you) manufactures, sells, serves, etc. alcoholic beverages.

<sup>3</sup>The employers liability exclusion provides an exception for liability assumed by the *insured* under any contract or agreement. However, contractual liability coverage as provided by the policy in subpart f. is specifically limited to liability assumed by the *named insured* (you). See (2) above. This presents a possible ambiguity.

<sup>4</sup>Three of the five exceptions to this exclusion apply specifically to the named insured (you).

<sup>5</sup>The 1986 CGL policy excluded personal property in the named insured's (your) care, custody, or control.

Source: *The Additional Insured Book*, 4<sup>th</sup> ed., International Risk Management Institute, Inc., 2000

**INSURED AND NAMED INSURED DIFFERENCES**

1. The named insured (NI) has more stringent occurrence reporting requirements.
2. The NI's employees, executive officers, and directors are insureds.
3. Certain exclusions apply only to the NI (e.g., property damage).
4. The NI must reimburse the amount of any deductible paid by the insurer.

5. The *first* NI is required to pay premium.
6. The *first* NI receives any premium return.
7. The *first* NI may cancel the policy.
8. The *first* NI receives cancellation notice.

Source: *The Additional Insured Book*, 4<sup>th</sup> ed., International Risk Management Institute, Inc., 2000

Another feature of some requests for additional insured status is the stipulation that the indemnitor's policy, to which the indemnitee is being added as an insured, be modified to provide "**cross-liability**" coverage. Cross-liability refers to the loss exposure created when one insured under a policy sues another. Standard general liability policies in use today provide "cross-liability" coverage—without the need for any modification—by virtue of the "**separation of insureds**" condition. This condition of the policy states that coverage will apply "separately to each insured against whom claim is made or suit is brought." For this reason, it may be a legitimate precaution to include in contract language a stipulation that liability insurance as required by the contract provide cross-liability *coverage*, but not a demand for a cross-liability *endorsement*, which is unnecessary when the standard CGL form is being used.

**b. Business Auto.**

Antiquated Terminology	Current Terminology
Comprehensive auto liability insurance	Business auto coverage form
Additional insured or co insured 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



**c. Workers Compensation.**

The standard workers compensation and employers liability policy used in most states was substantially revised in 1984 and again to a lesser extent in 1992. As compared to the previous 1954 policy, these revisions included some slight changes in terminology and coverage approaches that should be reflected in contract insurance requirements. One of these was a change in the name from "workmen's compensation" to "**workers compensation.**" Another more important change was the inclusion of "other states coverage" in the basic form and the elimination of the "broad form all states" endorsement, which was previously used to provide this coverage.

Antiquated Terminology	Current Terminology
Workmen's compensation insurance	Workers compensation and employers liability insurance
Borrowed servant endorsement	Alternate employer endorsement
All states coverage/broad form all states coverage	Other states coverage
In rem endorsement	Maritime coverage endorsement

A very problematic requirement sometimes included in contracts is one for additional insured status. The workers compensation policy covers injuries to its insured's employees. If additional insured status were to be provided to another party, the policy would cover injuries to that party's employees, and the insurer would be entitled to a commensurate additional premium.

**d. Property Insurance.**

One error sometimes made by financial institutions is to require insurance equal to the loan amount. The loan amount is often not reflective of the insurable value of the property. It could be higher, as would be the case when it includes property that would not be covered under the policy, such as the value of the land. Conversely, the loan amount may be significantly less than the value of the property, since it would not recognize increases in the property's value over time. For this reason, the amount of insurance required should relate to the valuation basis (replacement cost or actual cash value) of the insurable property rather than the loan amount.

Another problem that sometimes arises is a requirement of **additional named insured status.** There are no advantages provided to a party who is not an owner of the property to be a named insured on the policy, and commercial property insurance underwriters have no endorsements in their forms portfolios to comply with such a contractual requirement. For most contracting situations, additional insured status, a loss payee clause, a lenders loss payable endorsement, or a mortgage clause is quite sufficient for protecting the contracting party's interest in the property.

Outdated terminology requiring that the policy provide "**fire and extended coverage**" is often used in contracts. "**Extended coverage**" refers to an endorsement that was once added to a standard fire policy to cover the perils now insured under ISO's basic causes of loss form. Since this endorsement is no longer used, a better approach to requiring this coverage would be to refer to the ISO basic causes of loss form.

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

**Covering Additional Interests**

There are four basic ways that the interest of a party other than the named insured can be protected in commercial property policies.

- Through a mortgage holders provision or endorsement (also called a "*mortgagee clause*")
- Through a loss payee endorsement
- Through a lenders loss payable endorsement
- Through an additional insured endorsement

ADDITIONAL INTERESTS APPROACHES COMPARISON				
Type of Endorsement	Typical Insurable Interest	Receipt of Loss Payment	Typical Notice of Cancellation	Coverage Despite Insured's Acts
Mortgage holders provision or endorsement	Holds mortgage on covered building(s)	Exclusive	For cancellation by the insurer only; 30 days, except 10 days nonpay. May include 10 days' notice of non-renewal.	Yes.
Loss payee endorsement	Leases personal property to the insured, may also be a creditor	May be exclusive or shared with the insured	None, unless specifically requested.	No.
Lenders loss payable endorsement	Creditor with an interest in covered personal property	Exclusive.	For cancellation by the insurer only; 30 days, except 10 days nonpay. May include 10 days' notice of non-renewal.	Yes.
Additional insured endorsement	Owner of building(s) leased to the insured	Shared with the insured	None, unless specifically requested; check policy cancellation provisions.	No.

### C. Releases.

[ 76 ] **Releases and Exculpation.** An example of a "**release**" is, "You are not liable ... " 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. *See Wallerstein v. Spirt*, 8 S.W.3d 774 (Tex.App.-Austin [3<sup>rd</sup> Dist.] 1999, *no writ*) - involving an indemnity by partners but not a release between partners. An example of an "**exculpation**" provision is, "I am not liable ... " 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. *See Ikard, Exculpatory Clauses and Their Effectiveness to Protect Drafters and Fiduciaries*, 18th ADVANCED ESTATE PLANNING AND PROBATE COURSE (STATE BAR OF TEXAS 1994); Annot., 49 A.L.R. 3d 321, *Validity of Exculpatory Clause in Lease Exempting Lessor from Liability* (1973); Annot., 30 A.L.R. 4th 971, *Applicability of Exculpatory Clause in Lease to Lessee's Damages Resulting From Defective Original Design or Construction* (1984); Annot., 8 A.L.R. 1393, *Validity, Construction and Effect of Agreement Exempting Operator of Amusement Facility from Liability for a Personal Injury or Death of Patron* (1966); Annot., 66 A.L.R. 4th 622, *Liability for Injury Incurred in Operation of Power Golf Cart* (1988); Annot., 88 A.L.R.3rd 1236 *Liability of Youth Camp, its Agents or Employees, or of Scouting Leader or Organization for Injury to Child Participant in Program* (1978); Annot., 73 A.L.R.4th 496, *Liability of Local Government Entity for Injury Resulting from Use of Outdoor Playground Equipment at Municipally Owned Park or Recreational Area* (1989). Springer, *Releases: An Added Measure of Protection from Liability*, 39 BAYLOR L.REV. 487 (1987); Smith, *Selected Topics in Lease Drafting: Indemnities, Waivers, Disclaimers and Remedies*, ADVANCED REAL ESTATE DRAFTING COURSE Q (STATE BAR OF TEXAS 1990).

#### 1. Released Persons.

[ 77 ] **Released Persons - Named Specifically.** 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 tortious 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. Perez*, 794 S.W.2d 373 (Tex.App.--Corpus Christi 1990, *writ den'd*).

**"Agents" Do Not Include "Contractors"**. The release in *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.--Austin 1993, *writ granted*) releasing Quaker Oats and its "agents" was held not to include a drug testing laboratory that was hired by Quaker Oats to perform pre-employment drug screens. The court held that the lab was an independent contractor and was not covered by the employment application release form that released "Quaker Oats, its employees and its agents, from any liability based on the results of the drug screening." See also *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508-09 (Tex. 1993); *Summers v. Skillern & Sons, Inc.*, 381 S.W.2d 352, 356 (Tex. Civ. App.--Waco 1964, *writ dismissed w.o.j.*); but cf. *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794, 806 (Tex. 1992).

**Third Party Beneficiaries.** For example, in *Derr Constr. Co. v. City of Houston*, 846 S.W.2d 854 (Tex. App.--Houston [1st Dist.] 1992, *no writ*), the court held that a release/indemnity provision in a subcontract released the owner (the City of Houston) from liability for damages to the subcontractor's crane. The court held that the owner was a named third party beneficiary of the release in the subcontract. The court also held that the subcontractor's insurer could not assert any rights of subrogation to pursue the owner for the monies it had paid the subcontractor for damages to the crane. The provision in the subcontract reads as follows:

**Provision:**

Subcontractor hereby assumes full responsibility and liability for the work to be performed hereunder, **and** hereby release, relinquishes and discharges **and** agrees to indemnify protect and save harmless Contractor, the City ... from all claims, demands and causes of action of every kind and character including the cost of defense thereof, for any injury to, including death of, person (**whether they be third person, contractor, or employees of either of the parties hereto**) and any loss of or damage to property (**whether the same be that either of the parties hereto or of third parties**) caused by or alleged to be caused, arising out of, or in connection with Subcontractor's work to be performed hereunder ... whether or not said claims, demands and causes of action in whole or in part are covered by insurance hereinbefore ... . (Court's emphasis in bold; author's emphasis underlined.)

*Id.* at 858. This case was decided after the court of appeals' decision in *Dresser Industries, Inc. v. Page Petroleum, Inc.* upholding the Houston Fishing Tool release provision, but before the supreme court's decision striking it down as not being conspicuous. The court did not address the conspicuousness of the provision in *Derr Construction*. Also, the court did not review the release in light of the express negligence test.

**2. Released Matters.**

**a. Negligence.**

[<sup>78</sup>] **Released Matter - Fair Notice and Express Negligence Tests. Requirement to Be Conspicuous.** 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).

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.

How "conspicuous" is conspicuous? See Greer and Collier, *The Conspicuous Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas After Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 SO. TEX. L. REV. 243 (1994). 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 in 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. "Where a party is not able to know what the contract terms are because they are unreadable, as a matter of law the exculpatory clause will not be enforced."

In *In Re H. E. Butt Grocery Co.*, 17 S.W.3d 360 (Tex.App.-Houston [14<sup>th</sup> Dist.] 2000, *orig. proceeding*) the court of appeals determined that testimony from the injured employee to the effect that he was told not to read a waiver and release was inadmissible parole evidence. The court found that the following notice was unambiguous and supported the conclusion that the employee was aware of the agreement to arbitrate claims and releasing his common law right to sue H.E.B. as a non-subscriber to the state's workers compensation system. The court noted that the notice was in all caps and underlined.

**Provision:**

ELECTION OF COMPREHENSIVE BENEFITS, RELEASE, WAIVER, INDEMNITY AND ARBITRATION AGREEMENT

**NOTICE: BY SIGNING THIS AGREEMENT, YOU AGREE TO RELEASE AND WAIVE CERTAIN RIGHTS TO SUE YOUR EMPLOYER, THE TRUST, THE TRUSTEE OF THE H. E. BUTT GROCERY COMPANY WELFARE BENEFIT TRUST, THE PLAN, AND THE PLAN ADMINISTRATOR IN EXCHANGE FOR THE AGREEMENT TO PROVIDE CERTAIN BENEFITS THROUGH THE TRUST. YOU AGREE TO INDEMNIFY YOUR EMPLOYER AND THE RELEASED PARTIES IN CERTAIN CIRCUMSTANCES AND YOU AGREE TO ARBITRATE ALL FUTURE DISPUTES. THIS AGREEMENT AFFECTS YOUR LEGAL RIGHTS! READ THIS AGREEMENT CAREFULLY AND MAKE SURE YOU UNDERSTAND IT BEFORE SIGNING IT!**

To similar effect is the holding in *Lawrence v. CDB Serv.*, 1 S.W.3d 903 (Tex.App.-Amarillo [7<sup>th</sup> Dist.] 1999, *aff'd*) as to a waiver of the common law right to sue and election to participate in an employers that was in **bold** type in a 2 page election form.

**Actual Notice.** The court noted that the fair notice requirements are not applicable when the Indemnified Person (Released Person) establishes that the Indemnifying Person (Releasing Person) possesses actual notice or knowledge of the indemnity agreement, *citing generally Cate v. Dover Corp.*, 790 S.W.2d 559, 561 (Tex. 1990). *Dresser* at 508.

**Express Negligence Requirement.** 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. Goodbodies, 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).

The court of appeals in *Rickey v. Houston Health Club, Inc.*, 863 S.W.2d 148 (Tex. App.--Texarkana 1993, writ granted)--jogger alleged that indoor astroturf track not suitable as jogging track-- found the following release **failed** the express negligence test:

**Provision:**

You agree that you are aware that you are engaging in physical exercise and the use of exercise equipment and club facilities which could cause injury to you. You are voluntarily participating in these activities and assume all risk of injury to you that might result. You hereby agree to waive any claims or rights you might otherwise have to sue the health club, its employees or agents for injury to you on account of these activities. You have carefully read this waiver and release and fully understand it is a release of liability. You further agree to release seller from any liability for loss or theft of personal property.

The court in *Polley v. Odom*, 957 S.W.2d 932 (Tex. App.--Waco 1997, *judgm't vacated*) held that the following “**risk of loss**” provision did not pass the express negligence test as it impliedly but did not expressly release the landlord from liability for its negligence.

**Provision:**

Risk of Loss. Except where due to the willful neglect of Lessor all risk of loss to personal property or loss to business resulting from any cause whatsoever shall be born exclusively by Lessee.

**b. Gross Negligence.**

[<sup>79</sup>] **Released Matter - Gross Negligence.** The court in *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App.--Beaumont 1986, *no writ*) **struck down** a portion of a release that released the “releasee” (the race track) from liability for its gross negligence. This is the position of the Restatement. RESTATEMENT OF CONTRACTS § 574 (1932). The court cited various decisions from other jurisdictions supporting this conclusion. The court upheld the release as to injuries due to the race track’s negligence. The court found that this case did not involve an issue of unequal bargaining power. There is no public policy to protect a right to be a spectator on the infield of a race track. *Corpus Christi Speedway v. Morton*, 279 S.W.2d 903 (Tex. Civ. App.--San Antonio 1955, *no writ*). The issue of whether a release can cover future gross negligence has not been yet been decided by the Texas Supreme Court. The Supreme Court in *Memorial Medical Center of East Texas v. Keszler*, 943 S.W.2d 433 (Tex. 1997) upheld the “all claims” release as covering Keszler’s claim for damages arising out of Memorial’s alleged gross negligence by making a distinction for post-accident waivers of liability. The court stated

The court of appeals held that such a release is against public policy. 931 S.W.2d at 63 (citing *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App.--Beaumont 1986, *no writ*)). However the court of appeals failed to distinguish a pre-accident waiver of liability from a post-injury release made in settlement of claims. In *Golden Triangle*, the issue was whether a pre-injury release could effectively dispense with a claim of gross negligence. *Id.* We have never held post-injury releases of gross

negligence claims invalid. There is no logic in prohibiting people from settling existing claims. Significantly, such a rule would preclude settlement of many such claims. The court of appeals erred in holding that Keszler could not release his gross negligence claim against Memorial.

In *Franklin v. Marie Antoinette Condominium Owners Ass'n, Inc.*, No. B064293 Cal. App. Ct. 2nd App. Dist. (1993), a California appeals court held that a unit owner was not entitled to recover for water damage to her unit based upon an exculpatory clause in the condominium declaration. The clause barred the association from liability for property damage caused by a central plumbing leak unless the damage was caused by the gross negligence of the association or its directors. The unit owner sustained \$74,000 in damages to her unit from water leaking into her unit through the HVAC vents. The court found that the exclusion from the exculpatory clause for "gross negligence" did not cover the omission of the association to prevent damage to the unit owner's unit. The court also held that enforcement of the clause was reasonable and fair to the condominium owners as a whole, since they had agreed to bear the risk of loss beyond what they could recover from the association's insurance policy.

### c. Intentional Torts.

[<sup>80</sup>] **Released Matter - Intentional Torts.** The court in *Sedona Contrg. v. Ford, Powell*, 995 S.W.2d 192 (Tex.App.-San Antonio 1999, *no writ*) noted that consent can constitute a defense for liability for an intentional tort, and thus reasoned that a waiver as to future intentional torts may be enforceable under certain circumstances. Ford, Powell recommended that a school district accept the bid of the second lowest bidder, Sedona was the lowest bidder. The bid documents contained the following waiver:

#### **Provision:**

By submitting a bid, each bidder agrees to waive any claim it has or may have against the Owner [NEISD], the Architect/Engineer, and their respective employees, arising out of or in connection with the administration, evaluation, or recommendation of any bid; waiver of any requirements under the Bid Documents; or the Contract Documents; acceptance or rejection of any bids; and award of the Contract.

The court noted that it had previously found *Golden Triangle* to be too broad in its application of the RESTATEMENT (SECOND) OF TORTS. In *Smith v. Holley*, 827 S.W.2d 433, 438 (Tex.App.-San Antonio 1992, *writ denied*) the court was faced with the issue of whether a prospective employee could release a previous employer from liability resulting from the communication of information regarding their work history. In its analysis, the court recognized the holding of *Golden Triangle*, but concluded that its application to intentional conduct was too broad. The court in *Smith* stated, "that it is universally recognized that in the right circumstances one can consent to certain actions that otherwise would be intentional torts." In *Smith* the court held Holley effectively consented to the possibility of defamation by signing a release form authorizing the release of work history. The court also cited *Unocal Corp. v. Dickson Resources, Inc.*, 889 S.W.2d 604, 610 (Tex.App.-Houston [14<sup>th</sup> Dist.] 1994, *writ denied*) holding that waiver, concerning oil and gas information, to be effective which permitted for the general waiver of future intentional tort claims and extinguished plaintiff's right to sue.

**Negligence" versus "Intentional Acts".** "Negligence" does not include intentional acts. *Richker v. Georgandis*, 323 S.W.2d 90 (Tex. Civ. App.--Houston 1959, *writ ref'd n.r.e.*).

### d. Unspecified or Unknown Matters.

[<sup>81</sup>] **Strict Construction. Scope of Release. Any claims not clearly within the subject matter of the release are not discharged.** Since an exculpatory provision is drafted by the Released Party to release or carve out liabilities or contractual obligations from other expressed or implied duties, courts will strictly construe such provisions. Releases will be subject to the same rules of construction discussed above as to indemnity agreements. General categorical release clauses are narrowly construed. In *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984). *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199 (Tex.App.--San Antonio 1986, *writ ref'd n.r.e.*)--claims not clearly within subject matter of the release are not discharged, even if such claims existed at the time the release was executed. In *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991), the supreme court held that a release executed by a borrower in a settlement agreement releasing a bank "from any and all claims and causes of action ... directly or indirectly attributable to the described loan transaction" did not include the borrower's claim of tortious interference by the bank in the



borrower's contract with a third party arising out of the borrower's sale of an asset as to which the bank erroneously asserted a security interest.

The court in *Memorial Medical Center of East Texas v. Keszler*, 943 S.W.2d 433 (Tex. 1997) distinguished the release litigated in *Keszler* from the release litigated in *Victoria*. In *Keszler* Memorial and Keszler entered into a Compromise Settlement Agreement and a separate Release document concerning damage claims that Keszler asserted against Memorial due to Memorial's terminating staff privileges at the hospital. Keszler later sued the hospital for fraud, negligence, and gross negligence for injuries Keszler allegedly suffered due to exposure to ethylene dioxide, a toxic sterilizing agent the hospital used during his employment. The *Keszler* court found that the release language, releasing all as to "any other matter relating to [Keszler's] relations with [Memorial]", included "all" claims including claims of negligently caused injuries to Dr. Keszler. The court noted that the release in *Victoria* was limited to claims arising out of "the above described loan transaction", which loan transaction did not as it turned out include claims arising out of another loan transaction with Victoria Bank & Trust. The court also upheld the release as being effective to release Keszler's claim for gross negligence.

**Release of Unknown Claims.** Release of future, unknown claims is permissible in Texas. *Sweeney v. Taco Bell, Inc.*, 824 S.W.2d 289, 292 (Tex. App.-Ft. Worth 1992, writ denied); *Pecorino v. Raymark Indus., Inc.*, 763 S.W.2d 561 (Tex. App.- Beaumont 1988, writ denied)--release executed in settlement of claim by worker and wife against asbestos products manufacturers based on worker contracting asbestos released all claims, including those that might be discovered in the future, precluded subsequent action by worker's widow based on death of worker from mesothelioma.

**e. Inadvertently Released Matters.**

**Inadvertently Released Matters.** Although releases are to be construed narrowly, if the release is broad enough to cover the released claims, then the claim is released, even if the releasor is unaware of claim. *White v. Grinfas*, 809 F.2d 1157 (5th Cir. 1987)--the court held that a settlement and release agreement settling prior lawsuit, purported to waive all claims or losses between the parties, would not be set aside on the basis of mutual mistake because the plaintiff purchasers were unaware of structural defects in the foundation of the apartment project which was the subject of litigation between the parties. See also *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279 (5th Cir. 1992), rehearing denied, 964 F.2d 1145 (5th Cir. 1992), cert. denied, 113 S.Ct. 186 (1992)--phrase "any fact pleaded," as used in provision of settlement agreement in which plaintiff agreed that it would not assert "any claim or counterclaim" made in that action "or which could have been made based upon any fact pleaded," modified the phrase "which could have been made," rather than the previous clause concerning "any claim or counterclaim made;" release thus affected not only the claims actually raised in the suit, but all those that could have been made based on any fact pleaded. See however, Note, Mills, *Personal Injury Settlement Release are Avoidable on Grounds of Mutual Mistake: Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990), 22 TEX. TECH LR. 309, 310 (1991).