TEXAS RISK MANAGEMENT MANUAL

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I. INTRODUCTION TO RISK MANAGEMENT

A. Risk of Property Loss and Injuries

1. Premises

A person injured on another's property has two potential causes of action against the owner of the property: a premises liability claim for an unreasonably dangerous condition on the premises, or a negligence claim for negligent activity on the premises. When the alleged injury is the result of a negligent activity, the injured party must have been injured by, or as a contemporaneous result of, the activity itself, not by a condition the activity created. The negligent activity theory of liability is only applicable where the evidence shows that the injuries were directly related to the activity itself. If the injury was created by a condition created by an activity rather than the activity itself, the plaintiff claiming negligent activity is limited to a premises liability theory of recovery. See 59 TEX. JUR. 3d Premises Liability § 7 *Negligent activity and premises defect bases for premises liability – Negligent activity claim*.

2. Leased Premises

The following list illustrates some of the many property loss and injury risk allocation questions to be addressed in leases:

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

3. Construction Premises

In the typical construction job, an owner hires a general contractor, who hires an independent contractor (*i.e.*, a subcontractor), who employs an employee. Unfortunately accidents happen in the course of construction that result in workplace injuries or even fatalities.

B. Contractual Risk Allocation

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The success of an entity's approach to contractual risk transfer can be considered successful if it meets the following criteria:

- Risks retained are appropriate and affordable.
- Risk as an element of the overall transaction and negotiation is incorporated at the onset.

- Indemnity, insurance, and other pertinent conditions are not so onerous that contact negotiations drag on unnecessarily delaying the transaction or necessitating the use of second-rate service providers to accomplish the contract's purpose.

- Contractual conditions allocating risk are not so onerous that a court disallows their operation at a future point in time.

- Insurance requirements are clear, using recognized terms that can be interpreted both at the time the contract is negotiated and in possible future disputes.

- Insurance and other support for the indemnity is in place when a loss occurs.

- A thorough insurance monitoring process keeps the transferee in compliance with the insurance requirements.

- The performance of the contract is monitored and regularly evaluated.

C. Absence of Contractual Risk Allocation – the Common Law and Statutory Allocation Schemes

The common law allocates risks in the absence of contractual risk allocation.

1. Activities and Locations

a. Premises

(1) Premises Liability

In *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 649, 644 (Tex. 2016) the Texas Supreme Court reviews the relationship between premises liability and general tort liability, stating

> Depending on the circumstances, a person injured on another's property may have either a negligence claim or a premises liability claim against the owner….When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. *Id.* When the injury is the result of the property's condition rather than an activity, premises-liability principles apply. *Id.* Although premises liability is itself of negligence law, it is a "special form" with different elements that define a property owner or occupant's duty with respect to those that who enter the property. *Id.*

A premises liability claim encompasses a nonfeasance theory of negligence based on the failure of the owner or occupier or controller to take reasonable measures to make the premises reasonably safe. [1] The elements of a premises liability claims are the following:

- The cause of the injury is a condition of the property.

- The condition existed prior to the accident.

- The condition posed a general, unreasonable danger to all working on the premises, rather than a specific danger to a person performing a particular activity. [2]

(2) Care, Custody or Control

The Texas Supreme Court in *Wilson v. Tex. Parks & Wildlife Dep't*, 8 S.W.3d 634, 635 (Tex. 1999 per curiam) observed

> As a rule, to prevail on a premises liability claim, a plaintiff must prove that the defendant possessed – that is, owned, occupied, or controlled - the premises where injury occurred.

Of these circumstances, **control** of the premises is the key element for premises liability. [3] "Possession," "Ownership" or "occupancy"[4] of property though needs to also involve an element of control except in circumstances of strict liability.

(3) Leases

An owner that leases a premises generally owes not duty to tenants or their invitees for unreasonably dangerous conditions on leases premises. Generally under a lease, the lessor transfers possession and control of the leased premises to the lessee. [5] See further discussion below as to Leases and Leased Premises.

(4) Easements

An easement holder is considered to be an owner, occupier or controller of premises for purposes of premises liability. [6]

(5) Construction Site

Generally a property owner does not owe a duty to ensure that an independent contractor performs its work in a safe manner.[7] See further discussion below of Construction and Construction Sites.

Texas has enacted a statutory screen for premises liability of a property owner [8] for certain personal injuries, deaths or property damage occurring on construction sites. TEX. CIV. PRAC. REM. CODE ANN. §95.003 Liability for Acts of Independent Contractors provides:

> A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:
>
> (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
>
> (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

TEX. CIV. PRAC. REM. CODE ANN. §95.001 Applicability provides:

> This chapter applies only to a claim:
>
> (1) against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and
>
> (2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.

Note that Chapter 95 does not apply to everyone injured on a construction site. It expressly applies on to contractors, subcontractors, and their employees who construct, repair, renovate or modify an improvement. The statute does not apply to other persons injured on the construction site. When Chapter 95 applies, it is the claimant's exclusive remedy, and all common law claims are pre-empted.[9] A plaintiff has the burden to show both **control** and **actual knowledge** of the danger by the property owner in order for the property owner to have liability.[10]

b. Leases and Leased Premises

(1) Maintenance

(a) If Landlord Does Not Retain Control of Portion of Premises

Under the traditional common law rule, a landlord was not required to make any repairs (including structural repairs) to the premises during the lease term, unless the lease expressly obligated landlord to do so. As the Texas Supreme Court put it nearly 70 years ago:

> The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. A covenant is never implied that the [landlord] will make any repairs. The obligation to make repairs is a very important element of a lease contract. The parties were free to contract with respect to this obligation as they desired.

Yarbrough v. Booher, 174 S.W.2d 47, 49 (Tex. 1943); *see also Medlin v. Havener*, 98 S.W.2d 863, 864 (Tex. Civ. App.–Fort Worth 1936, no writ) stating that

> in the absence of a special contract to the contrary, and in the absence of fraud and deceit inducing the [tenant] to believe the landlord would make such repairs, the [landlord] is under no implied obligation to the [tenant] to keep the rented premises in a

> condition safe and suitable for the uses to be made of the demised premises by the [tenant].

Thus, at common law, a landlord generally had no implied duty to tenant (in contract or implied from the parties' relationship) or to third parties (in tort for premises liability) to keep the premises in good condition, absent either the express obligation to do so in the lease or landlord's exercise of control of conditions within the premises. *See Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285 (Tex. 1996) holding that a landlord has no duty to tenant or its invitees for dangerous conditions on the leased premises, unless the landlord: (1) makes negligent repairs; (2) conceals defects in premises of which landlord is aware; or (3) retains control over that portion of premises where a defect or unsafe condition causes injury. Thus, it has been said "[a]bsent a covenant, or evidence of concealment or misrepresentation, the landlord [is] not liable for a latent structural defect…within premises that causes damage to tenant's property." [11]

Repairs Gratuitously Made by Landlord

Ordinarily, a landlord who voluntarily makes repairs is not estopped from claiming that it had no such duty. The fact that a landlord voluntarily or gratuitously makes repairs constitutes neither an admission or evidence of a duty to make such repairs, nor does it operate to create a new or collateral agreement to do so. *See Yarbrough v. Booher*, 174 S.W.2d 47, 48-49 (Tex. 1943); *In Morton v. Burton-Lingo Co.*, 150 S.W.2d 239, 241(Tex. 1941) the Texas Supreme Court held that a landlord is not bound to make repairs or to pay for repairs that may have been made by the tenant and that "[t]he mere relation of landlord and tenant creates no obligation on the part of the landlord to repair or keep in repair the leased premises". The court in *Kallison v. Ellison*, 430 S.W.2d 839, 840 (Tex. Civ. App.—San Antonio 1968, *no writ*) held that evidence of repairs gratuitously undertaken by the lessor is not sufficient, standing alone, to establish the existence of an agreement to repair. The court in *Dalkowitz Bros. v. Schreiner*, 110 S.W. 564, 565 (Tex. Civ. App. 1908, no writ) held that, although a landlord had no express or implied duty at common law to tenant to repair a leaky roof in a single tenant building, once the landlord undertook a repair, the landlord was required to use due care and was, therefore, liable for damage to tenant's property caused by a leak in the new roof.

Implied Warranty of Suitability

The traditional common law rules governing the limitations on a landlord's duty to its tenant to repair and maintain leased premises partially gave way to an implied warranty of suitability in 1988. In *Davidow v. Inwood N. Prof'l Group-Phase I*, 747 S.W.2d 373 (Tex. 1988), the Texas Supreme Court held that there is an implied warranty of suitability that the premises in a commercial lease are suitable for their intended commercial purpose. The court states

> This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control. *Id*. at 376-77.

(b) If Landlord Retains Control of Portion of Premises

When the landlord retains possession or control of a portion of the leased premises, the landlord, in absence of any agreement to contrary, has an implied duty to the tenant to maintain the retained portion of the premises "so as not to damage the tenant." [12] A landlord has an implied contractual duty – even when a lease is silent – to its tenant, as well as a legal duty to third parties sounding in tort, to keep common areas and other facilities within the landlord's control in good repair and condition. The Texas Supreme Court in *Brown v. Frontier Theatres, Inc.*, 369 S.W.2d 299, 303 (Tex. 1963) held that when a landlord retains possession or control of a portion of the leased premises, the landlord is charged with a duty of ordinary care in maintaining the portion retained so as not to damage the tenant.

(c) Multi-Tenant Building

In the absence of an agreement to the contrary in a lease for space in a multi-tenant building

> consisting of a number of different apartments… divided among several tenants, each one of whom takes a distinct portion and none of [whom] rent the entire building, the

> rule must then be applied so as to make each tenant responsible only for so much [of the building] as his lease includes, leaving the landlord liable for every part of the building not included in the actual holding of any one tenant. *O'Connor v. Andrews*, 16 S.W. 628, 629 (Tex. 1891).

(d) Tenant's Obligation is Not to Commit Waste

In the absence of express repair and surrender covenants, a tenant has an implied obligation not to commit waste. The Texas Supreme Court in *R. C. Bowen Estate v. Continental Trailways, Inc.*, 256 S.W.2d 71, 72-73 (Tex. 1953) held that the implied covenant against waste arises from the landlord-tenant relationship, and unless superseded by an express covenant, obligates the tenant "to make such repairs as are necessary to preserve the property in the condition in which it was when rented, reasonable wear and tear excepted[.]" The court in *King's Court Racquetball v. Dawkins*, 62 S.W.3d 229, 233 (Tex. App.—Amarillo 2001, no pet.) noted that a covenant against waste is "the implicit duty of a tenant to exercise reasonable care to protect the leased premises from injury other than by ordinary wear and tear". [13]

(e) Express Covenant to Pay for Repairs not Covenant to Make Repairs

At common law, a covenant to make repairs is distinct from the covenant to pay for them, and an agreement to pay for a repair does not itself impose an active duty to make a repair. The court in *National Living Ctrs., Inc. v. Cities Realty Corp.*, 619 S.W.2d 422, 424 (Tex. App.—Texarkana 1981, *no writ*) held "[a] covenant to pay for repairs is distinct from the covenant to make repairs, and such an agreement does not impose upon the landlord any active duty to repair…" and held that a clause providing "any alterations or repairs, required for said licensing will be at the expense of the Lessor…" did not impose affirmative duty on landlord to make needed repairs.

(2) Casualty Loss

(a) Tenant Takes the Risk

At common law, the destruction of the improvements on leased property did not relieve the tenant of its obligation to pay rent or give the tenant the right to terminate the lease. [14]

(b) Landlord Bears Risk of Decline in Improvements not Restored

At common law, neither the landlord nor the tenant is obligated to repair the premises after casualty damages unless it caused the damage; the lease continues in effect, and the rent is not reduced or abated. In order to use the premises, the tenant is put to the burden of restoring the premises to useful condition. If the lease does not obligate the landlord or the tenant to restore the premises after a casualty loss, and the loss is not caused by the negligence of either party, the landlord bears the risk of the decline in value of the property if either it or the tenant does not restore the property.

(c) Tenant Liable for Negligently Caused Damage

The tenant is liable to the landlord, if the tenant negligently destroys the premises (*e.g.*, a negligently caused fire) absent a provision in the lease to the contrary. *Nagorny v. Gray*, 261 S.W.2d 741 (Tex. Civ. App.—Galveston 1953, *no writ*).

2. Indemnity Absent Contractual Indemnity

a. Common Law

Early English and American courts refused to adjust the financial burdens between defendants who were regarded by the court as being equally blame worthy. Therefore, joint tortfeasors who were in "***pari delicto***" had no rights to contribution at common law from other joint tortfeasors, each tortfeasor being jointly and severally liable. However, courts held that they had the power in equity to aid a tortfeasor who was relatively blameless by granting indemnity ("**common law indemnity**"). Prior to 1980, Texas courts viewed the availability of common law indemnity between jointly liable defendants based on whether: (1) the court viewed the defendants as being equally at fault (*i.e.*, in *pari delicto*) or (2) the defendants were not equally at fault (not in pari delicto) with common law indemnity being allowed on a case-by-case basis ("an all or nothing approach to indemnification"). Courts envisioned two torts: one tort committed by the defendants against the plaintiff, the second committed by one of the defendants against the other, which gave rise to court-made indemnity.

b. Statutory Allocation

(1) 1917 Statute

The legislature enacted statutes in 1917 and 1973 establishing rights of contribution between certain jointly liable tortfeasors. In 1917 Texas enacted its first statutory contribution scheme for tort actions, which survives today in Chapter 32 of the Texas Civil Practice and Remedies Code (the "**1917 Statute**" and as amended "**Chapter 32**"). TEX. CIV. PRAC. & REM. CODE ANN. §§ 32.001 to 32.003.

(2) 1973 Statute

In 1973, Texas adopted a comparative negligence statute that also governed contribution in pure negligence cases. Later enactments and amendments extend the comparative responsibility scheme, including contribution claims, to virtually all tort actions (the "**1973 Statute**" and as amended "**Chapter 33**"). TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001 *et seq.*

(3) Court Intervention

In **1980** the Texas Supreme Court in *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980) held that there could not be common law indemnity due to the adoption of the Comparative Negligence and Contribution Statute in 1973. Texas courts have held that Texas' comparative negligence statutes abolished the common-law doctrine of indemnity between negligent tortfeasors. In **1984** the Texas Supreme Court felt compelled, due to continued inaction of the Texas legislature, to enact by judicial fiat in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) its own comparative and contribution scheme to compare the fault or causation of defendants where one or more of the defendants were held liable on theories of negligence, strict liability and breach of contact.

(4) Comparative Responsibility and Apportionment

In **1987**, the Texas legislature enacted "**tort reform**" amendments to the Civil Practice and Remedies Code (the "**1987 Statute**"), the genesis of today's Comparative Responsibility and Apportionment legislative risk allocation scheme. The common law principle of joint and several liability for the damages resulting from an "indivisible wrong or tort" was replaced under the 1987 Statute with the "tort reform" concept that a defendant is generally liable 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. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a).

(5) 1995 Statute

Again, in **1995** the Texas legislature enacted further significant "tort reform" amendments to Chapter 33 of the Civil Practice & Remedies Code (the "**1995 Statute**").

c. Sole Vestige of Common Law Indemnity – Vicarious Liability

The only remaining vestige of common law indemnity involves liability of a purely vicarious nature. An example of pure vicarious liability is a case where an employer, without independent fault, is held responsible for the torts of its employees that were committed within the scope of their employment. Under this circumstance, the employer has a right to bring an action against an employee to recover the full amount of damages that the employer paid as a result of the employee's conduct. *South Austin Drive-In Theatre v. Thompson*, 421 S.W.2d 933, 348 (Tex. Civ. App. – Austin 1967, *writ ref'd n.r.e.*).

3. Waiver of Subrogation Absent Contractual Waiver of Subrogation

a. Majority Rule: Implied Co-Insured Negates Equitable Subrogation

In circumstances where the lease does not contain a waiver of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, **equitable subrogation**. A majority of courts follow the rule that a lessor's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an **implied coinsured**. Some of these courts have concluded that the landlord's agreement to procure property insurance covering the building implies an obligation by the landlord to insure the building for the benefit of both the landlord and the tenant. Others of these courts have reasoned that the tenant has indirectly paid for

the insurance, either through rent or through expense pass through. The better practice is to address this risk in the lease.[15]

b. Minority Rule: No Implication of Co-Insured Status

Texas follows the minority rule. [16] The minority jurisdiction rule is based on the common-law presumption that a tenant is liable for the tenant's own negligence and the equitable principle of subrogation. Upon payment by the landlord's insurer for an insured property loss, the landlord's insurer is subrogated to the landlord's rights and claim against its tenant and can sue the tenant to recoup the insurance proceeds. In *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956), the Texas Supreme Court held that where the lease merely provided that the landlord agreed to carry fire and extended coverage insurance on the building, part of which was occupied by the landlord, there was no duty on the landlord to procure insurance for the benefit of the tenant, and the landlord's insurers were not precluded from obtaining a subrogated cause of action to recoup its policy proceeds on account of fire caused by the tenant's negligence. The court rejected the tenant's contention that the intent of the parties for including a covenant of the landlord to insure its own building (presumably the cost of which was built into the rent) was to exculpate the tenant for its own negligence.

D. Common Contractual Means of Allocating Risk

1. The Protecting Party and Protected Party

Every provision of a lease or contract is either (a) restating the rule that would be supplied by the court in the absence of the provision (the "**common law**") or is supplied by statute or (b) is expressly shifting a risk from one party (the "**party to be protected**") to the other (the "**protecting party**"), to the extent not prohibited by common law and statute.

2. Three Legged Stool – Contractual Indemnity, Insurance and Waiver of Subrogation

The most common method of risk management are through contractual provisions for (1) **contractual indemnity**, (2) **insurance**, and (3) **contractual waiver of subrogation** (aka the "**three legged stool**"). Neglecting any one of these three risk management legs may result in a failed risk management program.

3. Pretzels – Drafting Conflicting Provisions

Drafting conflicting risk management provisions (aka a "**pretzel**") also results in a failed risk management program. [17] The three-legged stool must be drafted in a harmonized fashion, and in a fashion that achieves a sensible allocation of risks. Ideally, to the maximum extent possible the risk management provisions will be drafted to take full benefit of the parties' insurance.[18]

E. Appendix of Forms and Commentary

Included in this article is an Appendix of Forms. In the Appendix of Forms are

- two forms of insurance specifications employed in leases: a typical narrative style set out in the body of the lease and a checklist style chart set out as an exhibit to a lease; and the 2017 AIA Insurance Exhibit; [19]
- risk management provisions in the Retail Lease form contained in the Texas Real Estate Forms Manual (3rd Ed. 2017) of the State Bar of Texas ("**Manual's Retail Lease**"), including the insurance, indemnity and waiver of claims/waiver of subrogation provisions, and its companion Insurance Addendum ("**Manual's Insurance Addendum**"); [20]
- insurance industry standard insuring forms ("**ISO Forms**") and standard certificates of insurance ("**ACORD Forms**");[21] and
- samples of a liability insurer's manuscripted additional insured forms ("**Manuscripted Forms**).[22]

Following the Appendix of Forms are Endnotes setting out a Commentary on the risk or peril addressed in the insurance forms, and the form's coverage limitations and exclusions.

II. INDEMNITY 101 AND INSURANCE 101 [23]

A. The Three Legged Stool

Every provision of a lease or contract is either (a) restating the rule that would be supplied by the court in the absence of the provision (the "**common law**") or is supplied by statute or (b) is expressly shifting a risk from one party (the "**protected party**") to the other (the "**protecting party**"), to the extent permitted by common law and statute. The most common method of risk management are through contractual provisions for (1) **indemnity**,[24] (2) **insurance** [25] and (3) **waiver of subrogation** [26] (aka the "**three legged stool**"). Neglecting any one of these three risk management legs may result in a failed risk management program.

B. Contractual Indemnity by a Party

An indemnity is comprised of the following elements:

1. The obligation to "indemnify" and defend.
2. The "indemnitors" (referred to in this Article as the "Protecting Party"),
3. The "indemnitees" (the referred to in this Article as the "Protected Party"),
4. The events, acts or omissions triggering Indemnified Liabilities (the "Indemnified Matters"),
5. The liabilities indemnified (the "Indemnified Liabilities"), and
6. Any excluded matters or excluded liabilities (the "Excluded Liabilities").

C. Insurance – A Contractual Indemnity By A Third Party

1. Liability Insurance

a. Some Common Types

(1) Commercial General Liability Insurance.

(a) Third Party Coverage

Commercial general liability ("**CGL**") insurance is termed "**third party coverage**" insurance as it covers liabilities incurred by the named insured to third parties and excludes injuries and damage to the insured (*e.g.*, it excludes coverage for property damage to "property you (the insured) own, rent, or occupy" [27] and to "personal property in the care, custody or control of the insured." [28]

(b) Parties

Parties to a CGL policy are the "**named insureds**" [29] including a "first named insured" if there are more than one named insured on the CGL policy, "**automatic insureds**" [30] and "**additional insureds**". [31]

(c) Insurance for Covered Liabilities Arising from an "Occurrence"

Covered liabilities or damages arise from an "**occurrence**" during the policy period which is not excluded by the Exclusions of the policy.[32] CGL insurance provides protection to the insured for amounts the insured is legally obligated to pay that are caused by physical injury, personal injury (libel or slander), advertising injury and property damage as a result of the insured's products, premises, or operations, and can be offered as a package policy with other coverages.

(d) Occurrence Policy vs. Claims Made Policy

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

(e) Indemnity for Defense

The standard CGL policy provide coverage for the cost to defend and settle claims.[33]

(f) The Policy

Commercial general liability policies typically and the ISO general liability policy form,[34] which is the industry standard, is comprised of the following forms:

Commercial General Liability Declarations and Schedule of Forms [35]

Commercial General Liability Form [36]

Section I - Coverages

Coverage A. Bodily Injury [37] and Property Damage [38] Liability

1. Insuring Agreement [39]
2. Exclusions [40]

Coverage B. Personal and Advertising Injury Liability [41]

1. Insuring Agreement
2. Exclusions

Coverage C. Medical Payments [42]

1. Insuring Agreement
2. Exclusions

Section II - Who Is An Insured [43]
Section III - Limits of Insurance [44]
Section IV - Commercial General Liability Conditions [45]
Section V - Definitions [46]

Amendments and Endorsements [47]

(g) Contractual Liability Insurance

The standard CGL policy (the ISO policy) provides an important additional insurance coverage for specified types of indemnities by the named insured in its contracts with third parties. This insurance coverage is provided in the standard CGL policy by virtue of

(1) a series of "defined terms" used in

(2) an "exception" (the exception for "**Insured Contracts**") to

(3) an "exclusion" to coverage (Exclusion **2.b** excluding coverage for "**Contractual Liability**") to

(4) a coverage provision in the CGL policy (Section I - Coverage A - Bodily Injury and Property Damage insuring the named insured for bodily injury and property damage liabilities). [48]

The "Insured Contract" exception to the Contractual Liability Exclusion provides coverage to the named insured for its contractual indemnity of a third party for bodily injury liability and property damage liability for five specified types of insured contracts set out in the definition of Insured Contract. [49]

(2) Business Auto Policy

A "business auto policy" ("**BAP**") is a commercial auto policy that includes auto liability and auto physical damage coverages arising from "covered autos"; other coverages are available by endorsement. Except for auto-related businesses and motor carrier or trucking firms, the business auto policy addresses the needs of most commercial entities as respects auto insurance.

(3) Workers Compensation Insurance and Employers Liability Insurance

A "**Workers Compensation and Employers Liability Policy**" is an insurance policy that provides coverage for an employer's two key exposures arising out of injuries sustained by employees. Part One of the policy covers the employer's statutory liabilities under workers compensation laws, and Part Two of the policy covers liability arising out of employees' work-related injuries that do not fall under the workers compensation statute. In most states, the standard Workers Compensation and Employers Liability Policy published by the National Council on Compensation Insurance ("**NCCI**") is the required policy form.

"**Workers Compensation insurance**" is the system by which no-fault statutory benefits prescribed by state law are provided by an employer to an employee (or the employee's family) due to a job-related injury (including death) resulting from an accident or occupational disease. 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. Workers compensation coverage is usually written in tandem with an employer's liability coverage policy. Leases and construction contracts frequently require that a party "maintain Workers Compensation and Employers Liability coverage **as required by law**." Does this verbiage really require coverage? With few exceptions, Texas does not require an insured to carry Workers Compensation insurance. A statement that coverage shall be provided "as required by law" does not require that the coverage be provided.

"**Employers Liability Coverage**" provides coverage against common law liability of an employer for accidents to employees, as distinguished from liability imposed by a workers compensation law. This is provided by Part 2 of the basic workers compensation and employer's liability policy and pays on behalf of the insured (employer) all sums the insured becomes legally obligated to pay as damages because of bodily injury by accident or disease sustained by any employee of the insured arising out of and in the course of his employment by the insured. Typically triggered by a third party after the insured's employee (who is barred by workers compensation laws from suing his or her employer) sues a third party for bodily injury suffered while performing duties of his or her employment (*e.g.*, contractor's employee injured on the premises of that third party).

(4) Umbrella and Excess Liability Insurance

The following definitions are found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx.

"**Umbrella policy**": "A policy designed to provide protection against catastrophic losses. It generally is written over various primary liability policies, such as the business auto policy (BAP), commercial general liability (CGL) policy, watercraft and aircraft liability policies, and employers liability coverage. The umbrella policy serves three purposes: it provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims; it drops down and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and it provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR)."

"**Excess policy**": "A policy issued to provide limits in excess of an underlying liability policy. The underlying liability policy can be, and often is, an umbrella liability policy. An excess liability policy is no broader than the underlying liability policy; its sole purpose is to provide additional limits of insurance."

b. What You Did Not Know, and Could Have Known, Can Hurt You

It is the author's opinion and experience that lawyers drafting transactional documents are resistant to undertaking the effort required to understand the insurance provisions they include in their documents and to following up with their clients to assure that the drafted insurance provisions are fulfilled by the parties and their insurance brokers.[50] On occasion this resistance has risen to heated rhetoric to the effect "I only draft the provisions. I am not an insurance person. It is up to the client to understand and implement the provisions."

Perhaps this choice arises out of concern that professing some knowledge as to one's craft exposes the practitioner to a greater likelihood of being held accountable in cases where "things go wrong" than being silent. The insurance industry's forms promote taking this position. The standard certificates of insurance are simple appearing one page documents.[51] Industry forms are not readily accessible to the practitioner. Once obtained, they appear complicated.[52] They are identified by a seemingly complicated numbering system.[53] These circumstances led the author to write Insurance 101 and Insurance 201. It is the author's hope that exposure to these "traps for the unwary" will result in change in your approach to drafting insurance provisions and will lead to your more active involvement in implementing the insurance program contemplated thereby.[54]

c. Certificates of Insurance Are Not Certificates

(1) An All Too Typical Specification

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

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

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

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

(2) It is Not Reasonable to Rely Upon an ACORD Certificate of Insurance

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

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

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

> **IMPORTANT: If the certificate holder is an additional insured, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s). If subrogation is waived, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

Many courts have held that these disclaimers effectively negate reliance by certificate holders.[55] See *e.g.*, the following statements by courts: *Bradley Real Estate Trust v. Plummer & Rowe Ins. Agency*, 609 A.2d 1233, 1235 (N.H. 1992):

> In effect, the certificate is a worthless document; it does no more than certify that insurance existed on the day the certificate was issued. We leave it to the legislature or to future bargaining of parties to rectify inequities in the notification process.

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

> Had Plaintiffs taken the reasonable step of obtaining a copy of (the policy) … Plaintiffs would have learned that there was no additional insured coverage in the policy at all. Thus, the Court finds that the Plaintiffs'

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

A certificate of insurance, if incorrect, may provide a claim against the agent who issued the incorrect certificate, but it does not obligate the underwriter under the policy.[56] A claim against the agent may be of small consolation under the circumstances. [57]

d. Antiquated, Problematic and Just Plain Wrong Terminology

Even after more than 30 years since the insurance industry changed their policy forms in 1986, leases, construction contracts and other forms drafted by many lawyers still employ "antiquated, problematic and just plain wrong" terminology.

Don't Say This	*Say This*
"comprehensive general liability policy" [58]	commercial general liability policy
"blanket or broad form contractual liability coverage" [59]	contractual liability coverage
"broad form property damage" [60]	(automatically covered)
"deletion of personal injury employee exclusion"	(this exclusion no longer exists, automatically covered)
"cross liability or severability of interests endorsement"[61]	separation of insureds
"products/completed operations for 2 years following completion of the Work" [62]	(See discussion below.)

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

Don't Say This	*Say This*
30 day notice of cancellation, amendment, reduction of limits or nonrenewal	30 day notice of cancellation

The standard ISO CGL policy provides that notice of cancellation will be provided to the first Named Insured.[63] Similarly, the ISO Common Policy Conditions, which is a component of the ISO property policy, provides that notice of cancellation is to be given only to the ***first*** Named Insured.[64] Neither the **ISO CP 12 18 06 07** Loss Payable Provisions nor the **ISO CP 12 19 06 07** Additional Insured – Building Owner endorsement issued to tenants insuring a building on leased premises provides for notice of cancellation to be given to the landlord.[65] Additional insureds are not first; they are "additional" and, therefore, the standard policy without endorsement does not commit the insurer to give notice to the additional insured if the insurer cancels the policy for nonpayment of premium or for any other reason.[66] Some but not all states permit policies to be endorsed with a "notice of cancellation" endorsement obligating the insurer to give Named Insureds other than the first Named Insured or additional insureds advance notice of policy cancellation.[67] Even in states where some form of notice endorsement has been approved by the state insurance industry regulatory body, it is difficult to get insurers to commit to give notice of cancellation to persons that are not the first Named Insured. Further, insurance companies will not provide a "notice of nonrenewal" endorsement. When any term, condition or verbiage is changed in a policy at time of renewal, that policy is technically no longer a renewal. Hence, every time there is even a minor change (and something is almost always changed), a nonrenewal notice would have to be sent. Insurance companies are unwilling to commit to such a burden and expense.

f. Not All Indemnified Liabilities Are Insured

(1) An Indemnitor is a Private Insurer

An obligation to defend, indemnify and hold harmless another party for risks other than those prescribed by law is a contractual assumption of those risks by the indemnitor. The indemnitor has *agreed* to be liable for those risks. Subject to the limits of anti-indemnification legislation, the scope of risks that can be transferred by indemnity are quite

broad, potentially including the indemnitee's joint, concurrent, sole, strict and even gross negligence. Indemnification agreements can be drafted to include "any and all liabilities including fines, penalties, and all other associated expenses." Most indemnification provisions are unlimited in amount (*i.e.*, a blank check!). An indemnitor becomes a private insurer of the indemnified liabilities, but usually one under an indemnification agreement not approaching the detail of an insurance policy.

(2) Applying Contractual Liability Coverage to the Indemnification Agreement

What portion of this transferred risk is insured, or even insurable? Contractual liability insurance is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. This insurance coverage is provided in the standard CGL policy as (1) a series of definitions to (2) an exception to (3) an exclusion to (4) the coverage provision for bodily injury and property damage liability only.[68] In other words, contractual liability insurance applies to allegations of bodily injury and physical injury to tangible property, and nothing else. The application of contractual liability coverage to a broad form indemnity provides coverage for a limited portion of the indemnified liabilities. It must be kept in mind that, since insurance potentially covers so few of the exposures for which indemnification may be required, the indemnification provision is potentially bankrupting to the indemnitor. Also, you cannot assume that contractual liability coverage afforded by the standard commercial general liability policy has not been limited or even deleted by endorsement. Furthermore, there is no duty to defend an indemnitee found in the standard commercial general liability policy. When defense is required in the indemnification provision, a funny thing happens. Unlike the way costs of defense is provided in most liability coverages, costs of defense provided on behalf of an indemnitee are deemed to be damages, meaning that those costs are included in the limit of liability (not outside of or in addition to that limit) and therefore erode the limit.

g. A General Specification for "Additional Insured Status" Is Meaningless

(1) Most Common Drafting Error

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

> (Named Insured) will cause its CGL insurer to list _____ as **an additional insured** on its CGL policy.

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

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

negligence, or (2) includes only ongoing operations and excludes sole negligence of the additional insured, or (3) includes only certain ongoing operations and excludes both concurrent and sole negligence of the additional insured, and has additional exclusions added to it, or (4) innumerable additional options.

(2) What to Look For In An Additional Insured Endorsement

The most common and well recognized additional insured endorsements are drafted for use by the insurance industry by ISO, or Insurance Services Office. ISO endorsements will include a footer that reads "© ISO Properties, Inc., 20__" or © Insurance Services Office, Inc., 20__".[69]

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

- Who? Who is being added as an additional insured?
- What? What scope of negligence is being transferred? What activity is covered (*e.g.*, operations, work, ownership, use, maintenance)?
- When? Is there a time period covered?
- Where? Is there a location covered?
- Exclusions? Are there exclusions to coverage?
- Limitations?[70]

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

h. Primary and Noncontributory Liability

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

This new endorsement will resolve some problems, if the requirement for it is carefully drafted.[71]

i. Umbrella and Excess Liability

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

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

2. Property Insurance

a. Parties

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

(1) Insureds

In a property policy, the insured is the party identified on the Declarations Page as having an **insurable interest** in the covered property and to whom loss payments will be paid if the property is damaged or destroyed. Third parties may be designated by endorsement to the property policy as an **additional insured** to protect their **additional interests**.[72]

(2) Additional Named Insured

Unlike liability insurance policies, there may be "additional named insureds" on a property policy. The following definition of "**additional named insured**" is found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx:

> (1) A person or organization, other than the first named insured, identified as an insured in the policy declarations or an addendum to the policy declarations. (2) A person or organization added to a policy after the policy is written with the status of named insured. This entity would have the same rights and responsibilities as an entity named as an insured in the policy declarations (other than those rights and responsibilities reserved to the first named insured). In this sense, the term can be contrasted with additional insured, a person or organization added to a policy as an insured but not as a named insured. The term has not acquired a uniformly agreed upon meaning within the insurance industry, and use of the term in the two different senses defined above often produces confusion in requests for additional insured status between contracting parties.

(3) Mortgageholder

Similarly, the standard commercial property policy contains the standard mortgage clause providing that loss payments will be made to the insured and the **mortgageholder** as their interests may appear.[73]

(4) Loss Payee

A "**Loss Payable Clause**" is an insurance provision authorizing payment in the event of loss to a person or entity (a "**loss payee**") other than the named insured having an insurable interest in the covered property. See **ISO CP 12 18 06 07** Loss Payable Provisions, **Optional Clause F** Building Owner Loss Payable Clause.[74] In November 2008 ISO amended its CP 12 18 Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the **CP 12 19**. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

b. Antiquated, Problematic and Just Plain Wrong Terminology

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

Don't Say This	***Say This***
"fire insurance"	basic,[75] broad [76] or special causes of loss[77] form
"extended coverage"	
"vandalism and malicious mischief"	
"special extended coverage"	
"all-risk"	

Outdated terminology requiring that the policy provide "all-risks" or "fire and extended coverage" is often used in contracts. "All risks" denoted property insurance covering losses arising from any fortuitous cause except those that are specifically excluded and is currently called "Special Form" or "Special Causes of Loss Form." "Extended coverage" refers to an endorsement that was once added to a standard fire policy to cover the perils now insured

under ISO's Basic Causes of Loss Form. Since the extended coverage endorsement is no longer used, a better approach to requiring this coverage is to refer to the ISO "Basic," "Broad," or "Special" Causes of Loss Form. Prior property insurance forms used the terms "risk" and "perils." Pre-"causes of loss" property insurance was written either on a "named peril" basis which insured property against loss or damage from causes of loss expressly enumerated in the policy or an "all risks" basis, which insured property against loss or damage from all causes of loss except those which were expressly excluded. "Fire and extended coverage" insurance was a named peril property insurance.

c. The Policy

Property policies, and the ISO property policy form, are comprised of a the following forms:

Commercial Property Coverage Part Declarations Page with Schedule of Forms [78]
Common Property Conditions [79]
Building and Personal Property Coverage Form [80]
- **Section A – Coverage** [81]
- **Section B – Exclusions and Limitations**
- **Section C – Limits of Insurance**
- **Section D – Deductible**
- **Section E – Loss Conditions** [82]
- **Section F – Additional Conditions** [83]
- **Section G – Optional Coverages** [84]
- **Section H – Definitions**

Business Income (And Extra Expense) Coverage Form [85]

Leasehold Interest Coverage Form [86]
- **Section A – Coverage** [87]
- **Section B – Exclusions and Limitations**
- **Section C – Limits of Insurance**
- **Section D – Loss Conditions**
- **Section E – Additional Condition**
- **Section F - Definitions**

Commercial Property Conditions [88]
Endorsements [89]

(1) Coverage under Each Causes of Loss

(a) Covered Causes of Loss

The following are the perils covered by each of the Causes of Loss Forms:

PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS	
Basic Causes of loss Form (CP 10 10) • Fire • Lightning • Explosion • Windstorm or hail • Smoke • Aircraft or vehicles • Riot or civil commotion • Vandalism • Sprinkler leakage • Sinkhole collapse • Volcanic action	**Broad Causes of Loss Form (CP 10 20)** Basic causes of loss form perils, plus: • Breakage of glass • Falling objects • Weight of snow, ice, or sleet • Water damage from leaking appliances • Collapse from specified causes
	Special Causes of Loss Form (CP 10 30) • All perils except as excluded • Collapse from specified causes

(b) Exclusions from Causes of Loss

The following are excluded perils from Causes of Loss coverage, including from Special Causes of Loss:

- Law and Ordinance;
- Earth Movement, Governmental Action;
- Nuclear Hazard;
- Utility Service;
- War and Military Action;
- Water;
- Fungus, Wet Rot, Dry Rot, and Bacteria, Boiler and Machinery Failure;
- Wear and Tear or Lack of Maintenance;
- Continuous Seepage or Leakage Over a Period of 154 Days or More;
- Dishonest Acts;
- Pollutants; and
- Faulty Design or Workmanship.

Also, in special hazard areas certain causes of loss may be excluded from coverage by endorsement with specialty insurance being required to cover the hazard (*e.g.*, windstorm).

(2) Difference in Conditions Insurance

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

(3) Valuation Terminology

Whether the policy is a "**Replacement Cost**" policy or an "**Actual Cash Value**" policy, the loss paid will be limited to the policy limits.

(a) Replacement Cost

"**Replacement Cost**" is the cost of repairing or replacing insured property at time of the occurrence of the loss, without reduction for loss of value through depreciation or age. Recovery is limited to the lesser of (a) the policy limit, (b) the cost to replace the lost or damaged property with other property of comparable material and quality and used for the same purpose, or (c) the amount actually spent to repair or replace the damaged or lost property. The policy proceeds are not paid until the property is actually repaired or replaced, and only if replacement occurs as soon as reasonably possible after the loss or damage. Notice of intent to replace must be given to the insurer within 180 days of loss. Replacement cost coverage does not prohibit recovery if the insured rebuilds at a new location, but the coverage is limited to what it would have cost to replace the improvements at the original premises. Replacement cost coverage does not cover the added costs of construction due to changes in laws and ordinances except if the policy is endorsed with an Ordinance or Law Coverage Endorsement (See Endnote 59 to **Insurance 201**). In the past replacement cost coverage was an option provided by endorsement. Now it is an optional coverage built into the ISO form policy. The option coverage is selected by notation on the Declarations Page. See **ISO CP DS 10 00** Declarations Page at Optional Coverages. [90]

(b) Actual Cash Value

"**Actual Cash Value**" or "**ACV**". The ISO policy does not define "actual cash value". The definition of this term is left up to case law. The term has generally been defined by cases to mean replacement cost of the covered property at the time of loss with like-kind and quality less physical depreciation. Depreciation may be determined by consideration of age, condition at time of loss, obsolescence and other factors causing deterioration. The term is seldom defined in the policy, but is used in property and automobile physical damage insurance and is generally considered in the industry to be the cost to repair or replace the damaged property with materials of like kind and quality, less depreciation of the damaged property. In other words, the sum of money required to pay for damages or lost property, computed on the basis of replacement value less its depreciation by obsolescence or general wear and tear (i.e., physical depreciation). This is one of several possible methods of establishing the value of insured property in order to calculate the premium and determine the amount the insurer will pay in the event of a loss. ACV coverage applies if Replacement Cost coverage is not affirmatively selected on the Declarations Page of the policy.[91]

(c) Inflation Guard

"**Inflation guard**" is an optional endorsement designed to offset potential inflation by specifying a percentage in the Declarations Page by which the coverage will increase annually as to the portion of the covered property specified.[92]

III. INSURANCE SPECIFICATION

A. Two Approaches

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

Narrative	Exhibit
General	Specific
Brief	Detailed
Paragraph Style	Checklist Style

The author encourages the use of the exhibit checklist approach. In the author's experience providing a specific, detailed, checklist style set of insurance specifications facilitates delivery of insurance meeting the parties' insurance requirements.[93]

B. The Protecting Party's Insurance Broker is the Audience for the Insurance Specifications

The author urges “Remember your audience,” which this author proposes is the insurance agents issuing and reviewing the insurance to be obtained, and not only the Protecting Party’s insurance counsel. The people that most need to understand what is being required are the Protecting Party’s insurance brokers. Make it easy for them to understand. Require a specific ISO endorsement or a specific scope of coverage. If requiring a specific ISO endorsement, do not say "or equivalent". What does that mean? What it does not mean is "identical". Make the Protecting Party declare what in fact they do have. Get a copy and read it. Make sure that it complies with your insurance specifications.

The author encourages the use of the exhibit checklist approach. In the author’s experience providing a specific, detailed, checklist style set of insurance specifications facilitates delivery of insurance meeting the parties' insurance requirements. Inform your client of the severity of the exclusions that are so widely and increasingly utilized by the insurance industry, yet are invisible to most certificate holders. Inform your client that a review of the coverage being provided must be performed, either by you, your client's insurance agent, or an independent consultant.

CHAPTER 2 INDEMNITY

3. Protected Party

    a. Direct Beneficiaries
    b. Third Party and Incidental Beneficiaries

4. Indemnified Matters

    a. Causation Triggers to Indemnity
    b. Injuries

5. Indemnified Liabilities

    a. Liabilities or Damages
    b. Contractual Obligations or Torts

6. Excluded Liabilities

    a. Broad Exception for Liabilities of Protected Party
    b. Exceptions for Sole Negligence, Gross Negligence, Knowing Actions, and Willful Misconduct of Protected Party
    c. Scope of the Work Limitations
    d. Contemplated Time Covered
    e. Negligence of Protecting Parties Not Same as Negligence of Protected Parties

C. Requirements for Enforceability 44

1. Statutory Limits on Indemnity

    a. Construction Contracts
    b. Architects and Engineers
    c. Oil and Gas Service Contracts

2. Common Law Rules of Contract Interpretation

3. Written Contract to Overcome the Worker's Compensation Bar

4. Fair Notice

    a. Appearance and Placement
    b. The UCC Standard
    c. Actual Notice

5. Express Negligence Requirement

    a. The Protected Person's Negligence
    b. The Protecting Party's Negligence
    c. Future Negligent Acts or Omissions

6. Strict Liability

    a. Indemnification for Strict Liability Arising out of Statutory Liability
    b. Indemnification for Strict Liability Arising out of Products Liability
    c. Indemnification for Strict Liability Arising out of Statutory Environmental Liability

CHAPTER 2: INDEMNITY

I. INTRODUCTION

A. Allocation of Risks

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." 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. The most common contractual methods by which risk is allocated or shifted are by the use of **representations and warranties**, **insurance covenants**,[94] and **express assumption of liabilities**, which can take the shape of **indemnity**,[95] **exculpation**,[96] **release**[97] and **limitation of liability** provisions.

B. Allocation of Extraordinary Risks

Each contracting party's risk-related goals are to accept no more risk than it can reasonably bear or insure or is willing to accept, and 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:

- which party is in the best position to control the extent of the occurrence of the risk?
- does one party have specialized knowledge of the type of risks most likely to occur and how to prevent or identify them?
    - custom and practice in the particular industry (for example, sellers to buyers; landlords to tenants; owners to contractors; contractors to sub-contractors).
    - the bargaining strength of the respective parties.
    - statutory and common law public policies.

C. Allocation of Liability Absent Contractual Indemnity

1. Common Law

a. Overview of Evolution of Court Approach

Early English and American courts refused to adjust the financial burdens between defendants who were regarded by the court as being equally blame worthy. Therefore, joint tortfeasors who were "**in pari delicto**" had no rights to contribution at common law from other joint tortfeasors, each tortfeasor being jointly and severally liable.

However, courts held that they had the power in equity to aid a tortfeasor who was relatively blameless by granting indemnity ("**common law indemnity**"). Prior to 1980, Texas courts viewed the availability of common law indemnity between jointly liable defendants based on whether: (1) the court viewed the defendants as being equally at fault (*i.e., in pari delicto*) or (2) the defendants were not equally at fault (*i.e., not in pari delicto*) with common law indemnity being allowed on a case-by-case basis ("an all or nothing approach to indemnification"). Courts envisioned two torts: one tort committed by the defendants against the plaintiff, the second committed by one of the defendants against the other, which gave rise to court-made indemnity.

b. Court's Basic Principles in Apportioning Liability between Jointly Liable Persons

(1) Joint and Several Liability

The common law of Texas recognized that persons who jointly contributed to cause injury, death or economic loss by their tortious conduct to a third person ("**joint tortfeasors**") would be jointly and severally liable for their wrongdoing. This concept is aptly stated in *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952) as follows:

> Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damage and the injured party may proceed to judgment against any one separately or against all in one suit.

The joint tortfeasors, rather than the injured plaintiff, bear the burden of apportioning damages through the mechanisms of contribution and indemnity.

(2) Common Law Contribution and Indemnity Defined

a. Common Law Indemnity

"**Indemnity**" is a mechanism by which all liability for a tort is shifted from one jointly liable defendant to another.[98]

b. Contribution

"**Contribution**" is a partial shifting from one jointly liable defendant to another defendant of a proportionate share of the damages. Contribution has been defined as "the payment by each tortfeasor of his proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate part." [99]

c. Employer – Employee Liability

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.[100]

d. Employer - Independent Contractor Relationships

As distinguished from the employer - employee relationship, the "**employer - independent contractor**" relationship exists in situations where the employer (an owner or contractor) hires a third person (independent contractor) to perform some act, but does not retain control of the means and methods used by the independent contractor to perform the act. The employer does not normally have a duty to see that an independent contractor performs work safely (the "**independent contractor rule**"). Additionally, such independent contractors are generally specially skilled to perform the particular task.[101] Under the independent contractor exception a person is not liable for the negligence of its independent contractors.[102] The independent contractor rule evolved as a means to combat the harshness of the common law rule.

A general contractor does not retain control over a subcontractor's work, and does not incur liability for the subcontractor's negligence that injures a third party, when the general contractor does nothing more than enter into a contract with the premises owner obligating it to be responsible for its employees' and contracted employees' actions. In such case, the general contractor does not owe the injured third party a duty. The following is an illustration for the independent contractor rule:[103]

Illustration:

> As a matter of law, the intent of a contract between the military and the manufacturer of a freezer, which required the manufacturer to be "fully responsible for the actions of all employees and contracted representatives," was to require the manufacturer to be fully financially responsible for any claims against the military arising out of actions of the manufacturer or its contractors, not to require the manufacturer to retain control over the means, methods, or details of the work of the independent contractor that installed the freezer, and thus, the contract did not impose liability on the manufacturer for injuries sustained by a sink installer when the freezer panels fell on him.

(3) Exceptions to the Independent Contractor Exception

However, numerous exceptions evolved to the independent contractor rule resulting in the risk of the re-imposition of liability even though the work is performed by independent contractors, to the point that the "exceptions swallowed the rule".[104] As codified in the RESTATEMENT (SECOND) OF TORTS, §§ 410 - 429 (1966, March 2018 Update), 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:

a. Employer Liability to Third Parties for Acts of an Independent Contractor

(1) Negligent Hiring

A person is liable for the negligent hiring of the contractor.[105] A general contractor is not liable to its

independent contractor's employee on the ground of negligent hiring of the independent contractor.[106]

(2) 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.[107]

(3) Project Necessarily Causes Loss

The employer may not, to escape liability, contract for the project, the necessary or probable effect of which would be to injure others.[108]

(4) 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.[109] So for instance the court held in *Sanchez v. MBank 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.

(5) Exercises 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.[110]

(6) 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.[111]

b. Employer 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.

(1) Premises Liability – Safe Work Place

The general rule is that an owner or occupier of land has a duty to use reasonable care to keep premises in a safe condition. This duty may subject the premises owner to direct liability for negligence in two situations: (1) those arising from a premises defect and (2) those arising from an activity on the premises.[112] A general contractor on a construction site who is in control of the premises, is charged with the same duty as an owner or occupier. In such case, the general contractor has overlapping duties as both the occupier of the land and the general contractor who hired an independent contractor.[113]

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 employees 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.[114]

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.[115] General contractor had no duty to inspect construction site to discover dangerous conditions and to see that independent contractor's employee was performing his work in a safe manner once the subcontractor had begun its work; general contractor could assume that independent contractor would take proper care and precautions to assure the safety of its own employees.[116]

Liability will result when a general contractor creates a dangerous condition for an independent contractor by directions to another independent contractor over whom control is exercised.[117]

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, March 2018 Update) 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.

(2) 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 or exercises actual control such that the employer is required to exercise that control with reasonable care.[118]

Section 414 of the RESTATEMENT (SECOND) OF TORTS (1966, March 2018 Update) 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 employer 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.

The following illustration is set out in 44 TEX. JUR. 3d, *Independent Contractors*, § 24 *Manner of retaining control* (1996, March 2018 Update) citing *Kolius v. Center Point Energy Hou. Elec., LLC*, 422 S.W.3d 861 (Tex. App. – Hou. [14th Dist.) 2014):

Illustration:

An electric utility did not have control over a construction company, and thus was not liable to homeowner for construction company's actions of restoring electric current to homeowner's home while it was flooded, even though electric utility employees were present during the fire caused by the restoration of current, where they did not have control over the construction company employees, there was no contract between company and utility that indicated utility's right to control, and statements in affidavits as to utility's control on incident date were merely conclusory.

(3) 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,[119] but a contractual retention of control is not necessary, if actual control is exercised;[120] (2) if the "special employer" pays the amount of the premiums for workers compensation insurance to the employer;[121] (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.

2. Statutory Allocation

(1) 1917 Statute

The legislature enacted statutes in 1917 and 1973 establishing rights of contribution between certain jointly liable tortfeasors. In 1917 Texas enacted its first statutory contribution scheme for tort actions, which survives today in Chapter 32 of the Texas Civil Practice and Remedies Code (the "**1917 Statute**" and as amended "**Chapter 32**").[122]

(2) 1973 Statute

In 1973, Texas adopted a comparative negligence statute that also governed contribution in pure negligence cases. Later enactments and amendments extend the comparative responsibility scheme, including contribution claims, to virtually all tort actions (the "**1973 Statute**" and as amended "**Chapter 33**").[123]

(3) Court Intervention

In **1980** the Texas Supreme Court in *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980) held that there could not be common law indemnity due to the adoption of the Comparative Negligence and Contribution Statute in 1973. Texas courts have held that Texas' comparative negligence statutes abolished the common-law doctrine of indemnity between negligent tortfeasors.[124]

In **1984** the Texas Supreme Court felt compelled, due to continued inaction of the Texas legislature, to enact by judicial fiat in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) its own comparative and contribution scheme to compare the fault or causation of defendants where one or more of the defendants were held liable on theories of negligence, strict liability and breach of contact.

(4) Comparative Responsibility and Apportionment

In **1987**, the Texas legislature enacted "**tort reform**" amendments to the Civil Practice and Remedies Code (the "**1987 Statute**"), the genesis of today's Comparative Responsibility and Apportionment legislative risk allocation scheme. The common law principle of joint and several liability for the damages resulting from an "indivisible wrong or tort" was replaced under the 1987 Statute with the "tort reform" concept that a defendant is generally liable 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. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a).

(5) 1995 Statute

Again, in **1995** the Texas legislature enacted further significant "tort reform" amendments to Chapter 33 of the Civil Practice & Remedies Code (the "**1995 Statute**").

3. Sole Vestige of Common Law Indemnity – Vicarious Liability

The only remaining vestige of common law indemnity involves liability of a purely vicarious nature.[125] An example of pure vicarious liability is a case where an employer, without independent fault, is held responsible for the torts of its employees that were committed within the scope of their employment. Under this circumstance, the employer has a right to bring an action against an employee to recover the full amount of damages that the employer paid as a result of the employee's conduct.[126]

D. Activities and Locations

1. Leases and Leased Premises

a. Maintenance

(1) If Landlord Does Not Retain Control of Portion of Premises

Under the traditional common law rule, a landlord was not required to make any repairs (including structural repairs) to the premises during the lease term, unless the lease expressly obligated landlord to do so. As the Texas Supreme Court put it nearly 70 years ago:

> The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. A covenant is never implied that the [landlord] will make any repairs. The obligation to make repairs is a very important element of a lease contract. The parties were free to contract with respect to this obligation as they desired.

Yarbrough v. Booher, 174 S.W.2d 47, 49 (Tex. 1943); *see also Medlin v. Havener*, 98 S.W.2d 863, 864 (Tex. Civ. App.–Fort Worth 1936, no writ) stating that

> in the absence of a special contract to the contrary, and in the absence of fraud and deceit inducing the [tenant] to believe the landlord would make such repairs, the [landlord] is under no implied obligation to the [tenant] to keep the rented premises in a condition safe and suitable for the uses to be made of the demised premises by the [tenant].

Thus, at common law, a landlord generally had no implied duty to tenant (in contract or implied from the parties' relationship) or to third parties (in tort for premises liability) to keep the premises in good condition, absent either the express obligation to do so in the lease or landlord's exercise of control of conditions within the premises. *See Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285

(Tex. 1996) holding that a landlord has no duty to tenant or its invitees for dangerous conditions on the leased premises, unless the landlord: (1) makes negligent repairs; (2) conceals defects in premises of which landlord is aware; or (3) retains control over that portion of premises where a defect or unsafe condition causes injury. Thus, it has been said "[a]bsent a covenant, or evidence of concealment or misrepresentation, the landlord [is] not liable for a latent structural defect…within premises that causes damage to tenant's property."[127]

Repairs Gratuitously Made by Landlord

Ordinarily, a landlord who voluntarily makes repairs is not estopped from claiming that it had no such duty. The fact that a landlord voluntarily or gratuitously makes repairs constitutes neither an admission or evidence of a duty to make such repairs, nor does it operate to create a new or collateral agreement to do so. *See Yarbrough v. Booher*, 174 S.W.2d 47, 48-49 (Tex. 1943); *In Morton v. Burton-Lingo Co.*, 150 S.W.2d 239, 241(Tex. 1941) the Texas Supreme Court held that a landlord is not bound to make repairs or to pay for repairs that may have been made by the tenant and that "[t]he mere relation of landlord and tenant creates no obligation on the part of the landlord to repair or keep in repair the leased premises". The court in *Kallison v. Ellison*, 430 S.W.2d 839, 840 (Tex. Civ. App.—San Antonio 1968, *no writ*) held that evidence of repairs gratuitously undertaken by the lessor is not sufficient, standing alone, to establish the existence of an agreement to repair. The court in *Dalkowitz Bros. v. Schreiner*, 110 S.W. 564, 565 (Tex. Civ. App. 1908, no writ) held that, although a landlord had no express or implied duty at common law to tenant to repair a leaky roof in a single tenant building, once the landlord undertook a repair, the landlord was required to use due care and was, therefore, liable for damage to tenant's property caused by a leak in the new roof.

Implied Warranty of Suitability

The traditional common law rules governing the limitations on a landlord's duty to its tenant to repair and maintain leased premises partially gave way to an implied warranty of suitability in 1988. In *Davidow v. Inwood N. Prof'l Group-Phase I*, 747 S.W.2d 373 (Tex. 1988), the Texas Supreme Court held that there is an implied warranty of suitability that the premises in a commercial lease are suitable for their intended commercial purpose. The court states

> This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control. *Id*. at 376-77.

(2) If Landlord Retains Control of Portion of Premises

When the landlord retains possession or control of a portion of the leased premises, the landlord, in absence of any agreement to contrary, has an implied duty to the tenant to maintain the retained portion of the premises "so as not to damage the tenant."[128] A landlord has an implied contractual duty – even when a lease is silent – to its tenant, as well as a legal duty to third parties sounding in tort, to keep common areas and other facilities within the landlord's control in good repair and condition. The Texas Supreme Court in *Brown v. Frontier Theatres, Inc.*, 369 S.W.2d 299, 303 (Tex. 1963) held that when a landlord retains possession or control of a portion of the leased premises, the landlord is charged with a duty of ordinary care in maintaining the portion retained so as not to damage the tenant.

(3) Multi-Tenant Building

In the absence of an agreement to the contrary in a lease for space in a multi-tenant building

> consisting of a number of different apartments… divided among several tenants, each one of whom takes a distinct portion and none of [whom] rent the entire building, the rule must then be applied so as to make each tenant responsible only for so much [of the building] as his lease includes, leaving the landlord liable for every part of the building not included in the actual holding of any one tenant.[129]

(4) Tenant's Obligation is Not to Commit Waste

In the absence of express repair and surrender covenants, a tenant has an implied obligation not to commit waste. The Texas Supreme Court in *R. C. Bowen Estate v. Continental Trailways, Inc.*, 256 S.W.2d 71, 72-73 (Tex. 1953) held that the implied covenant against waste arises from the landlord-tenant relationship, and unless superseded by an express covenant, obligates the tenant "to make such repairs as are necessary to preserve the property in the condition in which it was when rented, reasonable wear and tear excepted[.]" The court in *King's Court Racquetball v. Dawkins*, 62 S.W.3d 229, 233 (Tex. App.—Amarillo 2001, no pet.) noted that a covenant against waste is "the implicit duty of a tenant to exercise reasonable care to protect the leased premises from injury other than by ordinary wear and tear".[130]

(5) Express Covenant to Pay for Repairs not Covenant to Make Repairs

At common law, a covenant to make repairs is distinct from the covenant to pay for them, and an agreement to pay for a repair does not itself impose an active duty to make a repair. The court in *National Living Ctrs., Inc. v. Cities Realty Corp.*, 619 S.W.2d 422, 424 (Tex. App.—Texarkana 1981, *no writ*) held "[a] covenant to pay for repairs is distinct from the covenant to make repairs, and such an agreement does not impose upon the landlord any active duty to repair…" and held that a clause providing "any alterations or repairs, required for said licensing will be at the expense of the Lessor…" did not impose affirmative duty on landlord to make needed repairs.

b. Casualty Loss

(1) Tenant Takes the Risk

At common law, the destruction of the improvements on leased property did not relieve the tenant of its obligation to pay rent or give the tenant the right to terminate the lease.[131]

(2) Landlord Bears Risk of Decline in Improvements not Restored

At common law, neither the landlord nor the tenant is obligated to repair the premises after casualty damages unless it caused the damage; the lease continues in effect, and the rent is not reduced or abated. In order to use the premises, the tenant is put to the burden of restoring the premises to useful condition. If the lease does not obligate the landlord or the tenant to restore the premises after a casualty loss, and the loss is not caused by the negligence of either party, the landlord bears the risk of the decline in value of the property if either it or the tenant does not restore the property.

(3) Tenant Liable for Negligently Caused Damage

The tenant is liable to the landlord, if the tenant negligently destroys the premises (*e.g.*, a negligently caused fire) absent a provision in the lease to the contrary.[132]

2. Construction and Construction Sites

In the typical construction job, an owner hires a general contractor, who hires an independent contractor (*i.e.*, a subcontractor), who employs an employee. Unfortunately accidents happen in the course of construction that result in workplace injuries or even fatalities.

E. Relationship of Insurance to Contractual Indemnity

Following the discussion of contractual indemnity, this Article will examine how liability insurance can be used to protect an indemnifying party, an indemnitor ("**Indemnifying Party**") for contractually assumed liabilities and to protect an indemnified party, an indemnitee ("**Indemnified Party**") as an additional insured on the Indemnifying Party's liability insurance. Generally, the Indemnifying Party is required by the Indemnified Party to carry liability insurance, such as commercial general liability insurance ("**CGL**") and business auto liability insurance ("**BAP**"), insuring the Indemnified Party as an additional insured ("**Additional Insured**") on the indemnifying party's liability policy ("**Named Insured**"), and workers compensation insurance insuring the Indemnifying Party for injuries to the Indemnifying Party's employees ("**Workers Comp**"). See discussion below of the attached ISO Additional Insured endorsement forms.[133]

In this Article the party that is the Indemnifying Party or the Named Insured, or being both, is referred to as the "**Protecting Party**" and the party that is the Indemnified Party or the Additional Insured, or being both, is referred to as the "**Protected Party**." The contract between the Protecting Party and the Protected Party (*e.g.*, lease, construction contract)

that includes the indemnity and insurance specifications to be met by the Protecting Party is referred to as the "**Insured Contract**". See the discussion below of the ISO definition of "Insured Contract" and the attached ISO Commercial General Liability Coverage Form setting out the industry's standard language providing insurance protection and the extent of insurance protection to the Protecting Party for its indemnity in an Insured Contract.

II. DRAFTING INDEMNITIES

A. Distinguished from Guaranty and Suretyship

Both guaranty and surety agreements are collateral undertakings dependent upon the existence of another contract or transaction. In *Pham v. Mongiello*, 58 S.W.3d 284 (Tex. App. - Austin [3rd Dist.] 2001, *no writ*), the court found that rules governing guarantees should be analogous to rules governing indemnity agreements; a guaranty of a tenant's obligations should clearly set out what possible charges could be incurred by the tenant, for example, charges arising out of a tenant's negligence. Indemnification is an original undertaking between the Protecting Party and the Protected Party.

B. Elements of an Indemnity

An indemnity is comprised of the following elements:

1. The duty to "**indemnify**" and "**defend**".
2. The "indemnitors" (referred to in this Article as the "**Protecting Party**"),
3. The "indemnitees" (the referred to in this Article as the "**Protected Party**"),
4. The events, acts or omissions triggering Indemnified Liabilities (the "**Indemnified Matters**"),
5. The liabilities indemnified (the "**Indemnified Liabilities**"), and
6. Any excluded matters or excluded liabilities (the "**Excluded Liabilities**").

1. To Defend and to Indemnify

a. Duty to Indemnify

An "**indemnity**" 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. The risk of loss may be contractual or tortious. Many times scriveners use an indemnity provision when they do not know whether the Protected Party 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."** Indemnity agreements are strictly construed in favor of the Protecting Party. However, it is not necessary that the words "indemnify" or "indemnity" be used or even that the promise be in writing.[134]

A defining characteristic of an indemnity agreement is that it "does not apply to claims between the parties to the agreement."[135] The Texas Supreme Court in *Dresser Indus., Inc. v. Page Petroleum, Inc.* 821 S.W.2d 359, 362 - 363 (Tex. App. - Waco 1991), *rev'd in part, aff'd in part*, S.W.2d (Tex. 1993):

> [A] contract of indemnity does not relate to liability claims between the parties to the agreement but, of necessity, obligates the indemnitor to protect the indemnitee against liability claims of persons not a party to the agreement.

In *National City Mortgage Co. v. Adams*, 310 S.W. 3d 139 (Tex. App. - Ft. Worth 2010, *no pet.*) the court rejected a lender's argument that it was entitled to be "indemnified" by the borrower for attorney's fees the lender incurred in defending itself in a suit brought by the borrower alleging that the lender had wrongfully paid a draw submitted by the borrower's home contractor. The loan agreement contained the following typical attorney's fee paragraph:

> That Lender will be reimbursed for all expenses of any kind, including without limitation attorney's fees, that may be incurred by Lender in connection with or arising out of this agreement ...
>
> BORROWER AGREES THAT LENDER AND ITS AGENTS AND ATTORNEYS WILL BE INDEMNIFIED AND HELD HARMLESS FROM ANY AND ALL ACTIONS, CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, AND OTHER LIABILITIES, INCLUDING WITHOUT LIMITATION ATTORNEY'S FEES, THAT ANY

SUCH PARTIES MAY INCUR OR THAT IN ANY WAY RELATE TO OR ARISE OUT OF THE CONSTRUCTION OF THE IMPROVEMENTS, INCLUDING WITHOUT LIMITATION THOSE ARISING OUT OF THE NEGLIGENCE OF LENDER.

The duty to indemnify does not necessarily include a duty to defend.[136]

See in discussion below of Indemnified Matters, the distinction between an "indemnity against liability" and an "indemnity against damages".

b. Duty to Defend

There is a distinction between the duty to defend and the duty to indemnify. Indemnification will not ordinarily arise until the Protected Party has been found liable. The duty to defend arises prior to a determination of liability, and is, therefore suitable to a declaratory judgment action. This distinction has played out many times in insured's demanding defense from its insurers.[137] The duty to defend can arise in a situation where a Protected Party is sued on various theories, some of which will trigger indemnification while others may not.[138]

In *Farmers Texas Mutual County Insurance v. Griffin*, 955 S.W.2d 8, 821 (Tex. 1997), the court addressed the separate duty of an insurer to defend its insured and explained

> [a]n insurer's duty to defend and duty to indemnify are distinct and separate duties. Thus, an insurer may have a duty to defend but, eventually, no duty to indemnify."

The court gave an example of how the duties may diverge,

> a plaintiff pleading both negligent and intentional conduct may trigger an insurer's duty to defend, but a finding that the insured acted intentionally and not negligently (i.e., not within the policy's coverage) may negate the insurer's duty to indemnify. [139]

The "duty to defend" cases have primarily arisen in construing an insurer's duty as opposed to the duty of an Protecting Party. However, the authority of insurance cases has been recognized as being relevant in interpreting the duties of Protecting Parties. *English v. BGP Intern, Inc.*, 174 S.W.3d 366 (Tex. App.–Hou. [14th Dist.] 2005, *no pet. h.*) at fn. 6:

> We recognize that most of the cases addressing this issue, and many of the cases we have cited, involve the duty to defend in the insurance context. However, we find little reason why the principles regarding an insurer's duty to defend should not apply with equal force to an indemnitor's contractual promise to defend its indemnity. .... Based on our interpretation of this provision, it appears BGP agreed to both defend and indemnify English in suits arising from BGP's operations when those operations began before 100 percent of the landowners had consented. Giving reasonable effect to every word used in the contract, and understanding the separate and distinct nature of the two duties, we hold that BGP agreed to defend English-separate and apart from its duty to indemnify-from suits falling within the terms outlined in the contract.[140]

2. Protecting Party

a. Common Law Right of Contribution Among Contracting Protecting Parties

When two persons separately indemnify a third party, then as between themselves, each is liable for only half.[141] This doctrine was recently applied in *Energy Service Co. v. Superior Snubbing Services, Inc*., 236 S.W.3d 190, 194-196 (Tex. 2007). The Texas Supreme Court held that the amendments to the Texas Labor Code did not prevent a Protecting Party from being a third-party beneficiary of another Protecting Party's indemnity thus permitting a settling Protecting Party to obtain indemnification from the other Protecting Party even though there was no privity of contract between them. In *Energy Service*, two contractors worked for an energy company; the two contractors had no contracts with one another, but both had executed contracts with indemnification provisions with the company. The employee of one contractor was injured. When the employee sued, the contractor-employer sought indemnification from the other contractor, claiming to be a third party beneficiary of the indemnification provision between the company and the other contractor.

b. Indemnification by a Protecting Party of Another Protecting Party

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 a Protected Party. 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). 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).

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.[142]

c. Example of Not Being a Protecting Party

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 a Protecting Party 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.

3. Protected Party

a. Direct Beneficiaries

(1) Primary Protected Party

Indemnification clauses typically name a primary party and secondary persons, some not even parties to the Insured Contract, as being a Protected Party. For example, an owner may be named as the primary Protected Party in a construction contract requiring the contractor to indemnify the owner for liabilities arising out of the contractor's construction activities.

(2) Secondary Protected Parties

In addition to naming the owner as the primary Protected Party, the owner may also require that the scope of the indemnity include liabilities of other persons by listing them as "additional" protected parties. An example of multiple protected parties is the following provision.

Insured Contract Provision:

> "**Protected Party**" shall include (a) the Owner, the Owner's partners, affiliated companies of Owner or of any partner of Owner, (b) Owner's construction lender, (c) the **Architect**, and (d) as to each of the persons listed in (a)-(c) the following persons: each of 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 this clause.

A similar provision protective of an architect was reviewed in *Foster, Henry, Henry & Thorpe, Inc. v. J. T. Const. Co., Inc.*, 808 S.W.2d 130 (Tex. App. – El Paso 1991, *writ denied*). The court held that an architectural firm was entitled to be indemnified for costs incurred in defending a suit by a property owner for damage resulting from work performed by a contractor in accordance with plans prepared by the architect. The jury found that (a) the contractor was 90% negligent in failing to protect the construction site — resulting in damage to an adjacent property during a substantial rainfall — and (b) the architectural firm was free from fault. The language of the indemnity provision in the owner/contractor agreement stated that the contractor was to indemnify the owner and architect for losses, including attorneys' fees, resulting from the contractor's

negligence. This language is similar to the AIA indemnity language.

Insured Contract Provision:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the **Architect** and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to ... injury to or destruction of tangible property ... and (2) is caused in whole or in part by any negligent act or omission of the Contractor ... regardless of whether or not it is caused in part by a party indemnified hereunder.

Other examples of contractual enlargements of direct beneficiaries of an indemnity are **additional insured endorsements** to liability policies and **dual obligee riders** on performance bonds.

The importance of specifically designating in the indemnity clause all of the persons intended to be Protected Parties 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** a Protected Party within the listing of Protected Parties in a indemnity covering the

Insured Contract Provision:

> 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).

Questions concerning the context of "who" and "when" should be resolved. For instance, assume an indemnity provision generally refers to a company's "**officers and directors**" as Protected Parties.

Question: What would happen if a claim were to be made against a party who, at the time the indemnification provision was signed, was an officer or director, but was not an officer or director at the time the claims were made?

To avoid issues of ambiguity, it should be made clear whether the Protected Parties covered are intended to be

Insured Contract Provision:

> all past, present, and future officers and directors

or a variation thereof that defines the scope of the Parties Protected.

b. Third Party and Incidental Beneficiaries

(1) Bonds

Indemnity bonds usually are construed as contracts of indemnity not creating third party beneficiary rights to sue on the bond protecting indemnitee of bond. [143]

(2) Creditors

It has been held that creditors of the seller of a business are not third party beneficiaries of an "all bills paid" indemnity contained in a contract for the sale of a business so as to revive a claim otherwise barred by the statute of limitations.[144] A creditor of a Protected Party has been held to be merely an incidental beneficiary of an indemnity agreement and does not have the right to bring suit directly against the Protecting Party.[145]

4. Indemnified Matters

a. Causation Triggers to Indemnity

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

(1) "Due To"

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

(2) "Caused By"

The court in *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5th Cir. 1993) held an 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.

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 Protected Party (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)" (the Protecting Party) and did not expressly mention that it covered injuries "caused by" the Protected Party.

Insured Contract Provision:

> By signing the below statement, the seller (meaning Faulk Management as the "seller" of janitorial services) (the **Protecting Party**) 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.
>
> (Author inserted **bold** and identification of acts of the Protecting Party as the cause of the Indemnified Liability.)

(3) "Arising Out Of"

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

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

The court in *Sieber & Callicutt, Inc. v. La Gloria*, 66 S.W.3d. 340 (Tex. App. – Tyler 2001, *no writ*) found, in a case where the negligence of the Protected Party (La Gloria) and the negligence of the Protecting Party (Sieber & Callicutt) was determined to be equal, that the negligence of the Protecting Party was a "**substantial factor**" and "**a proximate cause**" of the liability although not the only factor in causing the Indemnified Liability (liability to the estate of a deceased employee of the Protected 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 man-way 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 Protecting 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.

Insured Contract Provision:

> CONTRACTOR 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.

(4) "In Connection With"

Indemnified Liabilities may be contractually limited to such injuries occurring "**in connection with**" the work being performed by the Protecting Party. If the indemnity is so limited, then it might be held not to cover the negligent acts of the Protected Party that are unrelated to the performance of the scope of the work by the Protecting Party.[146] 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.[147] 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:

Insured Contract 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.[148]

Some cases have determined that the activity covered by the indemnity has completed for the day and not extended the Protecting Party's indemnity.[149]

b. Injuries

(1) "Injuries"

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. – Hou. [14th Dist.] 1994, *writ denied*).

(2 Injuries To Employee of Protected Party

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 rather broadly by a court to include the employees of the lessor.[150]

(3) Injuries To Protecting Party

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 Liabilities did not include injuries to the Protecting Party, the contractor.[151]

(4) Injuries To Employee of Protecting Party

The Texas Supreme Court in *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990) construed the following reference to "**death 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):

Insured Contract 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)....

The supreme court found that this language was sufficient to refer to employees of the Protecting Party (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:

Insured Contract 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. *Id.* at 301.
>
> (Court's emphasis.)

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 Protecting Party would not indemnify the Protecting Party for the Protecting Party's own negligence:

Insured Contract Provision - Exclusion:

> The subcontractor agreed to indemnify the contractor from liability for or on 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 Liabilities did not include injuries to an employee of the Protecting Party due to the negligence of the Protecting Party.

In *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200, 210 (Tex. Civ. App. – Hou. 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 Protected Party:

Insured Contract 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 [Babcock's] agents, servants and employees, as well as the agents, servants, and employees of [Babcock's] subcontractor, whether or not arising from sole or concurrent negligence or fault of [Texas Utilities].

(5) Injuries To Independent Contractor of Protecting Party

It has been held that an indemnity provision which clearly limited a contractor's obligation to indemnify a 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.[152] Adding "**employees**" or "**agents**" to the list may capture damages not otherwise awarded against the Protecting Party in its capacity as employer.[153]

5. Indemnified Liabilities

a. "Liabilities" or "Damages"

(1) Liabilities

Indemnities have sometimes been classified as an "**indemnity against liability**."[154] In the case of a promise to indemnify against liability, a cause of action accrues to the Protected Party 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.[155]

(2) Damages

Alternatively, an indemnity may be an "**indemnity against damages**." With respect to a promise to indemnify against damages, a right to bring suit does not accrue until the Protected Party has suffered damage or injury by being compelled to pay the judgment or debt.[156]

b. Contractual Obligations or Torts

Indemnity agreements may cover contractual obligations of others or torts committed by others.

(1) 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.[157]

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).[158] 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.[159]

Perhaps the result might have been different in *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex. App. – Hou. [14th 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 stems solely from the parties' contract.

(2) Torts

(a) Negligence

Indemnity against "**one's own negligence**" has long been recognized in Texas.[160] *See* the discussion of the "express negligence test" as a rule of contract construction below.

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

Insured Contract Provision:

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.*,

Insured Contract Provision-Exclusion:

but not injuries due to the sole negligence of the _____ (*e.g.*, landlord).

(b) Gross Negligence and Punitive Damages

In drafting the classes of liabilities covered by an indemnity care should be given to the scope of Indemnified Liabilities.

Questions: For example, are damages from gross negligence[161] or punitive damages of the Protected Party to be covered? Are the punitive damages of an employee or an agent covered, if the employer is not liable?

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. 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.

In *Webb v. Lawson-Avila Const., Inc.*, 911 S.W.2d 457 (Tex. App. - San Antonio 1995, *writ dism'd by agreement*) the court reviewed an indemnity provision providing that steel erector would indemnify a general contractor

Insured Contract Provision:

irrespective of whether such liability, damages, losses, claims, and/or expenses are actually or allegedly, caused wholly or in part, through the **negligence** of contractor or any of its agents, employees, or other subcontractors (**Bold** added by author.)

The court held this provision was sufficient to provide indemnity for the general contractor from the consequences of all degrees of negligence, including gross negligence.[162]

In *Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex. App. — San Antonio 1989, *no writ*) 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 Protected Party (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.

Insured Contract 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.

Texas allows insurance coverage for punitive damages derivative of gross negligence.[163]

(c) Willful Misconduct and Intentional Torts

The court in *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 232 33 (Tex. App. — Hou. [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

Insured Contract Provision-Exclusion:

any claim aris(ing) out of the sole and **gross negligence** or **willful misconduct** of Owner (the commercial landlord, the Protected Party)

(**Bold** added by author.)

as including as an exclusion of 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 Protected Party 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.[164]

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. - Hou. [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.

See Comment by Meagan McKeown, *Indemnification Agreements for Intentional Misconduct: Balancing Public Policy and Freedom to Contract in Texas*, 46 ST. MARY'S L. J. 345, 355 (2015) stating

> Although the Supreme Court of Texas has not yet extended the express intent requirement to cases involving gross negligence or intentional misconduct, some lower courts have considered the issue and reached divergent conclusions as to whether parties can contract for indemnity against gross negligence or intentional acts.[165]

6. Excluded Liabilities

a. Broad Exception for Liabilities of Protected Party

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

Insured Contract Provision - Exclusion:

> any liability which lessor (the Protected Party) would be liable

b. Exceptions for Sole Negligence, Gross Negligence, Knowing Actions, and Willful Misconduct of Protected Party

(1) A Continuum of Culpable Mental States

The court in *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 232 33 (Tex. App. – Hou. [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

Insured Contract Provision:

> any claim aris(ing) out of the sole and gross negligence or **willful misconduct** of Owner (the commercial landlord, the Protected Party)
>
> (Author inserted the parenthetical reference and bold.)

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).

(2) Exception for Sole Negligence Includes Sole Gross Negligence

The court in *Crown Central Petroleum Corp. v. Jennings*, 727 S.W.2d 739 (Tex. App. - Hou. [1st Dist.] 1987, *no writ*) held that a clause -

Insured Contract Provision - Exclusion:

> **excepting** only claims arising out of accidents resulting from the sole negligence of Owner
>
> (**Bold** added by author.)

included accidents arising from the sole gross negligence of the owner.

(3) Exception for Sole Negligence Does Not Affirmatively Create Indemnity for Protected Party's Concurrent Negligence

However, the court of appeals' reliance in *Crown Central Petroleum Corp. v. Jennings* upon its opinion in *Singleton v. Crown Central Petroleum Corp.*, 713 S.W.2d 115 (Tex. App. - Hou. [1st Dist.] 1985, *writ ref'd n.r.e*) was misplaced since, after citing the *Singleton* writ history of "*writ ref'd n.r.e*," the Texas Supreme Court withdrew its opinion and reversed the court of appeals in *Singleton* at 729 S.W.2d 690 (Tex. 1987). The court of appeals both in *Jennings* and *Singleton* erroneously concluded that the above quoted language "**excepting** ..." was an express statement that the concurrent negligence of the Protected Party was indemnified by the Protecting Party. As noted in the discussion of the Texas Supreme Court cases construing *Ethyl*, the Texas Supreme Court held that this type language states

what is not to be indemnified, and not what is indemnified.

c. Scope of the Work Limitations

Courts have attempted to limit the scope of the Indemnified Liabilities to job site injuries or activities and work within the scope of the contract.

(1) Contemplated Work

Indemnified Liabilities may be contractually limited to such injuries as "**arise out of**" or are "**in connection with**" the work being performed by the Protecting Party. If the indemnity is so limited, then it might be held not to cover the negligent acts of the Protected Party that are unrelated to the performance of the scope of the work by the Protecting Party.[166] 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.[167]

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:[168]

Insured Contract 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.
>
> (**Bold** added by author.)

(2) 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 Protected Party 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.

d. Contemplated Time Covered

Indemnity provisions have been strictly construed to limit the time of the occurrence of the Indemnified Liabilities. 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

Insured Contract Provision:

> assumed all obligations

under the lease, as not covering damages to the leased premises which occurred prior to the sublease.

However, an indemnity provision whereby an equipment lessee agreed to indemnify the lessor for loss, damage, and expense incurred to the leased equipment and agreed to be responsible for the return of the leased equipment at its expense did not terminate when the equipment was delivered by the lessee to a third party selected by the lessee, but terminated when actually delivered back to the lessor.[169]

e. Negligence of Protecting Parties Not Same as Negligence of Protected Parties

"Clearly and unequivocally", provisions requiring the Protecting Parties to indemnify the Protected Parties against loss resulting from the negligent acts or omissions of the Protecting Parties do not cover loss caused by the negligence of the Protected Parties.[170] Extensive litigation over the intent of the drafters of such indemnity clauses lead the Texas Supreme Court to adopt the "express negligence" test.

C. Requirements for Enforceability

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

1. Statutory Limits on Indemnity

A contract of indemnity is not against public policy even if the Protected Party is indemnified against its own negligence, except if there is a specific statute declaring such a contract is void.

a. Construction Contracts

In 2011 Texas adopted an anti-indemnity, anti-additional insured law applicable to construction contracts ("**Texas Anti-Indemnity and Anti-additional Insured Act**". Chapter 151 of the INSURANCE CODE. This effected a major change in Texas construction law.

- It applies to all "**construction contracts**" and agreements collateral to construction contracts, entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier or equipment lessor, and agreements between these parties and an owner's lender regarding an assignment of the construction contract.

- It applies to both public and private construction.

- Except as listed in the last bullet point below, **void and unenforceable** are any requirements to the extent they require an indemnitor to indemnify, hold harmless or defend a party, including a third party, against a claim caused by the negligence (whether concurrent, sole, strict, gross, etc.) or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract, of the indemnitee, its agents or employees, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. § 151.102 TEXAS INSURANCE CODE.

- Also except as listed below, **void and unenforceable** are any additional insured requirements covering the same liabilities.

- Except indemnity and/or additional insured coverage can be enforced as to

  (1) injury or death of an employee of an indemnitor, its agent or subcontractors (see Section 151.103 below),

  (2) a cause of action for breach of contract or warranty that exists independently of an indemnity obligation,

  (3) indemnity provisions in loan documents, other than construction contracts,

  (4) an indemnity provision pertaining to a claim based upon copyright infringement,

  (5) an indemnity provision in a construction contract pertaining to (a) a single family house, townhouse, duplex, or land development directly related thereto, or (b) a city public works project, and

  (6) several other limited exceptions.

One of the exceptions to Chapter 151's prohibitions is Section 151.103 Exception for Employee Claim (the "**Exception for Employee Claim**"). It provides

> Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

b. Architects and Engineers

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. 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.

c. Oil and Gas Service Contracts

Indemnity contracts in oil and gas service contracts are void as against public policy unless certain statutory requirements are met. TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001 - .007. This statute is known as the "**Texas Oilfield Anti-Indemnity Statute**"; this statute, formerly TEX. REV. CIV. STAT. ANN. Art. 2212b, was originally enacted in 1973, and amended in 1979. Article 2212b was recodified as Chapter 127 of the Civil Practice and Remedies Code in 1985, and amended again in 1989.[171]

2. Common Law Rules of Contract Interpretation

(a) Intent

A contract of indemnity is read, as any other contract, to ascertain the intent of the parties. [172]

(b) *Strictissimi Juris*

(1) Strict Construction Limiting Scope of Indemnified Liabilities

Once the intent of the parties is ascertained, the doctrine of ***strictissimi juris*** is applied to prevent the Protecting Party's liability from being extended beyond the terms of the agreement.[173] Courts have stated that the Protecting Party is entitled to have the indemnity contract strictly construed in the Protecting Party's favor. Courts examine the "event" to determine whether it is within the scope of Indemnified Liabilities. The San Antonio Court of Appeals has held that an indemnity for one's own negligence also **includes** all shades and **degrees of negligence**, including one's own gross negligence.[174]

(2) Conflicting Terms: Express Duty and Indemnity

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 (Ex. 1980), the Texas 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 Protecting Party 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. The court was applying the "clear and unequivocal' test.

3. Written Contract to Overcome the Worker's Compensation Bar

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

Compensation Act, TEX. LABOR. CODE ANN. § 417.004.

4. Fair Notice

a. Appearance and Placement

The concept of fair notice was introduced into Texas indemnity law in 1963 by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp*., 365 S.W.2d 631 (Tex. 1963). The supreme court in *Spence* reasoned that

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

The fair notice requirement focuses on the appearance and placement of the provision as opposed to its "content."[175]

b. The UCC Standard

In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the Texas 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. The *Dresser* court **struck down** an indemnity located on the back of a work order, in a series of uniformly numbered paragraphs, with no heading and with no contrasting type.

Section 1.201(10) of the Texas UCC provides

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

TEX. BUS. COMM. CODE § 1.201(10).

c. Actual Notice

The conspicuousness requirement is not applicable when the Protected Party establishes that the Protecting Party possesses actual notice or knowledge of the indemnity agreement.[176]

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.[177]

Question: Does actual knowledge apply to both conspicuousness test and the express negligence requirement?

Some courts have recognized that the "actual notice or knowledge" exception should apply to the procedural requirement (conspicuousness), but not necessarily the substantive requirement (the express negligence rule).[178]

Other courts following the maxim that a party's subjective "actual notice or knowledge" of a provision should not alter that provision's objective interpretation. Some Texas appeals courts have cited the "four corners" rule and refused to apply the "actual notice or knowledge" exception to the express negligence rule.[179] The argument is that if the actual notice rule is applied as an exception to the express negligence requirement, the actual knowledge exception would transform the requirement, an issue of law determined by the four corners of the document, into an issue of fact – the existence of notice of the indemnity, and allow parole evidence and testimony of subjective interpretation.

5. Express Negligence Requirement[180]

a. The Protected Party's Negligence

In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co*., 725 S.W.2d 705, 707 (Tex. 1987) adopted the "**express negligence**" requirement.[181] In *Ethyl*, the court observed

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel

> ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that true intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine…. We now reject the clear and unequivocal" test in favor of the express negligence doctrine. *Id.* at 707 – 708.

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did **not** protect (indemnify) a Protected Party for losses and damages caused by the Protected Party's (Ethyl's) negligence:

Insured Contract Provision:

Contractor (Daniel) (the Protecting Party) shall indemnify and hold Owner (Ethyl) (the Protected Party) 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 (the Protecting Party), Contractor's employees, subcontractors and agents or licensees.

(Emphasis and parenthetical references added by author).

Id. at 708. This provision does not identify the Owner's (Ethyl's) (the Protected Party's) negligence, as a cause of the liability; it identifies only the negligence of the Contractor (the Protecting Party), as the cause of the liability being indemnified.

The express negligence requirement is a rule of contract interpretation and therefore is to be determined by the court as a matter of law.[182]

The following indemnity provision will **not** be enforced to indemnify "y" "for loss caused by y's negligence":[183]

Insured Contract Provision:

x will indemnify y for all loss arising out of the acts or omissions of y except for loss caused by the gross negligence or willful misconduct of y"

"Y's" (the Protected Party's) negligence is **not** expressly identified as a cause of the liability.

The anti-indemnity provisions of Chapter 151 of the INSURANCE CODE reduce the number of circumstances in which a Protecting Party is permitted to indemnify a Protected Party in a construction contract. One of the exceptions to Chapter 151's prohibitions is the Section 151.103 Exception for Employee Claim quoted above.

b. The Protecting Party's Negligence

(1) Contractual Comparative Negligence

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did not protect a Protected Party either for the Protected Party's (Owner's) negligence or for the Protecting Party's (Contractor's) negligence causing injuries to the Protecting Party's employee:

Insured Contract 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 (the Protecting Party), Contractor's employees, subcontractors and agents or licensees.

Id. at 708. The court termed this claim as one for "**comparative indemnity**." The court held that the indemnity provision did not meet the express negligence test in this respect even though the indemnity provision expressly refers to the Protecting Party's (Contractor's) negligence! 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.

(**Bold** added by author.)

If a Protected Party wants to be indemnified for liabilities caused jointly by the Protected Party and the Protecting Party and so including the contributory share of the Protecting Party, the indemnity must expressly so state.

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

Insured Contract 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 Protecting 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 (Protecting Party) to assume liability for injuries to its employees thereby overcoming the Workers' Compensation Bar.

(2) Contractual Proportionate Sharing

In *Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.3d 340 (Tex. App. - Tyler 2001, *no writ*) 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 it 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:

Insured Contract 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 <u>greater than or equal to the comparative negligence</u> of the Contractor, then the Contractor shall only be liable to La Gloria to the extent of the Contractor's own negligence.
>
> (<u>Underlining</u> added by author.)

(3) Does Express Negligence Apply to an Indemnity by the Protecting Party as to its Own Negligence?

Question: Is it necessary for an indemnity to expressly cover a Protecting Party's negligence?

Questions: If the Protecting Party is indemnifying the Protected Party for injuries to employees of the Protecting Party, or employees of its agent, or employees of subcontractors of any tier (an indemnity expressly excluded from Chapter 51 Anti-Indemnity and Anti-Additional Insured Act in the Insurance Code as § 151.103 quoted above), does the express negligence doctrine have to be met? As to both the Protecting Party's indemnity for the Protected Party's negligence? And the Protecting Party's indemnity as to its own negligence and the negligence of the subcontractors of any tier?

Several courts have also held that the **doctrine does not apply** when a party does not seek indemnity from its own negligence. In *Paragon Gen. Contractors, Inc. v. Larco Const., Inc.*, a general contractor sought indemnification against a caulking subcontractor for the cost of repairing water leaks which it claimed were the result of the subcontractor's negligence, breach of contract and breach of warranty. Although the indemnification clause probably would not have passed muster under Fisk, the Dallas Court of Appeals nevertheless reversed a summary judgment for the subcontractor, holding that

> the express negligence doctrine does not apply when the indemnitee does not seek indemnity for its negligence.

In *M. Sundt Constr. Co. v. Contractors Equipment Co.*, 656 S.W.2d 643 (Tex. App. - El Paso 1983, *no writ*), a lessee of a crane was required to indemnify the equipment lessor (equipment lease required Sundt to indemnity the equipment supplier for loss "because (or as a result) of the return of the leased equipment") in spite of Texas's "clear and unequivocal" or "express negligence" rule of construction as:

> [t]he obligation to indemnify is absolute, and it arises out of the obligation of Sundt with regard to the return of the equipment and not from any negligence on the part of Contractors [equipment supplier]. Where the damages result from conduct for which indemnity is provided and which does not involve the negligence of the indemnitee, liability is established. In such cases, the "express negligence" rule is not applicable. *Id.* at 645.[184]

c. Future Negligent Acts or Omissions

The express negligence doctrine applies only to future negligent acts or omissions.[185]

6. Strict Liability

a. Indemnification for Strict Liability Arising out of Statutory Liability

In 1994 the Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) expanded the express negligence doctrine to require indemnity agreements intending to cover a Protected Party's statutory strict liability to expressly state that it covers such 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. Some subsequent court of appeals have been unwilling to extend the express negligence doctrine to non-negligence claims.[186]

b. Indemnification for Strict Liability Arising out of Products Liability

The Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) in *dicta* also recognized that indemnity provisions shifting liability arising out of strict products liability are similarly enforceable, if fair notice has been given, including expressly using the words "**strict liability**".[187] Texas courts generally have cited two policy rationales for the express negligence rule: (1) if a contract explicitly covers all situations where a party might be forced to indemnify another, it prevents the injustice that may occur when an innocent party incurs tremendous cost because of another's liability; and (2) indemnification is an exception to the rule that parties are liable for their own actions. Because these rationales also apply to causes of action other than negligence, the Texas Supreme Court saw no reason to limit the scope of the express negligence rule to negligence.

The Dallas Court of Appeals 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 Protected Party's negligence, breach of warranty, and strict product liability:

Insured Contract 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 nonoperation 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.
>
> (Underling and **bold** added by author.)

c. Indemnification for Strict Liability Arising out of Statutory Environmental Liability

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

Insured Contract Provision:

> 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 Protected Party'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.

7. Other Insured Contract Provisions

a. Defense

(1) "Defense Costs": Precondition - Express Negligence Test Satisfied

In *Fisk Electric Co. v. Constructors & Assoc.s, Inc.*, 888 S.W.2d 813 (Tex. 1994), the Texas 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 Protecting Party, 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 Texas Supreme Court **declined** to carve out an exception to the express negligence rule for contracts which although they did not expressly indemnify the Protected Party for its own negligence, clearly, expressly or broadly covered the Protected Party's defense costs. Also see *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App. – Hou. [1st Dist.] 1995, *writ denied*), holding **no** right to attorney's fees absent an enforceable indemnity provision.

(2) Attorney's Fees

The expense of defending a liability suit and in subsequently enforcing the contractual indemnity are reimbursable when the Protected Party recovers contractual indemnification from the Protecting Party. A Protected Party's attorney's fees in defending a liability suit are recoverable from the Protecting Party as "**indemnified damages**" even though not expressly mentioned in the indemnity provision. Attorney's fees may be awarded to the Protected Party pursuant to TEX. CIV. PRAC. & REM. CODE § 38.001(8) in connection with a suit against the Protecting Party for its breach of its contract of indemnity.[188]

In *Construction Investments and Consultants, Inc. v. Dresser Industries, Inc.*, 776 S.W.2d 790, 792 (Tex. App. Houston [1st Dist.] 1989, writ denied), the court of appeals found the following extensive contract language as ***clearly indicating the intent*** of the Protecting Party to cover the Protected Party's attorney's fees ($142,633.20) where the Protected Party successfully defended against the negligence suit, even though the indemnity provision otherwise would not pass the express negligence test:

Insured Contract Provision

> Contractor (**CIC**) shall, except as otherwise expressly provided herein, indemnify, protect and save Dresser

... harmless against any and all actions ... including *costs of litigation, attorney fees and reasonable expenses in connection therewith* ... whether or not such loss, injury, or damage shall be valid or groundless, and Contractor agrees that in case Dresser ... shall be made defendant in any suit ..., *Contractor*, immediately upon notice from Dresser, *shall be bound and obligated to assume the defense thereof, including the settlement negotiations and shall pay* ... expenses resulting from ... . *It is understood and agreed by Contractor that in case Dresser is made defendant in any suit or action and Contractor fails or neglects to assume the defense thereof, after having been notified so to do by Dresser, that Dresser may compromise and settle or defend any such suit or action, and Contractor shall be bound and obligated to reimburse Dresser for the amount expended by it in settling and compromising any such claim, or in the amount expended by Dresser in paying any judgment rendered therein, together with all reasonable attorneys' fees incurred by Dresser by reason of its defense or settlement of such claims*.

(*Italics* added by court.) *Id*. at 791.

The court of appeals held that CIC's obligation to indemnify Constructors for attorney's fees and costs in the defense of the underlying suit is separate from CIC's obligation to indemnify Constructors for Constructors' negligence. The court held that

> an Protected Party may recover attorney's fees and costs where it was not found negligent, even though the indemnity provision did not meet the express negligence standard.

(3) Costs and Expenses

However, a different rule may apply to "**costs**" and "**expenses**" beyond attorney's fees. In *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.—Dallas 1999, *no writ*) the court held that failure of the indemnity provision to expressly cover the Protected Party'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.

(4) Allocation of Costs of Defense if defending Protected Party and Persons Not Indemnified

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

b. Choice of Laws

(1) Insured Contract Without Choice of Law Provision

See *Maxus Exploration Co., f/k/a Diamond Shamrock Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50 (Tex. 1991).

(2) Insured Contract With a Choice of Law 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).

c. 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

The indemnity should address whether its rights are exclusive of any other remedy available to the Protected Party. It might be argued that an indemnity was intended to be the exclusive remedy afforded to the Protected Party 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. Powers Granted to Protected Party

Certain express broad powers granted in an Insured Contract to a Protected Party have been upheld.

(1) Modification of Instruments Increasing Liability

It has been held that an indemnity contract is not contrary to public policy even though the contract makes vouchers or affidavits *prima facie* evidence of any loss paid by the Protected Party and gives the Protected Party power to alter and modify instruments and to execute new obligations that fix the Protecting Party's liability without notice to the Protecting Party. In *Hammond v. Travelers Indem. Co.*, 553 S.W.2d 205 (Tex. Civ. App. – Hou. [14th Dist.] 1977, *no writ*), the court upheld a clause in an indemnification agreement in a surety bond which provided for indemnification of all claims resulting from suretyship, or any renewal, extension, modification, or continuation for suretyship or additional suretyship even though increases in the surety bond were made without the knowledge or consent of the Protecting Party (the surety company).

(2) Expenses Incurred in Good Faith

A provision requiring the Protecting Party (principal on a surety bond) to reimburse the Protected Party for all disbursements made by it in good faith, belief of liability, necessity, or expediency, regardless of whether such factors existed in actuality, has been upheld.[189]

(3) Prior Notice Provision

In a case involving a lease which provided that a landlord's duty to repair the leased premises was conditioned upon the tenant giving notice or upon the landlord obtaining knowledge of the defect, the tenant was **not** entitled to indemnification from the landlord for liability for injuries sustained by the tenant's customer occasioned by an unreported defect in the premises. [190]

(4) Discretion

(a) No Common Law Indemnity for Voluntary Settlements of Indemnified Liability

Settlement by one joint tortfeasor extinguishes any common law and statutory contribution rights such person may have had. [191] In *MAN GHH Logistics GMBH v. Emscor, Inc.*, 858 S.W.2d 41 (Tex. App. – Hou. [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:

Insured Contract Provision:

> *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:

(i) any breach or default in the performance by Sellers of any covenant or agreement of Sellers contained in this Agreement;

(ii) 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;

(iii) third party claims regarding Emscor's management of Purchaser's Wolff tower cranes prior to the Closing Date;

(iv) third party claims regarding any matter relating to title to or Emscor's maintenance of the Purchase Assets prior to the Closing Date; or

(v) 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.

(b) No Equitable Right to Settle Indemnified Claim Absent Contractual Right to Settle Without Consent

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 Protected Party (Guardian Title Co.) to settle a claim (an abstract of judgment bonded around) when the Protecting Party did not voluntarily step in and assume the defense against the adverse claimant. The Protected Party had sent a letter to the Protecting Party requesting the Protecting Party to "honor the terms" of the indemnity agreement. The court found that the indemnity contract **did not contain a provision** obligating the Protected Party to offer to undertake the defense of the claim and that the Protecting Party never made a "tender of the defense" to the Protected Party. Therefore, the Protected Party could not obtain reimbursement of the amount paid to settle the adverse claim when the Protected Party settled the claim in violation of the following contractual provision:

Insured Contract Provision:

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

(Underlining added by author.)

(c) Settlement Authority

Delegating settlement authority to the Protected Party has been upheld. The Supplement to Manual's Lease attached as a form to this article contains the following provision protective of the Protected Party in the conduct of the defense of an Indemnified Liability:

(1) the Protected Party (Indemnified Person) is permitted to employ its own counsel in addition to the counsel employed by the Protecting Party (the Indemnifying Person);

(2) the cost of the Protected Party's counsel is also an Indemnified Liability;

(3) the Protected Party is given the right to settle claims in the event that the Protecting Party does not provide a defense to the claim; and

(4) amounts paid by the Protecting Party under such circumstances is an Indemnified Liability.

Also see in this form procedures for the Protected Party to determine if the Protecting Party will honor its obligation to provide a defense and, if not, for the Protected Party to employ counsel to defend the claim.

(1) Contracts

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. [192]

(2) Bonds

An indemnity provision that "any decision, determination, settlement, defense, compromise, or other action in connection with any matter arising under an indemnity bond would be final, conclusive, and unconditionally binding on the indemnitor" has been upheld as not being against public policy. [193] In *Ford v. Aetna Ins. Co.*, 394 S.W.2d 693 (Tex. Civ. App. - Corpus Christi 1965, *writ ref'd n.r.e.*), the court upheld an indemnity provision which granted the Protected Party (surety on a performance and payment bond) exclusive power to make conclusive determinations of claims and demands to be paid.

(d) Settlement Standards

(1) Reasonable and Prudent

For a settling Protected Party to recover an amount of the settlement from this Protecting Party, the Protected Party must show the potential liability to a claimant and that the settlement was **reasonable, prudent and made in good faith** under the circumstances. [194] Absent an unconditional contractual right to settle, a Protected Party 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. [195] 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. [196]

(2) Good Faith

An Protected Party cannot recover to reimburse himself for amounts paid in settlement, if the settlement was not made in good faith. Additionally, even though an indemnity agreement vests settlement authority in the Protected Party, a contractual requirement of settling in "good faith" can lead to liability on the part of the settling Protected Party. The court in *H.S.M. Acquisitions, Inc.* found the terms of an agreed judgment between a claimant and the Protected Party 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. [197]

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 Protected Party 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. The provision in the indemnity agreement granted the following settlement authority:

Insured Contract Provision:

> The Surety shall have the exclusive right to decide and determine whether any claim, liability, suit or judgment made or brought against the Surety or the indemnitors or any one of them on any such bond shall or shall not be paid, compromised, resisted, defended, tried or appealed, and the Surety's decision thereon, if made in **good faith**, shall be final and binding upon the indemnitors. An itemized statement of the payments by the Surety for any of the purposes specified herein, sworn to by an officer of the Surety, or the voucher or vouchers for such payments, shall be *prima facie* evidence of the liability of indemnitors to reimburse the Surety for such amounts, with interest.
>
> (**Bold** added by author.)

f. Settlement Agreements.

(1) Effect of Settlement by Plaintiff with a Joint Tortfeasor

(a) One Recovery Rule: Credit for Settlement Payments

Although the court in *Kenneth H. Hughes Interests v. Westrup* found that the defendant (landlord) was liable to the plaintiff (tenant), the landlord's $23,000 liability was more than offset by the $770,000 settlement payment made by its joint defendants, a contractor (which had indemnified the landlord) and the contractor's subcontractor. The court followed the "one recovery" rule announced in *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991). In that case, the supreme court held that "(t)here can be but one recovery for one injury, and the fact that more than one defendant may have caused the injury or that there may be more than one theory of liability does not modify this rule." [198]

(b) Effect of Settlement (by Release and Indemnity) by Plaintiff of a Joint Tortfeasor Which Also is an Protecting Party

In *Martinez v. Gulf States Utility Co.*, 864 S.W.2d 802 (Tex. App. - Houston [14th Dist.] 1993, *writ denied*) the plaintiffs, who were injured when they accidentally touched a high voltage wire, were held to be precluded from recovering against Gulf States, the utility company and owner of the utility pole, because they had previously settled their claim with the contractor, which owed a statutory indemnity to the utility company for such type of accidents. Plaintiff, Daniel Hernandez, was killed, and plaintiffs, Clarence Thompson, Sr. and David Martinez, were injured, in repairing a water well for the defendant property owners, Clarence Thompson, Jr. and Pamela Mendez. Hernandez was killed when Clarence Thompson, Sr., Martinez and Hernandez accidentally touched a high voltage wire.

The court found that a **circuit of indemnity**, created by statute and by contract (the release agreement), had been created by the settlement agreement that precluded recovery by the plaintiff against the utility company. In settling with the property owners, Thompson Jr. and Mendez, the plaintiffs executed a typical release releasing these defendants "for any and all claims, demands ... and causes of action ... whether in contract or in tort ... for and on account of injuries sustained ... (including) any liability for any cross actions seeking contribution and indemnity. ..."

TEX. HEALTH & SAFETY CODE ANN. § 752.008 creates a statutory indemnity by persons responsible for having workers near utility lines if they do not follow the advance notice and precautionary procedures established to protect against these type of accidents. The court found that a *circuit of indemnity* existed **precluding** recovery against the utility company since the utility company had a statutory indemnity by the settling defendants, who had a contractual indemnity (release) from the plaintiffs.

Consideration should be given to addressing the level of success that is covered by an indemnity ("success on the merits or otherwise" includes settlement? versus indemnification for "**to the extent successful**"). [199]

(2) Express Negligence Rule And Settlement Agreements

(a) The Settlement Agreement Itself

The court in *Martinez v. Gulf States Utility Co.*, 864 S.W.2d 802 (Tex. App. – Hou. [14th Dist.] 1993, *writ denied*), also held that the express negligence doctrine was **not applicable** to the release executed as a part of the settlement agreement since the plaintiff could not claim surprise as to the cross claim by the utility company against the settling defendant for statutory indemnity. The release explicitly contemplated cross actions by the other co-defendant. Liability was certain. *Id.* at 805.

(b) Settlement Authority

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 Protected Party, then the Protecting Party is **not** liable for a settlement negotiated by the Protected Party, 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). The court quoted *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813 (Tex. 1994) in rejecting Coastal's argument that the express negligence test was not applicable where absolute settlement authority granted to the Protected Party:

> The *Fisk* court made explicitly clear that allowing the rule proposed by Coastal would "leave indemnitors vulnerable to indemnitees who might settle cases without admitting negligence, leaving the indemnitor to pay the costs of settlement and defense."

Id. at 815.

The court further stated in a footnote that even if a settlement could be contested by the indemnitor, such a result would retard, rather than advance, the policy of preventing satellite litigation surrounding interpretation of indemnity clauses.

(c) Covenants Not to Execute

In *Ard v. Gemini Exploration Co. and Resolve Drilling Co.*, 894 S.W.2d 11 (Tex. App. – Hou. [14th Dist.] 1994, *writ denied*), the court found that a covenant by an injured employee (Ard) of the Protecting Party (RRS Services, Inc.) not to execute (a "**covenant not to execute**") upon the assets of the Protected Party (Resolve) did not extinguish the liability of the Protected Party in such a manner as would prevent the Protected Party and the injured party from realizing upon the Protected Party's excess liability insurance policy.

> Therefore, the fact that the indemnitee, Resolve, will not have to pay any damages does not eradicate Resolve's liability, nor does it eradicate an indemnitor's or an insurer's duty to pay.

The "covenant not to execute" was the result of insurance settlement paid by the Protected Party's primary insurance carrier.

A covenant not to execute is a contract rather than a release.[200] Its legal effect is similar to a "**covenant not to sue**" because it does not eliminate a damage award; the underlying tort liability remains.[201]

III. INTERRELATIONSHIP OF INDEMNITY AND INSURANCE

There are two insurance methods to effectuate protection by a Protecting Party of a Protected Party:

- **Indirectly**, by the Protecting Party insuring its contractually assumed liability (its indemnity); and
- **Directly**, either by the Protecting Party purchasing a CGL policy naming the Protected Party as the Named Insured or by the Protecting Party causing its insurer to list the Protected Party as an additional insured on the Protecting Party's CGL policy.

A. Contractually Assumed Liability Insurance: Coverage for the Protecting Party

1. Exception to an Exclusion

Most but not all CGL policies cover the Protecting Party for liability for "bodily injury" and "property damage" arising under an Insured Contract (sometimes referred to as "**contractually assumed liability insurance**"). Coverage is accomplished through the addition to the CGL Policy of an **exception to an exclusion** from coverage. Standard form CGL policies (ISO CG 00 01) provide as to "Coverage A"[202] the following exceptions to the exclusion from coverage of contractually assumed liability:

ISO Policy:

2. Exclusions
This insurance does not apply to:
…
b. Contractual Liability

"Bodily Injury" or "Property Damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does **not apply** to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs

subsequent to the execution of the contract or agreement….

(Emphasis, underlining and **bold**, added by author.)

"**Insured Contract**" is defined in the standard ISO CGL policy form as including to the ISO CG 00 01 04 13 Commercial General Liability Coverage Form, which is attached as an exhibit to this article.

a. Exceptions 9a – 9e to Exclusion 2b

"**Insured Contract**" is defined in the standard ISO CGL policy form as being one of six specified exceptions to Exclusion 2b. The first five exceptions to the 2b exclusion from coverage, and therefore each qualifying as an Insured Contract, are the following:

ISO Policy:

9. "Insured contract" means:

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

b. A sidetrack agreement;

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

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

e. An elevator maintenance agreement;

….

b. Exception 9f to Exclusion 2b

Exception 9f is defined in the standard ISO CGL policy form as including

ISO Policy Provision:

9. "Insured contract" means: …

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

(Underlining added by author. Also, "You" refers to the named insured.)

2. Named Insured May Not Be Insured for all Contractually Assumed Liabilities

a. ISO CG 24 26 07 04 - Assumption of Tort Liability Limited to Protected Party's Contributory Negligence

In 2004 ISO adopted an Amendment to the insured contract definition which introduced into the "insured contract" definition a "contributory negligence" condition ("*caused in whole or in party by (the Protecting Party*"). Inclusion of this type language into a CGL policy effectively **eliminates coverage** for the named insured's indemnification of a third party for its **sole negligence**. Care therefore must be taken by named insureds in coordinating and negotiating the terms of their CGL policies and indemnity agreements. It is possible for a named insured to be "uncovered" in such circumstances for an indemnity of another party's sole negligence.

See ISO CG 24 26 07 04 Amendment of Insured Contract Definition, attached as an exhibit to this article.

If this Amendment is coupled with an exclusion from additional insured coverage for an additional insured's sole negligence (as is the case with the current ISO additional insured endorsement forms), the named insured may find itself acting as the insurer or in breach of its covenants to protect the additional insured/indemnified party!

b. ISO 21 39 10 93 – Exclusion of Assumed Tort Liability

Another ISO endorsement that may be attached to the Protecting Party's CGL totally eliminates coverage for the Protecting Party for its contractual assumption of the tort liability under its indemnity!

B. Additional Insurance: Coverage for the Protected Party

1. Purpose

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

An additional insured designation seeks to achieve the following results:

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

There are important considerations for a Protected Party to remember when evaluating whether to forgo a contractual indemnity by the Protecting Party and to rely solely on being an additional insured on the Protecting Party's CGL policy.

- The policy may be canceled with or without the Protected Party's knowledge.
- The insurer may become insolvent.
- The additional insured's coverage under the Protecting Party's CGL policy is subject to the policy's limits and exclusions from coverage.

2. Covered Matters

Additional insured endorsements (depending on which endorsement is chosen) furnish coverage to an additional insured for liabilities "arising out of" the named insured's "**work**", "**operations**", or "**premises**" or some variation of these themes.

3. Covered Liabilities

a. Additional Insured's Vicarious Liability for Named Insured's Negligence

Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured's acts or omission. An additional insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors*; and RESTATEMENT

(SECOND) OF TORTS Introductory Comment to §§ 416-429. It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy.[203] As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured's vicarious liability for the named insured's negligence.

b. Additional Insured's Own Negligence

Depending on the language of the Protecting Party's insurance, the Protected Party **may** be covered for its own negligence, whether sole or contributory, and whether or not the Protecting party is negligent.

c. Interpretation of Additional Insurance Specifications

(1) Express Negligence Requirement Not Applicable to Insurance Specifications

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), (**Getty 2**),[204] the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring the Protected Party (Getty) to be listed as an additional insured on the Protecting Party's (NL Industries') liability policies. In Getty the injuries arose out of Getty's sole negligence; the indemnity provision excluded indemnity for Getty's negligence; the **insurance covenant was silent** as to whether the insurance was or was not to cover injuries due to Getty's negligence; the insurance covenant in the contract provided for NL Industries to maintain commercial general liability insurance and for such insurance to "**extend to and protect Getty**."[205] The court found that there was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies.

Insured Contract 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 Statutory Employer's Liability	$500,000
General Liability: Bodily Injury	$500,000
Automobile Liability: Bodily Injury	$500,000

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.)

(2) ISO Additional Insured Endorsements

(a) 2004 Additional Insured Amendments

In 2004, ISO revised its additional insured endorsements, including the CG 20 26, CG 20 10 and CG 20 37, to eliminate coverage for an additional insured's sole negligence. The 2004 revisions seek to limit the trigger for additional insured coverage to occurrences caused by the sole or partial negligence of the named insured.

(b) 2013 Additional Insured Amendments – Friend or Foe?

ISO amended most of its additional insured endorsements effective April, 2013, so the new endorsements reflect a 04 13 edition date. These revised endorsements provide that the insurance afforded to the additional insured (the "**2013 Additional Insured Amendments**"):

- Applies only to the extent permitted by law;
- Will be no broader in scope than required by the contract; and
- Will not provide for more than the limit required by the contract or the policy limit, whichever is *less*.

See the following language highlighted in the copies of several ISO Additional Insured forms attached to this article.

ISO Policy:

A. Section II - Who is An Insured …. However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law;[206] and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

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

The most we will pay on behalf of the additional insured is the amount of insurance:
1. Required by the contract or agreement you have entered into with the additional insured; or
2. Available under the applicable Limits of Insurance shown in the Declarations;
whichever is less.[207] This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

(Underlining added by author.)

[1] "Coverage Not Be Broader Than Required by the Contract or Agreement"

This change was made to make it clear that additional insured coverage will be no broader than "required" in the underlying contract or agreement. This is to avoid giving an additional insured coverage **broader** than the coverage specified in the contract or agreement. The "required" language stresses the importance of insurance specification drafting.

Questions Will Abound

- What was the parties' intent? If the additional insured endorsement is an 07 04 endorsement but the CGL policy required by the contract is an 04 13, will the endorsement be broader than the underlying policy?
- Will the adjuster have to divine the parties' intent? How will the adjuster divine the parties' intent (ask the parties, read the contract)?
- What if the insurance specifications in the contract merely state that a party is to be an additional insured, and does not specify the scope or limits of coverage?
- Even if the contract's additional insured specification specifies coverage for bodily injury and property damage, what if it does not specify additional insured coverage for otherwise covered risks (*e.g.*, fire damage legal liability coverage or medical payments or completed operations coverage?
- Does the absence of a specific requirement mean that such coverage will not be available to the additional insured? (Narrative form insurance specifications generally do not go into the detail of insurance contracts.)
- Are these questions eliminated by a contract provision that the additional insured coverage will be the broader of the minimum required by the contract or that included within the named insured's policy, or a provision in the contract that states that if the additional insured endorsement contains such "no broader" language, that it shall in no way limit the "breadth" of insurance provided to the additional insured?

- Will the court or the insurance adjuster look to the indemnity provision and its qualifications to determine the scope of additional insured coverage intended?

[2] AIA A201 - Limited Indemnity

A common example is the following limitation contained in the **AIA A201-2007** General Conditions indemnity language (see attached forms, **A201 § 3.18.1** (Indemnification) limiting the contractor's indemnity:

AIA A201 Insured Contract Provision:

> To the fullest extent permitted by law the Contractor shall indemnify, defend and hold harmless Owner … but only to the caused by the negligent acts or omissions of the Contractor, a 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 ….
>
> (Author inserted underlining.)

This language arguably creates only a "**limited form indemnity**", since it does not expressly involve the contractor's assumption of the owner's tort liability. The negligence of the Protected Party is not expressly stated in the "regardless …" language. Similar language was held by a court in *Cabo Const., Inc. v. R S. Clark Const., Inc.*, 227 S.W.3d 314 (Tex. App. – Hou. [1st Dist.] 2007) **not** to meet the express negligence test. The case did not involve the 2007 edition of the A201, but its indemnification provisions are the same. There, a contractor attempted to enforce the AIA indemnification clause against a trenching subcontractor on a grocery store job who left a ditch open, into which a customer fell. In reversing a summary judgment for the contractor, the court held that because the clause

> is unclear as to who is indemnified and for what, the indemnity provision is ambiguous. Ambiguous indemnity provisions are unenforceable.

In another case using language similar to the AIA language, the court in *Gilbane Bldg. Co. v. Keystone Structural Concrete, Ltd.*, 263 S.W.3d 291 (Tex. App. – Hou. [1st Dist.] 2007) held that the following clause is "unclear as to who is indemnified and for what, the indemnity provision is ambiguous. Ambiguous indemnity provisions are unenforceable."

Insured Contract Provision:

> [The subcontractor] agrees to indemnify and hold harmless [the contractor] … from and against claims, damages, losses and expenses … arising out of or resulting from the performance or failure in performance of [subcontractor's] work under this agreement provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property including the loss of use resulting therefrom, (2) is caused, in whole or in part, by any negligent act or omission of [subcontractor] or anyone directly or indirectly employed by [subcontractor] or anyone for whose acts [subcontractor] may be liable, regardless of whether caused in part by a party indemnified hereunder.
>
> (Author inserted underlining.)

The contractor and its subrogated carrier sought indemnification from a subcontractor whose employee fell through a skylight. Gilbane recognized that it could not enforce the clause to recover for its own negligence but it argued that it should be able to recover indemnity if it was "able to establish that the incident … was caused by the negligence of [the subcontractor] in whole or part and not the negligence of Gilbane." The Houston Court of Appeals nevertheless refused to enforce the indemnification, citing *Fisk Elec. Co. v. Constructors & Assocs., Inc.*, 888 S.W.2d 813, 59 A.L.R.5th 893 (Tex. 1994) for the proposition that the obligation to indemnify "should not depend on the outcome of the underlying suit" and "either the indemnity agreement is clear and enforceable, or it is not."

Question: Is it the intent of the parties to limit the additional insured coverage by this limitation to the indemnity?

(3) Manuscripted Additional Insured Endorsement to Cover Named Insured's Contractually Assumed Liability

One approach parties have used is have the Protecting Party's insurer issue a manuscripted additional insured endorsement that is limited to insured Indemnified Liabilities. In *Certainteed Corp. v. Employers Ins. of Wausau*, 939 F. Supp. 826 (D. Kan. 1996). In *Certainteed* the additional insured endorsement issued by Wausau was a blanket automatic additional insured provision in the CGL policy it issued to its named insured contractor. This provision provided as follows:

Insurance Policy:

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

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

In *Gilbane Building Co. v. Admiral Insurance Co.*, 664 F.3d 589 (5th Cir. 2011 a manuscripted endorsement was held to insure an additional insured for liability assumed by the named insured by indemnity, even though the indemnity agreement may not have been enforceable under Texas law. The indemnity agreement arguably was unenforceable as it did not expressly indemnify the Protected Party for its own negligence. The additional insured provision in the Protecting Party's CGL insurance reads as follows:

Insurance Policy:

> **Name of Additional Insured Person(s) or Organization(s):** Any person or organization that is an owner of real property or personal property on which you are performing ongoing operations, or a contractor on whose behalf you are performing ongoing operation, ***but only if coverage as an additional insured is required by written contract or written agreement that is an "insured contract***," and provided that the "bodily injury," "property damage" or "personal & advertising injury" first occurs subsequent to execution of the contract or agreement… .
>
> **A. Section II—Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, *but only with respect to liability for "bodily injury," "property damage" or "personal & advertising injury" caused, in whole or in part, by:*
>
> *1. Your acts or omissions; or*
> *2. The acts or omissions of those acting on your behalf;*
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above… .
>
> 9. "Insured contract" means: …
> f. That part of any other contract or agreement pertaining to your business … *under which you assume the tort liability of another party* to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury"

or "property damage" is caused, in whole or in part, by you or those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(*Italics* added by the court.)

The court summarized the coverage as follows:

> In other words, the CGL policy provides coverage to additional insureds for their own or their agents' acts or omissions, so long as (the Protecting Party) had previously assumed the liability of the potential additional insured in a written contract. (Author inserted reference to Protecting Party). *Id.* at 592-93.

The court held the unenforceability of the indemnity not relevant to the enforceability of the additional insured protection afforded to the Protected Party stating

> Here, as in Swift, Admiral's argument relies on the policy language defining an insured contract as one that "assume[s] the tort liability of another party," and concludes that an unenforceable provision does not actually assume liability. However, as we explained in Swift, the additional insured question turns not on enforceability, but on whether Empire Steel agreed to "assume the tort liability of another party." In the TCA (the Insured Contract), Empire Steel (the Protecting Party) contracted not only to indemnify Gilbane (the Protected Party), but also to secure insurance on its behalf; by doing so, it agreed to assume Gilbane's tort liability. That provision is not rendered void by the indemnity provision, even if it is unenforceable. As such, Empire Steel agreed to assume Gilbane's tort liability, and Gilbane qualifies as an additional insured. *Id.* at 596. (Author inserted parenthetical identifications.)

(4) Additional Insured Coverage and Scope of Indemnity

(a) Case Where Additional Insured Status Limited to Liabilities Assumed in the Insured Contract

[1] *In re Deepwater Horizon Facts*

In a case arising out of the infamous "British Petroleum" ("**BP**") oil spill in the Gulf of Mexico, the Texas Supreme Court in *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), in answer to two questions certified to it by the Fifth Circuit,[208] held that BP, the developer of an offshore oil field, was **not** an additional insured on the liability insurance policies of Transocean, the rig owner and drilling contractor. At the time of the events giving rise to the litigation, Transocean owned the *Deepwater Horizon*, a mobile offshore drilling unit operating in the Gulf of Mexico pursuant to a Drilling Contract between Transocean and BP. After an explosion, the rig caught fire and fully submersed after burning for more than a day. The incident killed eleven crew members, propagated numerous personal-injury claims, and begat a myriad of claims for environmental and economic damages stemming from the discharge of millions of gallons of oil into the Gulf of Mexico. To cover Transocean's worldwide drilling operations, including its obligations under the Drilling Contract with BP, Transocean maintained a $50 million general liability policy with Ranger Insurance, Ltd. as its primary policy and four layers of excess insurance from a multitude of additional insurers with an additional $700 million in coverage.

[2] District Court

Agreeing with Transocean's insurers, the federal district court held that BP was not an "Insured" on Transocean's insurance for subsurface pollution liability deriving from the *Deepwater Horizon* incident.

[3] Fifth Circuit

On appeal, the Fifth Circuit reversed, holding that Transocean's insurance policies imposed no relevant limitations upon the extent to which BP was covered. The Fifth Circuit later withdrew its decision and certified questions to the Texas Supreme Court. Resting on the court's decision was $750,000,000 of Transocean's insurance coverage. The following is the box score: federal district court – BP gets "0"; Fifth Circuit opinion – BP gets "$750,000,000"; Fifth Circuit withdraws its opinion and certifies questions to Texas Supreme Court; Texas Supreme Court – BP gets "0". This swing in the results is grounded in a

drafter's drafting of insurance specifications and an argument that arose as to the absence of a comma.

[4] Drilling Contract – Indemnity Provisions

In the Drilling Contract, BP and Transocean agreed to a knock-for-knock allocation of risk by contractual indemnities as is standard in the oil and gas industry. "**Knock-for-knock**" indemnity agreements require each party to assume responsibility for injuries to its own employees and damage to its own property without regard to who caused the injury or how the damage occurred. Transocean and BP also agreed to allocate risk of pollution liability regardless of fault. Transocean agreed to indemnify BP for damages resulting from above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all pollution risk Transocean did not assume. The pollution indemnity provisions of the Drilling Contract state

Insured Contract Provision:

> 24.1 [Transocean] shall assume full responsibility for and shall protect, release, defend, indemnify, and hold [BP] and its joint owners harmless from and against any ... liability for pollution or contamination, including control and removal thereof, originating on or above the surface of the land or water, from spills, leaks, or discharges ... without regard to negligence of any party or parties and specifically without regard to whether the spill, leak, or discharge is caused in whole or in part by the negligence or other fault of [BP].
>
> 24.2 [BP] shall assume full responsibility for and shall protect, release, defend, indemnify, and hold [Transocean] harmless from and against any ... liability for pollution or contamination, including control and removal thereof, arising out of or connected with operations under this contract hereunder and not assumed by [Transocean] in Article 24.1 above, without regard for negligence of any party or parties and specifically without regard for whether the pollution or contamination is caused in whole or in part by the negligence or fault of [Transocean].
>
> (Author added underlining.)

[5] Drilling Contract – Insurance Provisions

The insurance provision in the Drilling Contract obligated Transocean to acquire various types of insurance, including commercial general liability, including contractual liability insurance for the indemnity agreement, workers' compensation, and employer's liability insurance, and required Transocean to name BP as an additional insured. The Drilling Contract contains the following statement as to the scope of Transocean's insurance in the context of Transocean's and its insurer's indemnity obligations or liabilities.

Insured Contract Provision:

> 20.1 Without limiting the indemnity obligation or liabilities of [Transocean] or its insurer, at all times during the term of this contract, [Transocean] shall maintain insurance covering the operations to be performed under this contract as set forth in Exhibit C.

[6] Drilling Contract – Additional Insured Provision

The additional-insured provision contained in Exhibit C to the Drilling Contract states

> 3. [BP], its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers, and agents shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation [,] *for liabilities assumed by [Transocean] under the terms of this contract.*
>
> (Court added *italics*) (Author added underlining and [,] for illustration of BP's argument that the court's interpretation is based on the court's insertion of a comma.)

Transocean's Insurance – Automatic Additional Insured Coverage

BP is BP is not specifically named as an insured in Transocean's insurance policies, endorsements thereto, or in a certificate of coverage. However, Transocean's policies contained an automatic additional insured provision extending "Insured" status to

> Any person or entity to whom the "Insured" (Transocean) is obliged by oral or written "Insured Contract" ... to provide insurance such as afforded by [the] Policy.
>
> (Underlining added by author.)

Additionally, the Transocean policy provided

> Underwriters agree where required by written contract, bid or work order, additional insureds are automatically included hereunder, and/or waiver(s) of subrogation are provided as may be required by contract.
>
> (Underlining added by author.)

Transocean's liability policy defined "Insured Contract" as

> any written or oral contract or agreement entered into by the "Insured" ... and pertaining to business under which the "Insured" assumes the tort liability of another party to pay for "Bodily Injury" [or] 'Property Damage' ... to a "Third Party" or organization.

[7] Texas Supreme Court

The Texas Supreme Court described additional insured status under Transocean's policies' as being determined as follows:

> Thus, under the express terms of the policies, additional-insured status hinges on (1) the existence of an oral or written contract, (2) pertaining to the business of an "Insured", and (3) under which an "Insured" assumes the tort-liability of another party and is "obliged" to provide insurance to such other party. The policy further specifies that "where required by written contract, bid or work order, additional insureds are automatically included hereunder....
>
> (Underlining provided by author.)

The court stated the questions to be decided as follows:

> The key points of contention among the parties are (1) whether the language employed in the insurance policies refers to, and thus incorporates, coverage limitations in the Drilling Contract from which BP's additional-insured status derives; (2) whether the Drilling Contract actually imposes any limitation on the extent of additional-insured coverage under the primary-and excess-insurance policies; and (3) who gets the benefit of the doubt if there is any ambiguity.

The court found that the only reasonable construction of the Drilling Contract's additional insured provision was that

> BP is an additional insured **only as to liabilities assumed** by Transocean under the Drilling Contract and no others. Because Transocean did not assume liability for subsurface pollution, Transocean was not "obliged" to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, BP lacks status as an "Insured" for the same.

(Author added **bold**.)

[8] BP's Argument – the "$750,000,000 Comma"

BP asserted that the court's interpretation was unreasonable because there is a comma before, but not after, the phrase "except Workers' Compensation." BP argued that the court's decision relies upon the court inserting a **comma** where it does not exist (after "Workers' Compensation"). BP argued that the court should not do so when doing so alters the plain meaning of the contract.

[9] Texas Supreme Court – Reasonableness Will Not Turn on Absence of a Comma

The court answered BP stating

> We will not construe the absence of a comma to produce an unreasonable construction…. Our inquiry does not end there, however, as we can only credit Transocean and the Insurers' alternative

> construction if it is reasonable. We conclude that it is. Transocean and the Insurers' construction is in harmony with the allocation of liabilities in the contract, gives meaning to all the language the parties employed, and is consistent with the standard use of such language and the purpose of such clauses. Additional-insured provisions are often phrased in terms of extending coverage to all policies except workers' compensation policies, which quintessentially involve an employer insuring its own employees. (FN. 15 omitted.) Moreover, a manifest purpose of an additional-insured clause is to provide supplemental protection when the additional insured may be sued for conduct within the contractor's scope of risk. (FN. 16 omitted.) Applying the only reasonable construction of the additional-insured provision, we conclude that BP is an additional insured only as to liabilities assumed by Transocean under the Drilling Contract and no others. Because Transocean did not assume liability for subsurface pollution, Transocean was not "obliged" to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, **BP lacks status as an "Insured" for the same**.

[10] What is the Effect of the Drilling Contract's Provision that the Insurance and Indemnity Provisions Are Separate and Independent?

The court also rejected BP's argument that the Drilling Contract's provisions providing that the indemnity and insurance provisions were **separate and independent** resulted in the insurance provisions not being limited by the scope of the indemnity. BP pointed to the following language in the Drilling Contract:

Insured Contract Provision:

> [w]ithout limiting the indemnity obligation or liabilities of [Transocean] or its insurer, at all times during the term of this CONTRACT, [Transocean] shall maintain insurance covering the operations to be performed under this CONTRACT as set forth in Exhibit C.

The court held that

> It is immediately apparent from the plain language of this provision that BP's status as an insured is **inexorably linked**, at least in some respect, to the extent of Transocean's indemnity obligations. What is in dispute is the intended breadth of the limiting language in the emphasized portion of the provision." (**Bold** added by author.)

The court continued

> But simply because the duties to indemnify and maintain insurance may be separate and independent does not prevent them from also being **congruent**; that is, a contract may reasonably be construed as extending the insured's additional-insured status only to the extent of the risk the insured agreed to assume. (**Bold** added by author.)

The Texas Supreme Court in *In re Deepwater Horizon* noted that "As the parties acknowledge, Transocean's insurance policies contain no language explicitly limiting the scope of additional insured coverage," but further notes that is not the end of the story, and states

> Thus, while our inquiry must begin with the language in an insurance policy, it does not necessarily end there. In other words, we determine the scope of coverage from the language employed in the insurance policy, and if the policy directs us elsewhere, we will refer to an incorporated document to the extent required by the policy. Unless obligated to do so by the terms of the policy, however, we do not consider coverage limitations in underlying transactional documents.

The parties involved in the contract in question were of the highest sophistication in the oil and gas business, yet the contract's insurance and risk allocation provisions consumed the attention of both federal courts and a state's supreme court and the extensive efforts of lawyers at multiple levels on both sides of the risk allocation provision after occurrence of the risk.

(b) Cases Where Additional Insured Coverage Limited by Limitations In Insured Contract Incorporated by Reference

The Supreme Court in *In re Deepwater Horizons* noted other cases where the scope of insurance coverage has been determined to be limited by the express and intentional incorporation into the insurance policy of limits or limitations contained in extrinsic documents, such as (a) following form excess-insurance policies which incorporate the coverage terms of underlying primary policies [209] and (b) liability insurance policies that contain language explicitly limiting the scope of additional insured coverage by expressly incorporating the limits for additional insured coverage found in the Insured Contract (see *Urrutia v. Decker*, 992 S.W.2d 440 (Tex. 1999).[210] In *Urrutia t*he issue was whether a vehicle rental agreement was effective to limit an additional insured's liability insurance to $20,000 instead of the $1 million policy limits available under the leasing company's commercial-business automobile policy. In *Urrutia* the policy covered

Insurance Policy:

> [b]oth lessees and rentees of covered autos as insureds, but only to the extent and for the limits of liability agreed to under contractual agreement with the named insured.
>
> (Underlining inserted by author.)

The *Urrutia* court found that the insurance policy's reference to the rental agreement was "explicit" enough to clearly indicate the parties' intent to include the rental agreement and its specification of liability limits as part of the insurance policy. Given the language in the policy, a customer's status as an additional insured depended on the existence of a rental agreement, and coverage was expressly limited to the amount specified in such agreement. *Id.* at 443. The court held that the insurance policy incorporate the rental agreement and that the rental agreement, in turn, limited the customer's liability protection to $20,000. The *Urrutia* court noted

> By tying additional-insured coverage to the terms of an underlying agreement, the parties procure only the coverage the insured is contractually obligated to provide, thereby minimizing the insurer's exposure under the policy and the named insured's premiums. *Id.* at 443.

(c) Cases Where Additional Insured Coverage Not Limited by Scope of Indemnity in Insured Contract

The Texas Supreme Court *In re Deepwater Horizons* distinguished the scope of the additional insured coverage afforded in *In re Deepwater Horizons* from cases where the additional insured coverage was found **not** to be limited by the scope of the protecting party's indemnity in the Insured Contract.

[1] *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*

The Texas Supreme Court reviewed the prior supreme court holding in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008) that was identified in the Fifth Circuit's first certified question to the Texas Supreme Court. The following is one of the questions certified to the court in *In re Deepwater Horizons*:

> 1. Whether *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the dam-ages at issue, because the language of the umbrella policies alone determines the extent of BP's cover-age as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "**separate and independent**"? (**Bold** added by author.)

***ATOFINA* Facts**

In *ATOFINA*, Triple S Industrial Corp. contracted to perform maintenance and construction work at an ATOFINA refinery under a service contract that contained separate indemnity and insurance provisions. Triple S agreed to indemnify ATOFINA for personal-injury and property loss that was not due to ATOFINA's concurrent or sole negligence, misconduct, or strict liability. Triple S also agreed to carry $500,000 of commercial general liability (CGL) insurance, including coverage for contractual liability insuring the indemnity agreement, and $500,000 in excess insurance that followed the form of the CGL policy. Triple S was also obligated to furnish certificates of insurance naming ATOFINA

as an additional insured. Triple S complied with its service-contract obligations by securing a $1 million CGL policy and a $9 million excess policy and furnishing the required certificates. When a Triple S employee drowned at the refinery, his survivors sued Triple S and ATOFINA. Triple S's CGL insurer tendered its $1 million limit to settle the suit, but the excess insurer denied ATOFINA coverage. The court stated the question faced as follows:

> In this case, we examine the interplay between a contractual indemnity provision and a service contract's requirement to name an additional insured. More particularly, we must decide whether a commercial umbrella insurance policy that was purchased to secure the insured's indemnity obligation in a service contract with a third party also provides direct liability coverage for the third party.

The court held that this direct route was available to ATOFINA because it was an additional insured under the Evanston Insurance policy. As such, Evanston Insurance owed ATOFINA a direct obligation as an insured, even though ATOFINA's contract with the general contractor contained indemnity provisions that disclaimed responsibility for ATOFINA's sole negligence. Rather than going through an indemnitor who would seek coverage from the insurance carrier, ATOFINA gives the indemnitee the right to go straight to the source itself and demand coverage from the indemnitor's insurance company.

Two Insurance Policy Provisions

The excess-insurance policy contained the following two independent coverage provisions.

Insurance Policy - Section III.B.6 – Trigger to Coverage:

The first provision in the Protecting Party's insurance, section III.B.6, extended coverage to

> A person or organization for whom [the insured has] agreed to provide insurance as is afforded by this policy; <u>but that person or organization is an insured only with respect to **operations** performed by you</u> or on your behalf, or facilities owned or used by you. *Id*. at 664.
> (<u>Underlining</u> inserted by author).

The insurer asserted that the accident did not respect Triple S's operations because ATOFINA's sole negligence caused the accident. The *ATOFINA* court disagreed. The *ATOFINA* court distinguished between Triple S's indemnity obligation under the contract and the insurer's indemnity obligation under the terms of the excess policy because the insurer's obligation depended on what it contracted to do, not what the insured contracted with another person to do. Although the underlying Insured Contract did not require Triple S to indemnify ATOFINA for ATOFINA's negligence, the *ATOFINA* court concluded that the insurance policy neither included nor incorporated a similar limitation. Rather, the only restriction on the scope of additional-insured coverage under **section III.B.6** was the requirement that the claims involve Triple S's **operations** or facilities. Because the accident was related to Triple S's operations, the claim for which ATOFINA sought coverage was within the scope of the coverage afforded under **section III.B.6** of the policy without regard to ATOFINA's culpability.

The *In re Deepwater Horizon* court also noted the following distinction in the facts in *ATOFINA* to the facts in *In re Deepwater Horizon*:

> The existence of a certificate of insurance naming ATOFINA as an additional insured meant that, unlike *Urrutia* and the present case (*In re Deepwater Horizon*), there was no need to look to the underlying service contract to ascertain ATOFINA's status as "[a] person or organization for whom you have agreed to provide insurance as is afforded by this policy." See *id.* at 663. Here, at a minimum, the Transocean insurance policies require reference to the underlying Drilling Contract to determine BP's status as an additional insured. Moreover, section III.B.6 of the policy in *ATOFINA* made no reference to the service contract in determining the scope of additional-insured coverage, while the Transocean policies refer to an "Insured Contract" that requires Transocean to provide the insurance as a predicate to status as an "Insured."
>
> (Author inserted reference to *In re Deepwater Horizon*).

Insurance Policy - Section III.B.5 – Coverage of Insured "No Broader Than" - Underlying Insurance (Other than Excess Policy's Limits)

The other provision in the Protecting Party's insurance, **section III.B.5**, defined an "insured" as

Insurance Policy:

> Any other person or organization who is insured under a policy of "underlying insurance" (but stated that) [t]he coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance." *Id.* at 667.
>
> (Underlining inserted by author).

The *In re Deepwater Horizon* noted that this section in the ATOFINA excess-insurance policy encompassed a narrower extension of coverage because it expressly incorporated limits on coverage by reference to the underlying CGL policy. The court noted that

> We enforced section III.B.5 as written, and because the underlying CGL policy excluded losses caused by ATOFINA's sole negligence, we held that limitation also applied to the excess policy. Our analysis of this second provision affirms the principle from *Urrutia* that an insurance policy may refer to another document to determine the extent to which an additional insured is covered.
>
> *ATOFINA* embodies several principles that are pertinent to the matter at hand. First, it is possible for a named insured to purchase a greater amount of coverage for an additional insured than an underlying service contract requires. Second, the scope of indemnity and insurance clauses in service contracts is not necessarily congruent. Third, and most importantly, we rely on the policy's language in determining the extent to which, if any, we must look to an underlying service contract to ascertain the existence and scope of additional-insured coverage. *In re Deepwater Horizon* at 462.

[2] *Aubris Resources LP v. St. Paul Fire & Marine Insurance Co.*

In *Aubris Resources LP v. St. Paul Fire & Marine Insurance Co.*, 566 F.3d 483 (5th Cir. 2009) the Protecting Party's insurance policy provided that

Insurance Policy:

> Any person ... that you agree in a written contract for insurance (the Insured Contract) to add as an additional protected person under this agreement is also a protected person ... if that written contract for insurance (the Insured Contract) specifically requires such coverages for that person...." *Id.* at 487
>
> (Author for clarification added the identification of the Insured Contract as being referred to by the insurance policy language).

Insured Contract's Additional Insured Specification

The additional-insured obligation in the Insured Contract provided that the

Insurance Policy:

> extension of [additional-insured] coverage shall not apply with respect to any obligations for which [the owner] has ***specifically*** **agreed** to indemnify Contractor. *Id.*
>
> (Underlining added by author).

The *In re Deepwater Horizon* court summarized the *Aubris* court's holding as follows:

> Although the underlying contract included a general indemnity provision, the *Aubris* court construed the term "**specifically agreed**" to mean an extra-contractual agreement to provide indemnification for the specific claim against the owner. *Id.* at 489–90. Because the owner and contractor reached no extra-contractual indemnity agreement specifically related to the litigation in question, the court held that the owner was an additional insured whose coverage was not restricted by the indemnity allocation in the contract. *Id.* at 490.

The *In re Deepwater Horizon* court found that the decision in *Aubris* adhered to *Urrutia* and *ATOFINA* by looking to the language of the underlying contract (to the extent the insurance policy required) to determine whether there was any limit on additional-insured coverage. See *id.* at 487 (observing that the court "consider[ed] the relationship between and among the policy, the additional insured provision in the services agreement, and the indemnity provision in the services agreement"). Having done so, it determined that there simply was no limitation in the contract that was applicable to the additional-insured's coverage demand.

[3] *Pasadena Refining System, Inc. v. McCraven*

The *In re Deepwater Horizon* court also reviewed the 14th Court of Appeals decision in *Pasadena Refining System, Inc. v. McCraven*, Nos. 14–10–00837–CV, 14–10–00860–CV, 2012 WL 1693697 (Tex. App. – Hou. [14th Dist.] May 15, 2012, *pet. dism'd by agr.*). There, an additional-insured endorsement to a Protecting Party's liability insurance policy extended coverage to

Insured Contract's Additional Insured Specification

> any person or organization ... for whom the named insured (the Protecting Party) ... has specifically agreed by written contract the (Insured Contract) to procure bodily injury ... insurance, (but restricted such coverage to) liability arising out of the work done by or on behalf of the named insured (the Protecting Party). *Id.* at 16-17.
>
> (Author added parentheticals identifying the parties being referenced)

The *In re Deepwater Horizon* court noted the distinction between the *Pasadena* policy language and the *In re Deepwater Horizon* policy language:

> Unlike the policy language in Pasadena, the Transocean policies require that the additional-insured obligation arise from a contract involving an indemnity agreement and specify that additional-insured coverage is extended as "obliged" and "where required" therein. *In re Deepwater Horizon* at 463 – 464.

[4] *Becker v. Tidewater, Inc.*

The *In re Deepwater Horizon* court also cited *Becker v. Tidewater, Inc.*. 586 F.3d 358, 370-72 (5th Cir. 2009) which it noted applied maritime and Louisiana law to construe policy language defining an assured as an entity to which the named assured was "obligated by virtue of a contract or agreement to include or name as an assured" as being limited by an indemnity restriction in the underlying service contract). *In re Deepwater Horizon*, at 464 FN. 13.

[5] *Certain Underwriters at Lloyd's London v. Oryx Energy, Co.*

The *In re Deepwater Horizon* court also cited *Certain Underwriters at Lloyd's London v. Oryx Energy, Co.*., 142 F.3d 255, 258 (5th Cir. 1998) which it noted applied Texas law to construe policy language providing coverage for an additional insured "when required" to call for an examination of the extent of the indemnity agreement in the underlying contract). *In re Deepwater Horizon*, at 464 FN. 13.

d. Caveat

Unfortunately, although additional insured covenants are the most common risk management technique, they are also the most commonly misunderstood, even by professionals in the field–risk managers, insurance agents, lawyers and courts that are called on to interpret them. The most common error is for the party's insurance covenant to fail to specify the terms of coverage and exclusions from coverage to be contained in the additional insured endorsement. For example, a landlord may specify in its lease that the tenant and the tenant's contractors will cause each of their CGL insurers to list the landlord and its management company and contractors as additional insureds on the tenant's and the tenant's contractors' CGL policies. A tenant may specify in its contract with its tenant finish out contractor that the contractor shall cause its CGL insurer to list the tenant, its landlord, and the landlord's lender, management company and contractors as additional insureds on the tenant finish out contractor's CGL policy. The tenant's contractor may specify in its subcontract that the subcontractors list the contractor as an additional insured on the subcontractors' CGL policies.

In each of these cases, the person desiring protection as an additional insured has left it up to the other party's insurance carrier to define the scope of the coverage to be provided. This is equivalent to letting the fox determine how, when, and if to protect the chicken! This mistake has been made because there is no commonly accepted definition of what it is to be an "additional insured." When a party fails to specify more than it be listed generically as an "additional insured," it has opened the door to the other party's insurer picking a form that effectively eliminates coverage for the additional insured.

CHAPTER 3. INSURANCE

CHAPTER 3. INSURANCE

I. INTRODUCTION

Every provision of a lease or contract is either (a) restating the rule that would be supplied by the court in the absence of the provision (the "**common law**") or is supplied by statute or (b) is expressly shifting a risk from one party (the "**party to be protected**") to the other (the "**protecting party**"), to the extent permitted by common law and statute. The most common method of risk management are through contractual provisions for (1) **indemnity**, (2) **insurance** and (3) **waiver of subrogation** (aka the "**three legged stool**"). Neglecting any one of these three risk management legs may result in a failed risk management program.

Forms

Included in this article as Chapter 5 is an appendix of forms ("**Forms**"). In the appendix of Forms are

- two forms of insurance specifications employed in leases: a typical narrative style set out in the body of the lease and a checklist style chart set out as an exhibit to a lease; and the 2017 AIA Insurance Exhibit;
- risk management provisions in the Retail Lease form contained in the Texas Real Estate Forms Manual (3rd Ed. 2017) of the State Bar of Texas ("**Manual's Retail Lease**"), including the insurance, indemnity and waiver of claims/waiver of subrogation provisions, and its companion Insurance Addendum ("**Manual's Insurance Addendum**").
- insurance industry standard insuring forms ("**ISO Forms**") and standard certificates of insurance ("**ACORD Forms**"); and
- samples of a liability insurer's manuscripted additional insured forms ("**Manuscripted Forms**).

Commentary

Following the Forms are Endnotes setting out a commentary ("**Commentary**") on the risk or peril addressed in the insurance forms, and the form's coverage limitations and exclusions.

II. CONTRACTUAL INDEMNITY BY THIRD PARTY: AKA INSURANCE

Set out in Article III to this Chapter are key points to understand and consider regarding liability insurance and property insurance.

A. Liability Insurance

1. Some Common Types

a. Commercial General Liability Insurance

(1) Third Party Coverage

Commercial general liability ("**CGL**") insurance is termed "**third party coverage**" insurance as it covers liabilities incurred by the named insured to third parties and excludes injuries and damage to the insured (*e.g.*, it excludes coverage for property damage to "property you (the insured) own, rent, or occupy" [211] and to "personal property in the care, custody or control of the insured." [212]

(2) Parties

Parties to a CGL policy are the "**named insureds**" [213] including a "first named insured" if there are more than one named insured on the CGL policy, "**automatic insureds**" [214] and "**additional insureds**". [215]

(3) Insurance for Covered Liabilities Arising from and "Occurrence"

Covered liabilities or damages arise from an "**occurrence**" during the policy period which is not excluded by the Exclusions of the policy.[216] CGL insurance provides protection to the insured for amounts the insured is legally obligated to pay that are caused by physical injury, personal injury (libel or slander), advertising injury and property damage as a result of the insured's products, premises, or operations, and can be offered as a package policy with other coverages.

(4) Occurrence Policy vs. Claims Made Policy

An "**occurrence policy**" provides liability coverage only for injury or damage that occurs during the

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

(5) Indemnity for Defense

The standard CGL policy provide coverage for the cost to defend and settle claims.[217]

(6) The Policy

Commercial general liability policies typically and the ISO general liability policy form,[218] which is the industry standard, is comprised of the following forms:

Commercial General Liability
Declarations and Schedule of Forms [219]

Commercial General Liability Form [220]

Section I - Coverages

Coverage A. Bodily Injury [221] and Property Damage [222] Liability

1. Insuring Agreement [223]
2. Exclusions [224]

Coverage B. Personal and Advertising Injury Liability [225]

1. Insuring Agreement
2. Exclusions

Coverage C. Medical Payments [226]

1. Insuring Agreement
2. Exclusions

Section II - Who Is An Insured [227]
Section III - Limits of Insurance [228]
Section IV - Commercial General Liability Conditions [229]
Section V - Definitions [230]

Amendments and Endorsements [231]

(7) Contractual Liability Insurance

The standard CGL policy (the ISO policy) provides an important additional insurance coverage for specified types of indemnities by the named insured in its contracts with third parties. This insurance coverage is provided in the standard CGL policy by virtue of

(1) a series of "defined terms" used in

(2) an "exception" (the exception for "**Insured Contracts**") to

(3) an "exclusion" to coverage (Exclusion **2.b** excluding coverage for "**Contractual Liability**") to

(4) a coverage provision in the CGL policy (Section I - Coverage A - Bodily Injury and Property Damage insuring the named insured for bodily injury and property damage liabilities). [232]

The "**Insured Contract**" exception to the Contractual Liability Exclusion provides coverage to the named insured for its contractual indemnity of a third party for bodily injury liability and property damage liability for five specified types of insured contracts set out in the definition of Insured Contract.[233]

b. Business Auto Policy

A "business auto policy" ("**BAP**") is a commercial auto policy that includes auto liability and auto physical damage coverages arising from "covered autos"; other coverages are available by endorsement. Except for auto-related businesses and motor carrier or trucking firms, the business auto policy addresses the needs of most commercial entities as respects auto insurance.

c. Workers Compensation Insurance and Employers Liability Insurance

A "**Workers Compensation and Employers Liability Policy**" is an insurance policy that provides coverage for an employer's two key exposures arising out of injuries sustained by employees. Part One of the policy covers the employer's statutory liabilities under workers compensation laws, and Part Two of the policy covers liability arising out of employees' work-related injuries that do not fall under the workers compensation statute. In most states, the standard Workers Compensation and Employers Liability Policy published by the National Council on Compensation Insurance ("**NCCI**") is the required policy form.

"**Workers Compensation insurance**" is the system by which no-fault statutory benefits prescribed by state law are provided by an employer to an employee (or the employee's family) due to a job-related injury (including death) resulting from an accident or occupational disease. 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. Workers compensation coverage is usually written in tandem with an employers liability coverage policy. Leases and construction contracts frequently require that a party "maintain Workers Compensation and Employers Liability coverage **as required by law**." Does this verbiage really require coverage? With few exceptions, Texas does not require an insured to carry Workers Compensation insurance. A statement that coverage shall be provided "as required by law" does not require that the coverage be provided.

"**Employers Liability Coverage**" provides coverage against common law liability of an employer for accidents to employees, as distinguished from liability imposed by a workers compensation law. This is provided by Part 2 of the basic workers compensation and employer's liability policy and pays on behalf of the insured (employer) all sums the insured becomes legally obligated to pay as damages because of bodily injury by accident or disease sustained by any employee of the insured arising out of and in the course of his employment by the insured. Typically triggered by a third party after the insured's employee (who is barred by workers compensation laws from suing his or her employer) sues a third party for bodily injury suffered while performing duties of his or her employment (*e.g.*, contractor's employee injured on the premises of that third party).

d. Umbrella and Excess Liability Insurance

The following definitions are found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx.

"**Umbrella policy**": "A policy designed to provide protection against catastrophic losses. It generally is written over various primary liability policies, such as the business auto policy (BAP), commercial general liability (CGL) policy, watercraft and aircraft liability policies, and employers liability coverage. The umbrella policy serves three purposes: it provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims; it drops down and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and it provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR)."

"**Excess policy**": "A policy issued to provide limits in excess of an underlying liability policy. The underlying liability policy can be, and often is, an umbrella liability policy. An excess liability policy is no broader than the underlying liability policy; its sole purpose is to provide additional limits of insurance."

2. What You Did Not Know, and Could Have Known, Can Hurt You

It is the author's opinion and experience that lawyers drafting transactional documents are resistant to undertaking the effort required to understand the insurance provisions they include in their documents and to following up with their clients to assure that

the drafted insurance provisions are fulfilled by the parties and their insurance brokers.[234] On occasion this resistance has risen to heated rhetoric to the effect "I only draft the provisions. I am not an insurance person. It is up to the client to understand and implement the provisions."

Perhaps this choice arises out of concern that professing some knowledge as to one's craft exposes the practitioner to a greater likelihood of being held accountable in cases where "things go wrong" than being silent. The insurance industry's forms promote taking this position. The standard certificates of insurance are simple appearing one page documents.[235] Industry forms are not readily accessible to the practitioner. Once obtained, they appear complicated.[236] They are identified by a seemingly complicated numbering system.[237] These circumstances led the author to write this article. It is the author's hope that exposure to these "traps for the unwary" will result in change in your approach to drafting insurance provisions and will lead to your more active involvement in implementing the insurance program contemplated thereby.[238]

3. Certificates of Insurance Are Not Certificates

a. An All Too Typical Specification

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

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

Is this sufficient? Unfortunately, **no**. Prior to 2006, the ACORD form of certificate of insurance appeared to be evidence of insurance and appeared to give rights against the insurer (including independent rights to notice upon cancellation). When ACORD changed its certificate forms in 2006 to clearly state that they conferred no rights on the certificate holder, insureds and their attorneys attempted to negotiate with insurers and agents to restore some enforceability to insurance certificates. Unfortunately, these efforts did not succeed. In response to these efforts the insurance industry approached state insurance commissioners and legislatures to gain support for their position that a certificate of insurance could not vary the underlying policy or grant rights that did not exist under the applicable policy. [239] At last count, 42 states have either insurance regulations or statutes on this point.

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

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

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

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

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

> **IMPORTANT: If the certificate holder is an additional insured, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s). If subrogation is waived, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

Many courts have held that these disclaimers effectively negate reliance by certificate holders.[240] See *e.g.*, the following statements by courts: *Prudential Property and Casualty Ins. Co. v. Anderson*, 922 A.2d 236 (Conn. 2007):

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

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

> **In effect, the certificate is a worthless document;** it does no more than certify that insurance existed on the day the certificate was issued. We leave it to the legislature or to future bargaining of parties to rectify inequities in the notification process.

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

> **Had Plaintiffs taken the reasonable step of obtaining a copy of (the policy)** … Plaintiffs would have learned that there was no additional insured coverage in the policy at all. Thus, the Court finds that the Plaintiffs' reliance upon (the insurance broker's) representation of additional insured status was not reasonable. Accordingly, as a matter of law, Plaintiffs' claims for negligent and fraudulent misrepresentation fail.

A certificate of insurance, if incorrect, may provide a claim against the agent who issued the incorrect certificate, but it does not obligate the underwriter under the policy.[241] A claim against the agent may be of small consolation under the circumstances.

4. Antiquated, Problematic and Just Plain Wrong Terminology

Even after more than 30 years since the insurance industry changed their policy forms in 1986, leases, construction contracts and other forms drafted by many lawyers still employ "antiquated, problematic and just plain wrong" terminology.

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

(1) "Comprehensive General Liability Policy"

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

(2) "Blanket or Broad Form Contractual Liability Coverage"

Since 1986, "blanket" or "broad form contractual liability coverage" has not existed. The current commercial general liability definition of contractual liability in the standard CGL policy achieves the same result.[242]

(3) "Broad Form Property Damage," "Broad Form CGL Endorsement," and "Deletion of the Personal Injury Employee Exclusion"

The same thing is true of "broad form property damage," "broad form CGL endorsement," and "deletion of the personal injury employee exclusion." Use of such terminology is indicative of lack of

awareness of changes that occurred almost 27 years ago.[243]

(4) "Cross Liability Endorsement" or "Separation of Insureds Endorsement"

Requiring a "cross liability endorsement" is even more problematic. A cross liability endorsement in today's vernacular is an exclusion, not a provision or extension of coverage, the purpose of which is to prevent one insured from being provided coverage when sued by another insured. A "separation of insureds endorsement" or "severability of interests provision" states that each insured against whom claim is made or suit is brought will be provided a separate defense. This protection is automatically included in today's standard form commercial general liability policy.[244]

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

A requirement that coverage be provided for a specified number of years following substantial completion of a construction job is not a requirement that can be met by any standard insurance program, as all such programs expire annually. A requirement for the continued provision of coverage is instead a performance requirement being placed on the insured.[245]

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

Don't Say This	*Say This*
30 day notice of cancellation, amendment, reduction of limits or nonrenewal	30 day notice of cancellation

The standard ISO CGL policy provides that notice of cancellation will be provided to the **first Named Insured**.[246] Similarly, the ISO Common Policy Conditions, which is a component of the ISO property policy, provides that notice of cancellation is to be given only to the **first Named Insured**.[247] Neither the **ISO CP 12 18 06 07** Loss Payable Provisions nor the **ISO CP 12 19 06 07** Additional Insured – Building Owner endorsement issued to tenants insuring a building on leased premises provides for notice of cancellation to be given to the landlord.[248] Additional insureds are not first; they are "additional" and, therefore, the standard policy without endorsement does not commit the insurer to give notice to the additional insured if the insurer cancels the policy for nonpayment of premium or for any other reason.[249]

Some but not all states permit policies to be endorsed with a "notice of cancellation" endorsement obligating the insurer to give Named Insureds other than the first Named Insured or additional insureds advance notice of policy cancellation.[250] Even in states where some form of notice endorsement has been approved by the state insurance industry regulatory body, it is difficult to get insurers to commit to give notice of cancellation to persons that are not the first Named Insured. Further, insurance companies will not provide a "notice of nonrenewal" endorsement. When any term, condition or verbiage is changed in a policy at time of renewal, that policy is technically no longer a renewal. Hence, every time there is even a minor change (and something is almost always changed), a nonrenewal notice would have to be sent. Insurance companies are unwilling to commit to such a burden and expense.

6. Not All Indemnified Liabilities Are Insured

a. An Indemnitor is a Private Insurer

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

b. Applying Contractual Liability Coverage to the Indemnification Agreement

What portion of this transferred risk is insured, or even insurable? Contractual liability insurance is the

funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. This insurance coverage is provided in the standard CGL policy as (1) a series of definitions to (2) an exception to (3) an exclusion to (4) the coverage provision for bodily injury and property damage liability only.[251] In other words, contractual liability insurance applies to allegations of bodily injury and physical injury to tangible property, and nothing else.

Problematic Insurance Spec:

> ____ shall provide contractual liability insurance **covering** the liabilities assumed in the indemnification agreement.

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

Revised Insurance Spec:

> ____ shall provide contractual liability insurance **applying** to the indemnification agreement.

The application of contractual liability coverage to a broad form indemnity provides coverage for a limited portion of the indemnified liabilities. It must be kept in mind that, since insurance potentially covers so few of the exposures for which indemnification may be required, the indemnification provision is potentially bankrupting to the indemnitor. Also, you cannot assume that contractual liability coverage afforded by the standard commercial general liability policy has not been limited or even deleted by endorsement. Furthermore, there is no duty to defend an indemnitee found in the standard commercial general liability policy. When defense is required in the indemnification provision, a funny thing happens. Unlike the way costs of defense is provided in most liability coverages, costs of defense provided on behalf of an indemnitee are deemed to be damages, meaning that those costs are included in the limit of liability (not outside of or in addition to that limit) and therefore erode the limit.

Hypothetical:

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

7. A General Specification for "Additional Insured Status" Is Meaningless

a. Complementary Risk Management Tools

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

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

b. Additional Insured Advantages

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

- The additional insured party is an insured under the policy. It has the right to contact the insurance company directly and place a claim. It does not have to even notify the named insured of its intent to do so.

- Each insured, including each additional insured, must not only be provided a separate defense but the cost of that defense is unlimited in amount, being outside of or in addition to the limit of liability, until the insurance company's obligations are fulfilled.

- Additional insured status can provide coverages that include the concurrent or sole negligence of the additional insured party.

- In most jurisdictions, there are no "fair notice rules" applicable to drafting of additional insured specifications, substantially reducing the likelihood of litigation to enforce this specification.

Returning to the Hypothetical:

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

c. Most Common Drafting Error

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

> (The Named Insured) will cause its CGL insurer to list _____ as **an additional insured** on its CGL policy.

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

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

d. What to Look For In An Additional Insured Endorsement

The most common and well recognized additional insured endorsements are drafted for use by the insurance industry by ISO, or Insurance Services Office. ISO endorsements will include a footer that reads "© ISO Properties, Inc., 20__" or © Insurance Services Office, Inc., 20__".[252]

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

- Who? Who is being added as an additional insured?
- What? What scope of negligence is being transferred? What activity is covered (*e.g.*, operations, work, ownership, use, maintenance)?
- When? Is there a time period covered?
- Where? Is there a location covered?
- Exclusions? Are there exclusions to coverage?

- Limitations?[253]

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

e. The 2013 Amendments to the ISO Additional Insured Endorsements – a Friend or a Foe?

ISO amended most of its additional insured endorsements effective April, 2013, so the new endorsements will reflect a 04 13 edition date. These revised endorsements provide that the insurance afforded to the additional insured (the "**2013 Additional Limitations**"):[254]

- Applies only to the extent permitted by law;
- Will be no broader in scope than required by the contract; and
- Will not provide for more than the limit required by the contract or the policy limit, whichever is *less*.

A. Section II - Who is An Insured …. However:
1. The insurance afforded to such additional insured only **applies to the extent permitted by law**;[255] and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will **not be broader than** that which you are **required by the contract or agreement** to provide for such additional insured.[256]
B. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits of Insurance:
The most we will pay on behalf of the additional insured is the amount of insurance:
1. **Required by the contract or agreement** you have entered into with the additional insured; or
2. Available under the applicable Limits of Insurance shown in the Declarations;
whichever is less.[257] This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations. (Underlining added by author.)

Note that the 2013 ISO Additional Limitations import into the endorsement the scope of coverage and limitations of coverage contained in the additional insured specifications in the underlying contract documents. This change introduces into the endorsement the potential for contract disputes over the meaning of contract wording.

f. Frequently Used Additional Insured Endorsements

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

The most common ISO additional insured endorsement used for the **construction** industry is the **ISO CG 20 10 04 13**.[258] A copy of this additional insured endorsement is found in the **Appendix of Forms**. This additional insured endorsement provides the following coverage:

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

What? Coverage is afforded "but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' **caused in whole or in part by your** (the Named Insured's) **acts or omissions**; or the acts or omission of those acting on your (the Named Insured's) behalf …."[259]

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

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

Exclusions? The additional insured endorsement expressly sets out the following two exclusions: "This insurance does **not** apply to 'bodily injury' or 'property damage' occurring after: (1) All work … **has been competed**; or (2) That portion of 'your work' out of which the injury or damage arises has been **put to its intended use**…."

Limitations? Additionally, the **ISO CG 20 10 04 13** contains the 2013 Additional Limitations.

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

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

Who? This endorsement "includes as an insured the person or organization shown **in the Schedule**."[260]

What and Where? Coverage is afforded "but only with respect to (1) "**liability arising out of the ownership, maintenance or use**" [261] of (2) "**that part of the premises leased to you**" (the named insured)…." [262]

When? This endorsement expressly sets out as a time of coverage limitation "This insurance does **not** apply to … (a)ny 'occurrence' which takes place after you cease to be a tenant in that premises."[263]

Exclusions? In addition to the time coverage limitation, this endorsement expressly sets out the following exclusion: "This insurance does **not** apply to …(s)tructural alterations, new **construction** or demolition operations performed by or on behalf of the person or organization shown in the Schedule."[264]

Limitations? The **ISO CG 20 11 04 13** contains the 2013 Additional Limitations.

g. Recap and Practical Advice

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

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

Recommended: Sample wording including the sole negligence of the additional insured:

> Contractor shall obtain additional insured coverage in favor of Landlord Parties on commercial general liability and excess liability policies. Additional insured status shall be provided on a combination of unmodified ISO endorsements CG 20 10 **10 01** and CG 20 37 **10 01**.

Alternative: Sample wording excluding the **sole negligence** of the additional insured:

Contractor shall obtain additional insured coverage in favor of Landlord Parties on commercial general liability and excess liability policies. Additional insured status shall be provided on a combination of unmodified ISO endorsements CG 20 10 **04 13** and CG 20 37 **04 13**.

h. Primary and Noncontributory Liability

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

Example – Manuscript Wording:

Primary & Noncontributory Additional Insured Endorsement

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

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

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

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

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

This new endorsement will resolve some problems, if the requirement for it is carefully drafted.[265]

Recommended Insurance Spec:

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

i. Umbrella and Excess Liability

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

Recommended Insurance Spec:

> Such insurance shall follow form of the underlying coverages. It shall be **excess** over and no less broad than all coverages and conditions described above, including but not limited to the required additional insured status, designated construction projects or locations, or both, general aggregate, waiver of subrogation, notice of cancellation, and prohibited exclusions or limitations and will be **primary** to and **not seek contribution** from any other insurance (**primary, umbrella, contingent or excess**) maintained by [the additional insured].

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

8. Completed Operations Coverage is Important.

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

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

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

> Who is An Insured is amended to include as an additional insured the person(s) or organization(s) … [shown in the Schedule], but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your **ongoing** operations for the additional insured(s) ….

They also contain the following exceptions to coverage:

This insurance does not apply to:

2. "Bodily injury" or "property damage" **occurring after**:
   a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
   b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

Additional insured coverage is available through issuance of **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations. This form is contained in the **Appendix of Forms**. Products and completed operations coverage only covers occurrences occurring during the CGL policy's term. For products and completed operations coverage to continue year-to-year after work completion, the Named Insured contractor must purchase from the insurer completed operations coverage either year-to-year after the original policy term or purchase such coverage for a specified term after work completion with the project scheduled as a covered project and endorsed to include the owner as an additional insured under **ISO CG 20 37 04 13** or **20 37 10 01** Additional Insured – Owners, Lessees or Contractors – Completed Operations. Another approach is to purchase a project specific policy written for the term of construction plus the extended coverage period negotiated by the parties (*e.g.*, up to a jurisdiction's statute of repose). An insurer may be unwilling to issue a completed operations extension endorsement on the original policy after its term without there being also issued a current term CGL policy for the periods covered by the completed operations sub-line.

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

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

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

9. Additional Insureds May Not Be Covered by a Blanket Additional Insured Endorsement

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

- It means that additional insured status is provided where required by written contract. If a written, executed contract does not exist, neither does additional insured status.

- It tells you nothing whatsoever about the coverage provided the additional insured. It may be an ISO endorsement or a manuscripted endorsement. It may offer broad coverage or essentially no coverage.

a. Endorsement May Contain a Requirement of Privity Between Named Insured and Additional Insured

It is essential to obtain a copy of the policy and read it as was learned by the general contractor in *Westfield Ins. Co. v. FCL Builders, Inc.*, 948 N.E.2d 115 (Ill. 2011). FCL, a general contractor, relied upon a certificate of insurance provided to it by its subcontractor listing FCL as an additional insured on

the CGL policy of the sub-subcontractor. A tort action was brought by a severely injured employee of the sub-subcontractor against the general contractor. Unfortunately, although subcontractor's CGL policy was issued with an blanket additional insured endorsement, it extended additional insured coverage only to "persons for whom you are performing operations when you and such person have agreed in a written contract that such person be added as an additional insured." There was no written agreement between the sub-subcontractor and the general contractor. A similar circumstance exists between a landlord and a tenant's improvement contractor.[266]

b. Endorsement May Require an Examination of the Contract Between the Insured and Additional Insured - the $750 M Comma

In a case arising out of the infamous "British Petroleum" ("**BP**") oil spill in the Gulf of Mexico, the Texas Supreme Court held in *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), in answer to questions certified to it by the Fifth Circuit,[267] that BP was not an additional insured on the liability insurance policies of Transocean, its drilling contractor. In the drilling contract, BP and Transocean agreed to a "knock-for-knock" allocation of risk that is standard in the oil and gas industry. Among other indemnity provisions, Transocean agreed to indemnify BP for above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all pollution risk Transocean did not assume, *i.e.*, subsurface pollution. The court interpreted the insurance policy's additional insured provision as incorporating the risk allocation provisions of the contract. The catastrophic damages resulted from subsurface pollution. The court found that the only reasonable construction of the additional insured provision in the BP drilling contract with Transocean was that

> BP is an additional insured only as to liabilities assumed by Transocean under the Drilling Contract and no others. Because Transocean did not assume liability for subsurface pollution, Transocean was not "obliged" to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, BP lacks status as an "Insured" for the same.[268]

The court rejected BP's argument that the presence of a comma in the additional insured provision made the court's interpretation unreasonable.[269] The court also rejected BP's argument that the contract's provision to the effect that the indemnity and insurance provisions were separate and independent resulted in the insurance provisions not being limited by the scope of the indemnity.[270]

10. Commercial General Liability Insurance Coverage of Construction Defects!

a. Uninsurable Business Risk or Insurable Accident?

The most common means of insuring against property damage at a construction site is through "**first party**" coverage, *e.g.*, builder's risk insurance. Protection of owners, developers, contractors and subcontractors against "**third party**" claims (claims by parties other than the parties to the contract, for example, claims by injured employees of the contractor against the owner) is the subject of commercial general liability ("**CGL**") insurance policies. CGL insurance is thus commonly considered to be third party insurance. Contractors have sought to utilize CGL policies as first party insurance to cover property damage occurring at the construction site arising out of faulty workmanship. Due to defective products and negligently performed work damage can occur to the contractor's work product and even beyond the work to the project. Liability insurers have sought to exclude from the coverage of CGL policies so-called "**business risks**", those risks thought generally to be under the control of the insured (contractor or subcontractor) and which are not regarded as fortuitous in nature. In crafting policy language (coverage and exclusions) insurers have struggled for decades to draft policy language that clearly and unambiguously covers "accidental" property damage but does not cover uninsurable business risks. The insurance industry has resisted insuring contractor's for property damage caused by "business risks" within the contractor's control. This issue has been the subject of considerable litigation. Although the vast majority of cases involve interpretation of the same CGL policy language, there is a marked split of authority. As reviewed below, the recent focus has been on the "occurrence" and "property damage" requirements of the CGL policy, with some courts applying the legal theories of "business risk" and "economic loss" as a means to exclude coverage. In undertaking this

approach, these courts have ignored interpreting the policy as a whole and have failed to consider the purpose and scope of the policy's construction-specific exclusions and the exceptions to these exclusions.

b. The Standard Policy Language

See the Appendix of Forms, **CG 00 01 04 13** Commercial General Liability Insurance Coverage Forms, and in particular the portions quoted below.[271] Upon examination of this language, a determination of what is covered and what is excluded is the product of the following definitions: "**property damage**"; an "**occurrence**"; "**your work**"; and "**products-completed operations hazard**".

Assuming that the property damage is covered because it is the result of an occurrence, then coverage involves a determination as to whether any of the policy's exclusions exclude coverage, including the following exclusions discussed below: **2.a** Expected or Intended Injury-"property damage" expected or intended from the standpoint of the insured (the contractor); **2.b** Contractual Liability; **2.j(5)** Damage to Property - "property damage" to that particular part on which the insured (the contractor) or its contractors or subcontractors are performing operations, if the "property damage" arises out of those operations; **2.j(6)** Damage to Property - damage to that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it; or **2.l** Damage to Your Work - damage to your work and included in the "products-completed operations hazard".

The standard policy definition of an "**occurrence**" is set out in Section V - Definitions, Paragraph **13** "Occurrence". The policy defines "occurrence" as an "**accident**". However, the term "accident" is not defined and its definition is left to the courts. This circumstance has led to a range of definitions and determinations of coverage. See Endnote 130 (Occurrence) for a list of jurisdiction holding that faulty workmanship is not an occurrence and a list of jurisdictions holding it is.

c. An "Occurrence"? - Or Excluded as Exclusion 2.a - Expected or Intended Injury?

The standard policy definition of an "**occurrence**" is set out in Section V - Definitions, Paragraph **13** "Occurrence". The policy defines "occurrence" as an "**accident**". However, the term "accident" is not defined and its definition is left to the courts. This circumstance has led to a range of definitions and determinations of coverage.[272]

See Endnote 214 for a list of jurisdiction holding that faulty workmanship is not an occurrence and a list of jurisdictions holding it is.[273]

Texas. Texas courts are of the view that the term "occurrence" is ambiguous and does not provide a basis for limitation on coverage. In its 2007 decision the Texas Supreme Court in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), in answer to certified questions from the Fifth Circuit, 501 F.3d 435 (5th Cir. 2007), held that an insured builder's faulty workmanship in building a house foundation met the "occurrence" requirement of its CGL policy.[274]

New Mexico. In *Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869 (N. M. Ct. App. 2015) the N. M. Court of Appeals held that property damage to homes stucco emanating from incorrect work by Pulte's subcontractor in installing sliding glass doors and windows was an "accident" and thus an "occurrence" for which Pulte was entitled to defense and indemnity as an additional insured on the subcontractor's policy. This case involved two tenders by Pulte to the insurer, both of which the insurer rejected. The court found that the first tender was correctly rejected as it was as to property damage (replacement) to the work itself, whereas the second tender was as to resultant damage to property other than the work itself. The court determined that recent cases in which courts have found that incorrect (faulty) work is an accident, and therefore an occurrence, represented a "more reasoned approach to construing the meaning of the term occurrence." Therefore, because noting in the policy's language definition of "occurrence" explicitly stated that faulty workmanship can never be an accident and nothing limited the definition to particular classes of property damage, insured's faulty workmanship was an occurrence. See discussion of *Pulte Homes* below in the discussion of **Exclusion 2.l – the "Your Work" Exclusion and the "Subcontractor" Exception**.

d. Coverage Triggers

A question arises as to the timing of the "occurrence" and which policy in a string of annual CGL policies

affords coverage. There are four theories of "occurrence" triggers: (1) **exposure** – a policy is triggered upon the first exposure to the injury-causing event;[275] (2) **manifestation** – a policy is triggered upon the first manifestation of injury;[276] and (3) **continuous** – all policies between the date of first exposure and the date of manifestation are triggered;[277] and (4) **injury-in-fact** – a policy is triggered when the first injury takes place.[278]

Texas. The Texas Supreme Court addressed this question in *Don's Building Supply, Inc. v. OneBeacon Insurance Co.*, 267 S.W.3d 20 (Tex. 2008). In response to certified questions raised by the Fifth Circuit, 496 F.3d 361, the supreme court responded as follows adopting the "**injury-in-fact**" trigger in Texas:

> The Fifth Circuit asks generally when property damage "occurs" under Texas law for purposes of an occurrence-based commercial general liability insurance policy, a question this Court has never answered. More specifically, is an insurer's duty to defend triggered where damage is alleged to have occurred during the policy period but was inherently undiscoverable until after the policy expired? As to this policy, which focuses on when damage comes to pass, not when damage comes to light, we answer "yes"-the insurer's duty is triggered under Texas law; the key date is when injury happens, not when someone happens upon it.

In *Don's Building Supply* the insurer sought a declaration that it had no duty to defend or indemnify its insured, Don's Building Supply ("**DBS**"), in 22 lawsuits that various homeowners filed against DBS and other defendants. Previously homeowners had filed suits against DBS asserting claims arising from water intrusion into the wall cavities of their homes due to an allegedly defective synthetic siding system known as Exterior Insulation and Finish Systems ("**EIFS**"). The EIFS was distributed and sold by DBS and designed, manufactured, and marketed by the other defendants. The defects were latent, being not readily apparent to one examining the exterior of the EIFS surface. DBS requested a defense from OneBeacon under three occurrence-based CGL policies issued to DBS by Potomac Insurance Company of Illinois and assigned by Potomac to OneBeacon. The central question before the federal district court was whether the property damage described in the suit was alleged to have occurred within the respective policy periods such that OneBeacon's duty to defend DBS was triggered. Based on the Texas Supreme Court's response, the Fifth Circuit issued its *per curiam* opinion reciting the following answers of the Texas Supreme Court:

> So in this case, property damage occurred when a home that is the subject of an underlying lawsuit suffered wood rot or other physical damage. The date that the physical damage is or could have been discovered is irrelevant under the policy…. (Answer to first question.)
>
> Under the actual-injury rule applicable to this policy, a plaintiff's claim against DBS that any amount of physical injury to tangible property occurred during the policy period and was caused by DBS's allegedly defective product triggers OneBeacon's duty to defend. The duty is not diminished because the property damage was undiscoverable, or not readily apparent or "manifest," until after the policy period ended. (Answer to second question.)

OneBeacon Ins. Co. v. Don's Building Supply, Inc., 553 F.3d 901, 902 (5th Cir. 2008 *per curiam*). The court of appeals in *Mid-Continent Casualty Co. v. Castagna*, 410 S.W.3d 445 (Tex. App.-Dallas 2013, *pet. denied*) held that a home owner did not have to apportion its damages attributable to foundation cracks that appeared over three CGL policy periods to each policy period, but could select the policy period with the highest limits; each insurer being fully liable for the loss.

Another Fifth Circuit case, *Wilshire Insurance Co. v. RJT Construction, LLC*, 581 F.3d 222, 226 (5th Cir. [Tex.] 2009) illustrates how the injury in fact may occur many years after the defective work was performed. In finding that the CGL insurance issuer had a duty to defend a foundation repair contractor, the court noted

> Wilshire urges that the homeowner's complaint in this case makes no allegations that property damage occurred during the policy period. We disagree. The complaint alleges that "cracks in the walls and ceilings" were "suddenly appearing" in late

> 2005. The cracks themselves are physical damage allegedly caused by the faulty foundation. This is not a case where latent internal rot long lies undiscovered before external signs warn of the festering damage. The cracks are not merely a warning of prior undiscovered damage; they are the damage itself. It is of no moment that the faulty foundation work occurred in 1999, [citation omitted] or that the damage was discovered in 2005; it matters only that damage was alleged to have occurred in 2005.[279]

In a more recent EIFS case, the Texas Supreme Court in *Lennar Corp v. Markel American Insurance Co.*, 413 S.W.3d 750 (Tex. 2013) held the insured's loss "***because of***" (see this language italicized above in Coverage A to the standard form CGL policy) property damage that occurred during the policy period (wood rot from defective construction due to using EIFS) included "rip and tear" costs Lennar incurred in ripping all of the EIFS off of the homes it constructed using EIFS, as the only way to find all the damage. These investigation and access costs were covered as all houses had suffered at least some wood rot during the policy period. The court rejected the insurer's argument that the damages should be apportioned among different insurers' policy periods. The court concluded, "that Markel's policy covered Lennar's entire remediation costs for damaged homes." *Lennar*, 413 S.W.3d at 758-59.

e. Excluded? - Other Exclusions

(1) Exclusion 2.b - the "Contractual Liability" Exclusion and the "Insured Contract" Exception

As noted above, the "**insured contract**" exclusion is contained in the CGL policy as an exception to an exclusion from coverage. The exclusion provides:

> **2. Exclusions**
> This insurance does not apply to:…
> **b. Contractual Liability**
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This **exclusion does not apply** to liability for damages:
> (1) That the insured would have **in the absence of the contract or agreement**; or
> (2) Assumed in a contract or agreement that is an "**Insured Contract**", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement…. (emphasis added.)

"**Insured contract**" is defined in the standard CGL (see Section 5 Definitions in the CG 00 01 attached in the Appendix of Insurance Forms) as follows:

> **9.** "Insured contract" means: …
> **f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you *assume* the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a **liability that would be imposed by law in the absence of any contract or agreement**…. (emphasis added.)

The Texas Supreme Court in *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014) held that Exclusion **2.b**, the "**Contractual Liability" Exclusion,** did not apply to negate coverage for a contractor where the "property damage" at issue is only to the property constructed. The supreme court was asked to answer two questions posed to it by the Fifth Circuit.[280] In 2008, Ewing Construction Company, Inc. (Ewing) entered into a standard AIA construction contract with a school district to build in a good and workmanlike manner additions to a school in Corpus Christi, including constructing tennis courts. Shortly after construction of the tennis courts was completed, the courts started flaking, crumbling, and cracking, rendering them unusable. Ewing tendered defense of the school district's suit to its insurer. The federal district court, and the Fifth Circuit initially held, that Ewing "assumed" the liability for its own performance under the contract. The Texas Supreme Court concluded that a contractor that agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract and thus does not "assume liability" for damages arising out of its defective work and does not trigger the contractual liability exclusion.[281] The

court found that the allegations that Ewing did not perform its work in a good and workmanlike manner were substantively the same as the allegations that it negligently performed its work under the contract. The court held that

> Accordingly, we conclude that a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not "assume liability" for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion. We answer the first question "no" and, therefore, need not answer the second question. *Id.* at 38.

New Mexico. See discussion of *Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869 (N. M. Ct. App. 2015) above in **c. An "Occurrence"? Or Excluded as Exclusion 2.1 – Expected or Intended Injury** and below in **Exclusion 2.l - the "Your Work" Exclusion and the "Subcontractor" Exception**. In *Pulte Homes* the N. M. Court of Appeals held that as to Pulte's first tendered claim it would not be covered pursuant to the Insured Contract Exception as coverage was excluded under the Your Work Exclusion.[282]

(2) Exclusion 2.j(5) - the "Operations" Exclusion (aka the "Property Being Worked On" Exclusion)

> **2. Exclusions.** This insurance does not apply to: …
> **j. Damage to Property**. "Property damage" to: …
> **(5)** That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; (emphasis added.)

A number of terms used in this exclusion are not defined in the standard policy, for example, "**that particular part.**"[283] See Turner, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES (2d ed.) § 31:5:

> The use of the word "particular" suggests that the exclusion should only apply to the smallest unit of division available to the work in question. This coverage approach is often called the "component parts" approach. Even in cases where work is being performed on a large, undivided and undifferentiated piece of property, such as bare land, the "particular part" language seems too limiting to allow the entire property to fall within the exclusion. More appropriately, only the immediate area of the work where the property damage arises should fall within the exclusion. Certainly, the entire building or piece of real property being worked on cannot be the "particular part." Thus, damages for the diminution in value of the entire building or property have been held to be unaffected by exclusions containing the "particular part" limitation.

The phrase "**are performing operations**" also is not defined. The vast majority of courts have concluded that this exclusion is limited to barring coverage for property damage occurring during on-going operations.[284]

New Mexico. A federal district court in New Mexico in *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp. 2d 1157 (D. N.M. 2012) held that water damage caused when a contractor intentionally diverted water onto plaintiff's property as not an "occurrence", even though the contractor did not intend to cause the water damage. However, the contractor's negligent misrepresentation to plaintiff that the contractor had the authority to construct the water diversion system on plaintiff's property was an occurrence because the contractor believed it had such authority.[285] Unfortunately, for the contractor the court further found that Exclusion 2.j(5) excluded coverage.[286]

(3) Exclusion 2.j(6) - the "Incorrect Work" Exclusion and the "Products-Completed Operations Hazard" Exception

> **2. Exclusions.** This insurance does not apply to: …
> **j. Damage to Property**. "**Property damage**" to: …
> **(6)** That particular part of any property that must be restored, repaired or replaced because "**your work**" ***was*** incorrectly performed **on it**.

> Paragraph (6) of this exclusion does not apply to "property damage" included in the "**products-completed operations hazard**". (emphasis added.)

a. Incorrect Work on That Particular Part of Property Damage

The **exclusion** is for "**property damage**" to "**that particular part**" because of "**incorrect work on it**". The purpose of exclusion 2.j(6) is to exclude coverage for the costs to repair or replace particular work discovered while the insured is still performing its work. Note that exclusion 2.j(6) employs the "**that particular part**" in the exclusion. This exclusionary wording has been held to permit coverage for damage to other non-defective work emanating from defective work.[287]

b. Products-Completed Operations Hazard Exception

The purpose of exclusion 2.j(6) is to exclude coverage for the costs to repair or replace particular work discovered while the insured is still performing its work and to except from the Incorrect Work Exclusion property damage included in the "**product and completed operations hazard**".[288] The function of the "products-completed operations hazard" ("**PCOH**") exception has been defined as follows:

> Before proceeding to our analysis of whether there was coverage, we think it would be helpful to explain how the PCOH provision fits into a CGL policy. A CGL policy, like every other insurance policy, has an insuring clause under which the insurer agrees to pay sums that the insured becomes legally obligated to pay because of property damages caused by an occurrence. The CGL policy also has exclusions that take away some of this coverage. The PCOH provision is an exception to these exclusions. Or, stated another way, the PCOH provision is simply a category of losses that are covered even though these losses might otherwise be excluded. Viewed in this light, the PCOH provision does not create a separate category of coverage. Rather, any loss falling within the PCOH provision must still meet all the requirements of the policy, like any other loss, except the exclusion from which the losses are excepted.[289]

(4) Exclusion 2.l - the "Your Work" Exclusion and the "Subcontractor" Exception

> **2. Exclusions.** This insurance does not apply to: …
>
> **l. Damage to Your Work**. "Property damage" to "**your work**" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damage arises was **performed on your behalf by a subcontractor**. (emphasis added.)

The exclusion is limited to damages to "your work". Damage to other property (*i.e.*, others' non-defective work or personal property) is not encompassed by this exclusion.[290] This exclusion is the "**heart**" of the "**business risk**" doctrine. It is most often asserted by insurers in claims against contractors for latent defective work. It is oft said that "CGL insurance does not insure against faulty workmanship." The policy arguments supporting this exclusion are the concerns that substituting CGL insurance for the contractor's workmanship obligation is tantamount to providing a performance bond; expanding CGL insurance to cover performance promises will encourage poor workmanship; shifting the economic loss to the insurer for the contractor's faulty performance affords little incentive for the insured to exercise the necessary care and workmanship to operate in a sound business manner; and to do otherwise would encourage the contractor to underestimate the cost of performing the job, and thus shift the cost of doing business from the insured to the insurer.[291]

Note that that Exclusion 2.l does not apply if the "damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." This exclusion and this exception were introduced into the standard policy and have remained unchanged since their introduction in the **1986** revision to the standard CGL policy. The 1986 exclusion/exception to exclusion replaced the 1973 "exclusion o" aka the "Work Performed" exclusion which read:

> This insurance does not apply … to property

> damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof or out of the materials, parts or equipment furnished in connection therewith.

The 1973 Work Performed exclusion applied to both property damage occurring during the course of construction and to completed operations. Also, the 1973 exclusion did not contain the "**subcontractor exception**". The 1986 exclusion is substantially narrower than the 1973 exclusion. Thus, whether this exclusion permits broader coverage depends on the extent to which the contractor has performed its services through subcontractors.[292] As the Texas Supreme Court explained in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), in answer to certified question from the Fifth Circuit, 501 F.3d 435 (5th Cir. 2007):

> Lamar submits that this exclusion would have eliminated coverage here but for the subcontractor exception. According to Lamar, this exception was added to protect the insured from the consequences of a subcontractor's faulty workmanship causing "property damage." Thus, when a general contractor becomes liable for damage to work performed by a subcontractor—or for damage to the general contractor's own work arising out of a subcontractor's work—the subcontractor exception preserves coverage that the "your-work" exclusion would otherwise negate. Lamar's understanding of the subcontractor exception is consistent with other authorities who have commented on its effect.

New Mexico. See discussion of *Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869 (N. M. Ct. App. 2015) above in **An "Occurrence"? Or Excluded as Exclusion 2.1 – Expected or Intended Injury** and in **Exclusion 2.b - the "Contractual Liability" Exclusion and the "Insured Contract" Exception**. In *Pulte Homes* the N. M. Court of Appeals reviewed two holdings of the lower court. The lower court held two tenders by the insured to the insurer were properly rejected. The court of appeals upheld the reject of the first tender but held the second tender was improperly rejected. The court of appeals held that property damage to homes stucco emanating from incorrect work by Pulte's subcontractor in installing sliding glass doors and windows was an "accident" and thus an "occurrence" for which Pulte was entitled to defense and indemnity as an additional insured on the subcontractor's policy and that the second tender[293] seeking coverage for property damage to property other than to the work itself was covered property damages. The court found that the first tender was correctly rejected as it was as to property damage (replacement) to the work itself.[294] The court found that the "your work exclusion" excluded coverage.[295] The court does not discuss why the **subcontractor exception** would not have applied resulting in coverage under the first tender.

11. Controlled Insurance Programs

There are two insurance approaches to protect the parties against the risk of non-auto "bodily injuries" and "property damages" arising out a construction project: the "traditional" approach; and a "controlled insurance program".

The "Traditional" Approach. The traditional approach is for each party to maintain its own liability insurance. The owner maintains commercial general liability insurance protecting it against liability arising out of its "ownership, maintenance and use" of the project site; and the contractor (*e.g.*, the construction manager) and its subcontractors of every tier each maintain a separate liability insurance program, including separate commercial general liability insurance, workers compensation and employers liability policies, and business auto liability policies.

A Controlled Insurance Program ("CIP").[296] The other approach is for the owner or the contractor to maintain a "controlled insured program" (an owner controlled insurance program or "**OCIP**" if established by the owner; and a contractor controlled insurance program or "**CCIP**" if established by the contractor). A CIP has certain advantages over the traditional approach.[297] A CIP also has additional considerations which must be addressed in order to be implemented.[298] A CIP can be just a consolidated commercial general liability program or it can be a consolidated commercial general liability program plus other consolidated lines of liability insurance such as a consolidated workers compensation/employer's liability program.

OCIP. In an OCIP subcontractors are "enrolled" in the OCIP. A CIP addendum is attached to the

general contract and to the subcontracts. Enrollment is accomplished by the subcontractors execution of the CIP addendum to their subcontract. This step can also be followed up by the formality of an enrolling call. An OCIP has the following advantages:

- The owner is the named insured. Thus, an owner's premises liability coverage (*e.g.*, inclusion of "slips, trips and falls") is included in addition to construction site liability coverage.

- Risk coverages can be tailored to an owner's objectives: *e.g.*, loss of use coverage.

- The premises liability aggregate is reinstated on an annual basis. This can be advantageous in a multi-year construction project. (In the Case Study addressed later in this article, the construction term was only 16 months).

- Unlike an OCIP, a CCIP contains a "builders risk exclusion." This exclusion modifies the CGL coverage to exclude property damage to property on which the contractor or the subcontractors are working and damages that arise out of those operations. There is in such case a potential risk that the builder's risk insurer will also deny claims on grounds of faulty workmanship and therefore, neither the CCIP nor the builder's risk policy insures against this risk.

- OCIPs may employ a 5-10% ("**swing**") audit margin clause. With such a feature added to an OCIP an additional premium is not assessed to the project if the exposure basis (hard costs) does not increase by more than the swing. The additional premium is only assessed on value exceeding the swing.

CCIP. In a CCIP, subcontractors are also enrolled. The workers compensation and employer's liability insurance may be maintained inside or outside of the CIP. The CIP in the Case Study was only a consolidated commercial general liability program and was part of a master CCIP into which all of the contractor's construction projects across the United States participated.

12. Excess & Surplus Lines Insurance

a. The Difference Between the Admitted Market and the Excess & Surplus Lines Market

(1) The Admitted Market

Most people think of insurance as one large marketplace, but there are really two different marketplaces – the admitted market and the excess and surplus lines market ("**E & S market**"). Insurance companies that participate in the admitted market are licensed and regulated by the state's agency charged with regulating insurers providing insurance coverage in the state (generically called herein the "**State Agency**").[299] Coverage forms and rates that can be used must be approved by the State Agency.[300] Insurance agents representing admitted insurance companies commonly have authority to both issue binders and certificates of insurance for those carriers.[301] Carriers in the admitted market include those that most of us have heard of: Allstate, Amerisure, Bituminous, Chubb, CNA, Farmers, Hartford, Liberty Mutual, State Farm, Travelers, Zurich and many more. Many of these companies have subsidiaries that operate in the E & S market for greater flexibility.

(2) The E & S Market

Insurance companies providing coverage through the E & S market in most states are not licensed by the State Agency but in most states must be authorized by the State Agency to operate in the state.[302] Insurance companies providing coverage through the E & S market ("**E & S carriers**") include some of the largest insurance companies in the nation but they are not required to file their rates and forms. As a result, manuscript forms abound arising in multitudinous coverage differences when compared to the coverage available through the admitted market.

Additionally, E & S carriers must operate through intermediaries ("**surplus lines insurance agents**"), through whom retail agents can access those insurance companies. Retail insurance agents are not contracted directly with E & S insurance companies and must also use those intermediaries. Retail agents do not have binding authority for these insurance companies and in many cases do not even have authority to issue certificates of insurance.

It is generally easy to identify a policy written in an E & S carrier, as usually the State Agency requires that a disclosure statement be stamped on the policy's

Declarations Page. For example, the disclosure statement in Texas the following:

> This insurance contract is with an insurer not licensed to transact insurance in this state and is issued and delivered as a surplus lines coverage pursuant to the Texas insurance statutes. The Texas Department of Insurance does not audit the finance or review the solvency of the surplus lines insurer providing this coverage, and this insurer is not a member of the property and casualty insurance guaranty association created under Chapter 462, Texas Insurance Code. Chapter 225, Insurance Code, requires payment of ___ (insert appropriate tax rate) percent tax on gross premium.

b. The Problem Giving Rise to the E & S Market

The admitted market shies away from providing insurance on a wide array of entities, such as those with:

- Adverse loss experience
- Higher risk that the premium warrants
- Limited experience in field of operations
- Small premium size.[303]

c. The Resulting Concern

There are a few admitted markets that attempt to limit their exposure in the above situations by using non-ISO, proprietary coverage policy and endorsement forms. More commonly, those businesses that do not qualify for the admitted market are relegated to the E & S market. Coverage issues (disappointments) arise more easily in a market like the E & S market that does not use standardized coverage forms filed with and approved for use by the State Agency. The insureds most likely adversely affected by non-standardized and unregulated coverage forms include small general contractors (especially "**paper contractors**", those that sub out all work) and the vast majority of subcontractors. These contractors are subjected to unregulated insurance coverage forms, just a few of which we will discuss today.

13. Exclusions May Be Invisible

There is today a plethora of "**invisible exclusions**" and limitations being added to general liability coverage by endorsement by the insurance industry to minimize the carrier's exposures. These are invisible because they never show up on any certificate of insurance unless you are careful in your drafting of the insurance specifications. Some of these invisible exclusions are the following, some of which apply to construction contracts and others to leases.

a. ISO Limitations and Endorsements to an ISO CGL Policy

(1) ISO Exclusion 2.p - Electronic Data Liability Exclusion

Not an endorsement but a relatively new exclusion in all general liability policies is that of injury to or damage of electronic data. **Exclusion 2.p** in general liability policies states:

> 2. Exclusions. This insurance does not apply to:
>
> p. Electronic Data. Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data. As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment. [304]

Coverage is readily available to cover this gap through an Electronic Data Liability endorsement **CG 04 37 04 13** [305] and should be required. Be sure to specify the amount of coverage required, as this endorsement is frequently provided with only a minimal sublimit (*e.g.*, $25,000 coverage).

(2) CG 20 33 Additional Insured – Owners, Lessees Or Contractors – Automatic Status When Required in Construction Contract With You

This endorsement provides "blanket" additional insured status for ongoing operations but **privity of contract** is required for insured status. [306]

(3) CG 21 39 Contractual Liability Limitation

As stated above in addition to additional insured coverage, Contractual Liability Coverage is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. **ISO CG 21 39 10 93** Contractual Liability Limitation is one of the most egregious endorsements in the insurance industry.[307] This form is contained in the Appendix of Forms. As stated above, the provision of contractual liability coverage includes a series of definitions of "insured contract". The first five definitions are referred to as incidental provisions, but the sixth definition is the provision that provides for the contractual assumption of tort liability. The sixth type of "insured contract" is most frequently the basis of insurance of a Named Insured on its indemnity of third parties (*e.g.*, indemnity for injuries to an employer's employees; indemnity for injuries to a subcontractor's employees). The CG 21 39 deletes this sixth definition in its entirety, deleting coverage for an indemnitor's indemnity of a third party for its negligence. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer, unless its indemnity falls within one of the five defined "insured contracts". Note as discussed in the Endnotes, the Anti-Indemnity Statutes in many states preclude enforcement of indemnities as to a third party's negligence, sole or even concurrent, except in statutorily limited circumstances.

(4) CG 24 26 Amendment of Insured Contract Definition

ISO CG 24 26 04 13 Amendment of Insured Contract Definition [308] modifies the sixth definition to eliminate coverage for the contractual assumption of another party's sole negligence. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer.

(5) CG 22 94 and CG 22 95 Exclusions – Damage to Work Performed by Subcontractors

Exclusion **2.l** in the standard CGL policy contains a significant exception (the subcontractor work performed exclusion) to its coverage exclusion. Exclusion 2.l states:

> **2. Exclusions.** This insurance does not apply to:
> **l. Damage To Your Work.** "Property damage" to "your work" arising out of and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damage arises was **performed on your behalf by a subcontractor**. (emphasis added.) [309]

Endorsements **ISO CG 22 94 10 11** Exclusion – Damage to Work Performed by Subcontractors[310] and **ISO CG 22 95 10 01** Exclusion – Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations[311] delete the exception to the exclusion, thereby eliminating the single most important coverage under which many construction defect claims have historically been paid.

(6) CG 21 42 12 04 and CG 21 43 12 04 Exclusions – Explosion, Collapse and Underground Property Damage Hazard

The standard CGL policy does not exclude "explosion, collapse and underground property damage" hazards (commonly referred to as "**XCU**"). However, XCU coverage is deleted by addition of endorsement **ISO CG 21 42 12 04** Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations) [312] and **CG 21 43 12 04** Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations Excepted).[313]

b. Manuscript Endorsements to CGL Policies

Admitted insurers generally issue on an ISO form, *e.g.*, CG 20 10. Some E & S companies issue on the ISO forms, but many issue on manuscripted endorsements. The following are examples of manuscript endorsements.

(1) Exclusions and Limitations on Negligence Coverage

The following are samples of egregious manuscript endorsements excluding coverage for the additional insured's negligence.[314] Some have taken this approach as far as excluding coverage for any liability of the additional insured![315]

Manuscript Endorsement # 1:

The following persons or entities scheduled below are added as **additional insureds** under the Insuring Agreement indicated below, but only with respect to any damages payable as a result of the **additional insured's** **vicarious liability** for the acts of omissions of an **Insured** otherwise covered under the applicable Insuring Agreement. This insurance does not apply to **losses** arising from or in connection with liability for any acts or omissions alleged against the **additional insured**.

Manuscript Endorsement # 2:

The **Company's** duty to defend and pay damages on behalf of an **Insured** shall extend to any **premises lessor** named in a **claim** solely as a result of the acts or omissions of an **Insured** in the maintenance, operation, or use of that part of a premises leased to an **insured business**. However, this extension of coverage shall only apply to a **claim** that arises from an **event** or offense that took place during the term of the lease and that is otherwise covered under the Commercial General Liability Insuring Agreement. In addition, under no circumstances shall the **Company** have any duty to defend or pay damages on behalf of a **premises lessor** with regard to any damages caused by, or allegedly caused by, the **premises lessor**. If a **premises lessor** is entitled to a defense and indemnity under this policy, all terms and conditions of the policy shall apply as if the **premises lessor** were an **Insured**.

Manuscript Endorsement # 3:

This insurance applies **only with respect to negligent act or omission of the Named Insured**.

Manuscript Endorsement # 4:

We have no duty to indemnify the additional insured for damages, claims or any other **liabilities arising from actions, inactions, errors or omissions of the additional insured**. This endorsement does not create a duty on our part to defend the additional insured or to participate in, contribute to, or reimburse any person, organization or entity for any fees or expenses incurred in the defense of the additional insured.

Manuscript Endorsement # 5:

A person or organization's status as an insured under **Additional Insured-Completed Operations continues only until the earlier of the end of the policy period; or the period of time required by the written contract or agreement**. If no time period is required by the written contract or agreement, a person or organization's status as an additional insured under this endorsement will not apply beyond the lesser of the end of the policy period; or **five years from the completion of "your work"** on the project which is the subject of the written contract or agreement.

(2) Additional Insured Coverage to Be Primary - But Contributory!

Many agreements call for the Named Insured's insurance to be primary. The intent of a primary insurance requirement is to get the other party's insurance, on which an additional insured has been added, to pay first and to the maximum extent possible before the additional insured's own insurance is called into play. The problem with this is that all general liability policies state that they are primary, and that, if two or more policies cover a claim, they will share in payment of that loss. The insurance industry attempted a fix to this by including a provision that states that a Named Insured's coverage is excess where that Named Insured is added to another party's coverage as an additional insured. That works fine so long as the Protecting Party hasn't also modified its additional insured coverage to be provided on an excess liability or other modified basis.

Manuscript Endorsement # 1:

Primary & Noncontributory Additional Insured Endorsement

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

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

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

Manuscript Endorsement # 2:

This insurance shall be primary and non-contributory but **only in the event of a named insured's sole negligence**.

(3) Waiver of Subrogation - But Conflicting with Indemnity

Manuscript Endorsement # 1:

This waiver shall not apply to "damages" resulting from the sole negligence of the person(s) or organization(s) indicated it the Schedule shown above.

Manuscript Endorsement # 2:

This waiver shall only apply to **"damages" resulting from the sole negligence** of the Named Insured.

Manuscript Endorsement # 3:

This waiver applies **only if the designated construction project** shown in the Schedule above **is completed**.

(4) Employer's Liability Manuscript Exclusion

Exclusion **2.e(1)** to the standard CGL policy states in part:

2. Exclusions. This insurance does not apply to: …

e. Employer's Liability. "Bodily injury" to:
(1) An "employee" of the insured arising out of and in the course of:
(a) Employment by the insured; or Performing duties related to the conduct of the insured's business…

This exclusion does not apply to liability assumed by the insured under an "insured contract". [316]

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

(5) Construction Defect - Completed Operations Manuscript Exclusion

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

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

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

Manuscript Endorsement # 1:

2. Exclusions. This insurance does not apply to: …
e. Employer's Liability. "Bodily injury" to:
(1) An "employee" of ~~the~~ **an** insured arising out of and in the course of:
(a) Employment by ~~the~~ **an** insured; or
Performing duties related to the conduct of **the** insured's business…
This exclusion does not apply to liability assumed by the insured under an "insured contract".

Manuscript Endorsement # 2:

Throughout this policy, with the exception of Section II – Who Is An Insured, when the word "insured(s)" is used it shall mean "any insured".

Manuscript Endorsement # 3:

This insurance does not apply to any liability arising out of "Action Over" or Indemnity Over" suits involving United States Longshoremen and Harbor Workers' Act, Jones Act, Outer Continental Shelf Extension Act, Workers' Compensation law or acts of any of the various states, or any other similar Workers' Compensation or Employers Liability Laws or act or Employers Liability Maritime Laws or Acts.

Manuscript Endorsement # 4:

~~This exclusion does not apply to liability assume by the insured under an "insured contract".~~

(6) Punitive Damages Exclusion

Some punitive damage endorsements state that coverage is excluded except where permitted by law, but many are absolute exclusions.

This insurance does not apply to fines, penalties, punitive, exemplary, vindictive or other non-compensatory damages imposed upon the insured, or any **multiplied portion of compensatory damages**.

(7) "Residential" or "Habitational" Exclusion

The meaning of "residential" or "habitational" differs from insurance company to insurance company. If the work being performed is on a structure that could conceivably be considered to be a "residence" by an insurance company adjuster, proceed with caution.

Manuscript Endorsement # 1:

It is agreed this insurance does not apply to liability arising in whole or in part, either directly or indirectly, out of any past, present, or future "residential construction activities" performed by or on behalf of any insured or others.

Manuscript Endorsement #2:

For the purposes of this endorsement, "residential construction activities" means any work or operations related to any job or project involving the construction, repair, remodeling, renovation, maintenance, change or modification of single-family dwellings, multi-family dwellings, condominiums, townhomes, townhouses, time-share units, fractional-ownership units, cooperatives and/or any other structure or **space used or intended to be used as a residence**, whether full-time, part-time, live-work combination, vacation or temporary residence, and **regardless of the actual use** or occupancy of any such structure or space.

(8) Classification Limitation Manuscript Exclusions

Classification limitation endorsements can defy logic. Their intent is to state that coverage is provided only for exposures declared to an insurance company, and new types of undeclared operations are not automatically included.[317]

Manuscript Endorsement #1:

> Coverage under this contract is strictly **limited to the classification(s) and code(s) listed** on the policy Declarations page. No coverage is provided for any classification(s) and codes(s) not specifically listed on the Declaration page of this policy.

Manuscript Endorsement #2:

> This insurance does not apply to any "bodily injury", "property damage", "personal and advertising injury", medical expenses or other injury or damage that **does not arise out of your operation described** in the above Schedule and performed by you or on your behalf.

(9) Height Exclusion

A height exclusion deletes coverage for work on a building or structure in excess of a stated height. Note that the below example does not state that the work must be performed above that stated height to be excluded. All work is excluded. The following is a height exclusion manuscript endorsement:

Manuscript Endorsement:

> This policy does not insure against loss or expense, including but not limited to the cost of defense, arising from or resulting, directly or indirectly, from:
>
> 1. "Your work" on the exterior of any building or structure in excess of fifty feet in height; or
> 2. "Your work" on the exterior of any building or structure that is proposed to be over fifty feet in height.

(10) Underground Utility Location Warranty

In spite of one's best efforts to compile a listing of unacceptable endorsements, the insurance industry is quite imaginative in dreaming up exclusions and limitations and there's a new one around every corner. This is a good example. While contractors are very good at getting underground utilities marked, how often do they get "proof in writing"?

Manuscript Endorsement:

> It is a condition of coverage that before the Named Insured commences any digging, excavation, boring or similar underground work, a local locator service must come to the job site and mark all underground lines, pipes, cables, and underground utilities. The **Named Insured must obtain proof in writing from the locator service**. If the above procedure is not completed, coverage under this policy is voided for any claim, loss, costs or expenses arising out of such digging operations. Where there is no coverage, there is no duty to defend.

(11) Escape Clauses

Particularly egregious manuscripted exclusions are escape clauses and negligence exclusions.[318]

(12) Subsidence Manuscript Exclusion

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

(13) "Prior Work" or "Continuous and Progressive Injury and Damage" Exclusions

There are many versions of this exclusion being used. The first example shown below is an example where coverage is excluded for any progressive or continuing injury or damage that starts before the policy inception, regardless of whether any insured knew of the prior injury or damage. The second example shown below is one of the most abusive endorsements I have found. The insurer will argue that no coverage exists regardless of when the coverage is triggered. All that is required is an "allegation" that the loss was "caused" by a "condition" that existed before the policy took effect.

Note that the "condition" is almost always in existence before a particular policy period begins. This begs the question: Does "condition" mean simply a condition from which injury or damage later results or latent injury or damage? Such an endorsement essentially turns the current coverage into a claims-made policy with no prior acts coverage and no extended reporting period (a/k/a "**tail**") if renewed with similar forms. Coverage is radically diminished in a way that most insureds and even their insurance agents do not understand. Contractors that regularly face exposures involving more than one policy period may face a bankrupting exposure.

Manuscript Endorsement #1:

> This insurance does not apply to "bodily injury" or "property damage" within the "products-completed operations hazard" if the injury or damage first occurred prior to the effective date of this policy.

Manuscript Endorsement #2:

> This insurance does not apply to "Bodily injury" or "property damage":
>
> •
>
> (1) which first existed, or is alleged to have first existed, prior to the inception date of this Policy, or
>
> (2) which are, or are alleged to be, in the process of taking place prior to the inception date of this Policy, even if the actual or alleged "bodily injury" or "property damage" continues during this policy period; or
>
> (3) which were caused, or are alleged to have been caused, by a condition that first existed prior to the inception date of this Policy.

(14) Insured vs. Insured Manuscript Exclusion

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

(15) Controlled Insurance Program ("CIP") or "Wrap" Manuscript Exclusion

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

14. Self-Insurance Is Not Insurance

a. What is Self-Insurance?

"**Self-insurance**" is not insurance.[319] Self-insurance is nothing more than a risk retention device (a method of "financing" certain risks), and an indemnity by the "self-insurer", the indemnifying party. Self-insurance and large self-insured retentions are a popular method for financing certain risks, particularly among very large commercial businesses[320] and public entities.[321] Self-insurance has the benefit of retaining dollars otherwise payable for insurance for cash flow purposes until needed to pay claims.

The term "self-insurance" is used to describe a range of risk retentions by the self-insurer. Self-insurance can range from no insurance ("going bare"), to a policy deductible, to insurance purchased over a large self-insured retention ("**SIR**"). A SIR is sometimes referred to as a "retained limit".[322] In the case of a deductible or SIR it may be designated as a dollar amount or a percentage. A deductible or SIR is the monetary threshold of the insurer's obligation to pay liabilities or losses covered by the policy.

b. Liability Risks: Deductibles, SIRs and Self-Insurance

(1) Deductibles

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

The industry standard ISO deductible endorsement obligates the *named* insured to pay the deductible. Thus, an additional insured on an ISO deductible endorsement is not required to pay the deductible in order to trigger coverage. Manuscript endorsements may, however, require payment of the deductible by *the insureds*, which would include an additional insured.

(2) Deductibles v. SIRs [323]

There are four major differences between liability deductibles and SIRs:

	Coverage	Deductibles	SIRs
1.	Defense Costs	The insurer pays all defense costs from the first dollar.	Insured usually is responsible for defense costs from the first dollar until the full amount of the retention is paid out.
2.	Policy Limits	Amount of the deductible is included in the policy limits.	Policy limits, including defense costs, are on top of the SIR amount. Once the SIR is paid, the insurer is obligated to pay costs above the SIR within the policy limits.[324]
3.	Payment to the Claimant	The insurer pays the full amount of a judgment against the insured up to policy limits, and then can seek reimbursement from the insured, if it can.	Insurer does not pay the portion of the judgment within the retention. The insured pays the SIR.[325]
4.	Certificates of Insurance	A deductible need not be divulged on a certificate of insurance.	An SIR must be divulged on a certificate of insurance, as the insurer has no responsibility to pay claims until the SIR is exhausted.

Unfortunately, courts and insurance industry personnel use the terms "deductible" and "self-insured retention" interchangeably and without care, and the four listed differences are not well understood. The actual operation of a deductible or SIR provision usually can only be determined through a review of the written policy and discussion with the insurer. The scope of a contract's indemnity and the financial ability of the indemnitor may reduce concern as to this distinction.[326]

(3) Settlement

Liability policies with deductibles sometimes contain provisions granting settlement authority to the insurer, even over an insured's objections, and permit the insurer to recover from the insured the portion of the settlement within the deductible. The same settlement right may be granted to the insurer by the SIR insured, but it is more common for an insured with a large self-insured retention to also retain settlement rights, even if the settlement exceeds the SIR amount.[327] In circumstances where the policy with a SIR grants settlement rights to the insurer, a conflict of interest can exist between the insurer and its insured.[328]

(4) Self-Insurance Specification Drafting.

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

(5) Self-Insurance and Additional Insured Status

Being named as an “additional insured” on a self-insurance program, does not provide any additional insurance to the "additional insured", as the indemnitor is the sole funding entity. [329]

(6) Funding Self-Insurance

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

B. PROPERTY INSURANCE

1. Parties

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

a. Insureds

In a property policy, the insured is the party identified on the Declarations Page as having an **insurable interest** in the covered property and to whom loss payments will be paid if the property is damaged or destroyed. Third parties may be designated by endorsement to the property policy as an **additional insured** to protect their **additional interests**.[330]

b. Additional Named Insured

Unlike liability insurance policies, there may be "additional named insureds" on a property policy. The following definition of "**additional named insured**" is found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx:

> (1) A person or organization, other than the first named insured, identified as an insured in the policy declarations or an addendum to the policy declarations. (2) A person or organization added to a policy after the policy is written with the status of named insured. This entity would have the same rights and responsibilities as an entity named as an insured in the policy declarations (other than those rights and responsibilities reserved to the first named insured). In this sense, the term can be contrasted with additional insured, a person or organization added to a policy as an insured but not as a named insured. The term has not acquired a uniformly agreed upon meaning within the insurance industry, and use of the term in the two different senses defined above often produces confusion in requests for additional insured status between contracting parties.

c. Mortgageholder

Similarly, the standard commercial property policy contains the standard mortgage clause providing that loss payments will be made to the insured and the **mortgageholder** as their interests may appear.[331]

d. Loss Payee

A "**Loss Payable Clause**" is an insurance provision authorizing payment in the event of loss to a person or entity (a "**loss payee**") other than the named insured having an insurable interest in the covered property. See ISO CP 12 18 06 07 Loss Payable Provisions, Optional Clause F Building Owner Loss Payable Clause.[332] In November 2008 ISO amended its CP 12 18 Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the CP 12 19. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

2. Antiquated, Problematic and Just Plain Wrong Terminology

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

Don't Say This	***Say This***
"fire insurance"	basic, broad or special causes of loss form
"extended coverage"	
"vandalism and malicious mischief"	
"special extended coverage"	

"all-risk"	

A "**basic causes of loss**" policy is extremely basic in the scope of coverage provided. A "**broad causes of loss**" policy is broader than a basic form, but is not very broad. A "**special causes of loss**" policy is what most lawyers, laymen and many insurance professionals think of as an "all risk" form and is by far the most common form of property insurance in use.[333]

3. The Policy

Property policies, and the ISO property policy form, are comprised of a the following forms:

Commercial Property Coverage Part Declarations Page with Schedule of Forms [334]

Common Property Conditions [335]

Building and Personal Property Coverage Form [336]

- **Section A – Coverage** [337]
- **Section B – Exclusions and Limitations**
- **Section C – Limits of Insurance**
- **Section D – Deductible**
- **Section E – Loss Conditions** [338]
- **Section F – Additional Conditions** [339]
- **Section G – Optional Coverages** [340]
- **Section H – Definitions**

Business Income (And Extra Expense) Coverage Form [341]

Leasehold Interest Coverage Form [342]

- **Section A – Coverage** [343]
- **Section B – Exclusions and Limitations**
- **Section C – Limits of Insurance**
- **Section D – Loss Conditions**
- **Section E – Additional Condition**
- **Section F - Definitions**

Commercial Property Conditions [344]

Endorsements [345]

(a) Coverage under Each Causes of Loss

(1) Included Causes of Loss

The following are the perils covered by each of the Causes of Loss Forms:

PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS	
Basic Causes of loss Form (CP 10 10) • Fire • Lightning • Explosion • Windstorm or hail • Smoke • Aircraft or vehicles • Riot or civil commotion • Vandalism • Sprinkler leakage • Sinkhole collapse • Volcanic action	**Broad Causes of Loss Form (CP 10 20)** Basic causes of loss form perils, plus: • Breakage of glass • Falling objects • Weight of snow, ice, or sleet • Water damage from leaking appliances • Collapse from specified causes **Special Causes of Loss Form (CP 10 30)** • All perils except as excluded • Collapse from specified causes

(2) Excluded Causes of Loss

The following are excluded perils from Causes of Loss coverage, including from Special Causes of Loss:

- Law and Ordinance;
- Earth Movement, Governmental Action;
- Nuclear Hazard;
- Utility Service;
- War and Military Action;
- Water;
- Fungus, Wet Rot, Dry Rot, and Bacteria, Boiler and Machinery Failure;
- Wear and Tear or Lack of Maintenance;
- Continuous Seepage or Leakage Over a Period of 154 Days or More;
- Dishonest Acts;
- Pollutants; and
- Faulty Design or Workmanship.

Also, in special hazard areas certain causes of loss may be excluded from coverage by endorsement with specialty insurance being required to cover the hazard (*e.g.*, windstorm).

(b) Difference in Conditions Insurance

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

(c) Valuation Terminology

Whether the policy is a "**Replacement Cost**" policy or an "**Actual Cash Value**" policy, the loss paid will be limited to the policy limits.

(1) Replacement Cost

"**Replacement Cost**" is the cost of repairing or replacing insured property at time of the occurrence of the loss, without reduction for loss of value through depreciation or age. Recovery is limited to the lesser of (a) the policy limit, (b) the cost to replace the lost or damaged property with other property of comparable material and quality and used for the same purpose, or (c) the amount actually spent to repair or replace the damaged or lost property. The policy proceeds are not paid until the property is actually repaired or replaced, and only if replacement occurs as soon as reasonably possible after the loss or damage. Notice of intent to replace must be given to the insurer within 180 days of loss. Replacement cost coverage does not prohibit recovery if the insured rebuilds at a new location, but the coverage is limited to what it would have cost to replace the improvements at the original premises. Replacement cost coverage does not cover the added costs of construction due to changes in laws and ordinances except if the policy is endorsed with an Ordinance or Law Coverage Endorsement (See Endnote 59 to **Insurance 201**). In the past replacement cost coverage was an option provided by endorsement. Now it is an optional coverage built into the ISO form policy. The option coverage is selected by notation on the Declarations Page. See **ISO CP DS 10 00** Declarations Page at Optional Coverages. [346]

(2) Actual Cash Value

"**Actual Cash Value**" or "**ACV**". The ISO policy does not define "actual cash value". The definition of this term is left up to case law. The term has generally been defined by cases to mean replacement cost of the covered property at the time of loss with like-kind and quality less physical depreciation. Depreciation may be determined by consideration of age, condition at time of loss, obsolescence and other factors causing deterioration. The term is seldom defined in the policy, but is used in property and automobile physical damage insurance and is generally considered in the industry to be the cost to repair or replace the damaged property with materials of like kind and quality, less depreciation of the damaged property. In other words, the sum of money required to pay for damages or lost property, computed on the basis of replacement value less its depreciation by obsolescence or general wear and tear (i.e., physical depreciation). This is one of several possible methods of establishing the value of insured property in order to calculate the premium and determine the amount the insurer will pay in the event of a loss. ACV coverage applies if Replacement Cost coverage is not affirmatively selected on the Declarations Page of the policy.[347]

(3) Inflation Guard

"**Inflation guard**" is an optional endorsement designed to offset potential inflation by specifying a percentage in the Declarations Page by which the coverage will increase annually as to the portion of the covered property specified.[348]

4. Self-Insurance Is Not Insurance

a. Deductibles

Under a property or builder's risk policy, the deductible is subtracted by the insurer from its loss payment. The insured who suffers the loss absorbs the deductible, unless the deductible is allocated between the parties in a different fashion. For example, if a builder's risk policy has a deductible, the party that owns the damaged property absorbs the deductible (absent a contractual provision reallocating the loss within the deductible).[349]

b. The Self-Insured Owner and "Waivers of Subrogation"

The concept of a waiver of subrogation is technically applicable only to an insurer. With a waiver of subrogation, the insurer waives its right to step in to the shoes of its insured and seek to recoup either from a specified person or all persons the policy proceeds paid out to the insured. A waiver of recovery by an insured often effectuates a waiver of an insurer's right of subrogation. In the self-insurance context, parties sometimes use the term "waiver of subrogation," but in reality what is meant is a "**waiver of recovery**;" the self-insured is waiving its right of recovery as to the other party. A self-insuring property owner may balk at waiving its right of recovery. However, when an owner elects to self-insure it likely has done so for sound economic reasons. By waiving recovery (aka granting a waiver of subrogation) against the other party, the waiving party assumes the risk of loss due to the negligence of the other party. If this waiver is not granted, then the other party might condition doing the transaction on its obtaining property insurance covering the loss, and seeking to pass the premium cost back to the other party. For example, a contractor contracting with a self-insured owner, who does not waive recovery against the contractor, likely will pass the insurance cost back to the self-insuring owner, and will seek to limit its liability to collected insurance proceeds.

c. The Self-Insured Tenant

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

5. Not all Builder's Risk Policies Are the Same

a. No Standard Builder's Risk Policy

There is no standard builder's risk policy, unlike liability insurance there is a commonly recognized standard ISO CGL policy. ISO has a builder's risk policy, but builder's risk policies are considered to be Inland Marine policies and there is a wide divergence in builder's risk coverages insurer to insurer. "**Inland Marine**" policies are policies that are customized to the loss sought to be insured, and are designed to provide coverage for special exposures typically associated with the type property at which they are directed and the special valuation methods needed to address the exposure. Construction is recognized as a special exposure. A commonly used Inland Marine policy for builder's risk coverage is the Commercial Inland Marine Conditions (Form CM 00 01 09 04).

b. Common Errors and Problems

(1) Exclusions

An unendorsed builder's risk policy includes a long list of exclusions.[350]

(2) Early Occupancy

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

(3) Review of Policy Delayed Until After Construction Commencement

Like the other insurance products discussed in this article, the builder's risk insurance policy may not, and likely will not, be issued or available prior to commencement of construction! The policy in many cases is not issued and delivered for weeks or months after work has begun. As noted above in the discussion of the perils of reliance on an ACORD Certificate of Property Insurance, an ACORD Evidence of Commercial Property Insurance or even

an ACORD Binder, the policy itself is the contract of insurance and contains extensive terms and conditions that should be reviewed and approved prior to commencement of work. A great level of "distress" can occur, if an assumed coverage in fact is not included in the policy, despite the best written insurance specifications, and a loss occurs before issuance of the policy. If construction will commence before issuance and delivery of the policy, one avenue may be to have the insurer deliver a specimen policy and specimen endorsements.

(4) Coverage Amount

Builder's risk can be provided on either an Actual Cash Value or a Replacement Cost basis. [351] Normally, there is little to no difference between Actual Cash Value and Replacement Cost on a newly constructed structure but the potential exists that an adjuster could allege physical depreciation, especially when covering long-term construction projects. Replacement Cost is the preferred valuation method. Failure of the policy amount to reflect the full loss exposure is a common error. The contractor's contract sum is a guide in setting the coverage amount. In projects involving remodeling (especially if the structure is a historic structure) or improvement to an existing building, limiting the coverage amount to the contractor's contract sum could lead to a significant uninsured loss. Builder's risk policies will not insure the building envelope unless specifically added. When added, some builder's risk policies insure the envelope only on an Actual Cash Value basis.

(5) Deductibles

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

(6) Coverage for Architect's Fees, Owner Supplied Materials, Debris Removal, Full Limit Coverage of Flood and Earthquakes, and Elimination of Ordinance or Law Exclusions

Many commonly expected coverages are available only through policy endorsement and are not part of the issuer's standard policy form. Missing coverages likely may be owner's additional architect's fees arising out of an insured loss; owner supplied materials; costs of demolition of the intact portion of a building when a law or ordinance requires that the entire structure be torn down; full collapse coverage, including collapse resulting from design error.

(7) Soft Costs

Builder's risk policies typically do not cover damages caused by delays arising out of a covered loss. These "soft costs" can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes.

(8) Delay Damages

Another endorsement that may be available to insure against a financial distress risk is a delayed completion and force majeure endorsement. This endorsement supplements the risk of covered loss to cover consequential damage losses due to completion delays and force majeure events not otherwise covered. This endorsement extends coverage for losses due to strikes and labor disputes, changes in law (*e.g.*, building codes, emission standards), acts of God, adverse weather conditions and off-site physical damage to materials or equipment.

(9) Watch Out for Protective Safeguard Warranties

"**Protective safeguard warranties**" are conditions precedent to coverage sometimes built into a builder's risk policy to assure the insurance company

of certain protections being provided at the job site. Their inclusion is justified by the insurer on grounds of reduced premium. However, a violation of a protective safeguard warranty voids coverage, potentially even if the loss is not tied to the violated protective safeguard warranty. Typical protective safeguard warranties address the following: emergency response protocols; fencing surrounding the project (*e.g.*, site must be fenced with a cyclone fence at least 6 foot high which must be locked during non-working hours); project lighting during night hours; site surveillance must be maintained by a licensed and bonded watchperson during non-construction hours; and water for fire suppression must be stored on site, or a working fire hydrant must be within 1,000 feet of the structure being constructed.

C. DRAFTING: SPECIFIC SPECIFICATIONS ARE BETTER THAN GENERAL

1. Two Approaches

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

Narrative	Exhibit
General	Specific
Brief	Detailed
Paragraph Style	Checklist Style

The author encourages the use of the exhibit checklist approach. In the author's experience providing a specific, detailed, checklist style set of insurance specifications facilitates delivery of insurance meeting the parties' insurance requirements. The checklist (aka "check the box") approach has now been adopted by AIA in a major revision to the AIA Documents system. See the **AIA Document A101 – 2017 Exhibit A *Insurance and Bonds*** set out below.

2. Remember Your Audience

The author urges "Remember your audience," which the author argues is the insurance agents issuing and reviewing the insurance to be obtained, and not only the Protecting Party's insurance counsel. The people that most need to understand what is being required are the Protecting Party's insurance brokers. Make it easy for them to understand. Require a specific ISO endorsement or a specific scope of coverage. If requiring a specific ISO endorsement, do not say "or equivalent". What does that mean? What it does not mean is "identical". Make the Protecting Party declare what in fact they do have. Get a copy and read it. Make sure that it complies with your insurance specifications.

3. Recommendations

The author encourages the use of the exhibit checklist approach. In the author's experience providing a specific, detailed, checklist style set of insurance specifications facilitates delivery of insurance meeting the parties' insurance requirements.

Inform your client of the severity of the exclusions that are so widely and increasingly utilized by the insurance industry, yet are invisible to most certificate holders. Inform your client that a review of the coverage being provided must be performed, either by you, your client's insurance agent, or an independent consultant.

Protect your client contractually. Insert a prohibition in your insurance requirements similar to the following:

The following exclusions/limitations or their equivalents are prohibited from use in the Protecting Parties' general liability and excess liability insurance policies:

- Amendment of Insured Contract Definition ISO CG 24 26
- Classification or Business Description
- Construction Defect Completed Operations
- Contractual Liability Limitation ISO CG 21 39
- Damage to Work Performed by Subcontractors On Your Behalf ISOCG 22 94 or CG 22 95
- Endorsement modifying the Employer's Liability exclusion or deleting the exception to it
- Explosion, Collapse and Underground Property Damage Hazard, ISO CG 21 42 or CG 21 43
- Habitational or Residential
- "Insured vs. Insured" except Named Insured vs. Named Insured

- Limitation of Coverage to Designated Premises or Project ISO CG 21 44
- "Prior Work" or "Continuous or Progressive Injury or Damage"
- Punitive, Exemplary or Multiplied Damages
- Subsidence
- Work Height
- Any other exclusion or limitation reasonably unacceptable to the Protected Parties.

CHAPTER 4. WAIVER OF SUBROGATION

CHAPTER 4. WAIVER OF SUBROGATION

I. COMMON LAW WAIVER OF SUBROGATION

In circumstances where the lease or construction contract does not contain a release of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, equitable subrogation. [352] Courts adhering to the doctrine of equitable subrogation hold that where one party pays a loss for which another is primarily liable, it a right of reimbursement exists. The principle is similar to the common law equitable principle of contribution and indemnity. In the case of a landlord's property loss, the loss is a *first-party loss* as opposed to a liability sustained due to a third party's loss. In the case of an injury to a third party (e.g., an invitee to a retail premises) the liability is a *third-party liability or loss*. In common parlance, insurance companies use "subrogation" to stand in the shoes of their insured and sue to recover money that the insurer has paid to the insured or to a third party on behalf of its insured.

Courts in the United States have taken three approaches in analyzing whether there is a "right" of subrogation, a "case-by case analysis"; a "no-subrogation rule"; and a "pro-subrogation rule" when the party's contract does not expressly address an insurer subrogating against a another party that has negligently caused a loss or liability to the insured party.[353]

A. Majority Rule: the "No Subrogation Rule"

A majority of courts follow the rule that a landlord's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an **implied coinsured**.

Some of these courts have concluded that the landlord's or an owner's agreement to procure property insurance covering the building implies an obligation by the landlord to insure the building for the benefit of both the landlord and the tenant, or in the case of a construction project, the owner's agreement to maintain builder's risk insurance is an a. For example, the Virginia Supreme Court has held that where "a plaintiff has contracted to protect the defendant from a loss by procuring insurance, the plaintiff (or his subrogee) may not recover for that loss from the defendant even if the loss is caused by the defendant's negligence." [354]

Others of these courts have reasoned that the tenant has indirectly paid for the insurance, either through rent or through expense pass through. [355]

B. Minority Rule: the "Pro-Subrogation Rule"

1. No Implication of Co-Insured Status Unless Explicitly and Unambiguously Stated Otherwise in the Lease

The minority jurisdiction rule is based on the common-law presumption that a tenant is liable for the tenant's own negligence and the equitable principle of subrogation. **Texas** follows the minority rule. [356]

2. Covenant Requiring Party to Insure its Own Property Not Equivalent to Waiver Of Recovery or Waiver of Subrogation

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

C. Middle Approach – Case-by-Case Analysis

Some courts favor an individualized decision-making process.[357]

II. CONTRACTUAL WAIVER OF SUBROGATION

A. Typical Provisions

1. Insuring Party Waives Recovery Against Other Party

Most construction contracts and leases contain a provision addressing the rights between the parties in the event that the property is damaged by the negligence of the other party. These agreements may provide that the party whose property is damaged waives claims against the other negligent party and that the damaged party will look to the property insurance for recovery. A court described this scenario in the context of a construction project as follows:

> On a construction project, the contractor risks liability for negligence and the owner risks damage to its property. The contractor purchases liability insurance and the owner purchases property insurance. If the contractor damages the owner's property, the owner or its property insurer (as subrogee) may sue the contractor for negligence. To prevent such litigation, an owner may waive its rights against the contractor for property damage to the extent covered by the owner's property insurance. This assigns losses from property damage caused by the contractor's negligence exclusively to the owner's property insurer (again, to the extent it pays the owner for damages incurred).[358]

Waivers on subrogation clauses permit the parties to avoid disruption during construction, substituting the protection of insurance for the uncertainty and expense of litigation and the compounding effect of the distraction and animosity that otherwise would be injected into the parties' relationship. *TX. C.C., Inc. v. Wilson/Barnes Gen. Contractors, Inc.*, 233 S.W.3d 562, 567-68 (Tex. App. – Dallas 2007, writ den'd).

2. Representation that Insurer Has Waived Right of Subrogation or Insuring Party Covenants to Obtain a Waiver of Subrogation from the Insurer

Further the agreement may contain a representation that the right of subrogation of the insurer has been waived or that the party obtaining the insurance will obtain an endorsement to the property policy whereby the insurer waives its rights of subrogation to recovery its insurance proceeds against the negligent party.

Since there is no recognized standard property policy form, like the ISO liability form, it is prudent to examine the property policy in connection with drafting the lease and to condition the lease, if necessary, on obtaining a subrogation waiver from the insurer. The ISO property policy for leased premises allows the parties to waive the insurer's rights in advance by a waiver of claims in the lease. The ISO property policy also allows the landlord to waive the insurer's subrogation right even after a loss. See ISO Commercial Property Conditions ¶ I. Transfer of Rights of Recovery Against Others To Us. [359]

B. Waivers of Subrogation

1. Waiver Of Recovery?

Waiver of recovery is the Protected Party (*e.g.*, landlord or tenant, owner or contractor, as the case may be) waiving its rights or recovery for the acts of the other. **Waiver of subrogation** is the Protected Party waiving the right of its insurer to be subrogated to the landlord's or tenant's claim. While a waiver of recovery also is a waiver of subrogation (because the insurer has no rights left to which to be subrogated), a waiver of subrogation alone is not a waiver of recovery.

2. Covenant Requiring Protecting Party to Pay for Insurance and the Protected Party as an Insured Equivalent to Waiver of Recovery By Protected Party Against Protecting Party

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

3. Waiver of Subrogation Follows the Current and Future Parties

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

4. Valid Despite Negligence of Released Party

In Texas, waiver of recovery and waiver of subrogation clauses are valid if properly drafted. *See International Co. v. Medical-Professional Building of Corpus Christi*, 405 S.W.2d 867 (Tex. Civ. App.— Corpus Christi 1966, writ ref'd n.r.e.)—lessee waived in advance any claims for damages caused by lessor's negligent failure to maintain boilers in the portion of the leased premises which was 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.

In order for indemnity and waiver provisions to be enforceable in Texas they must be drafted to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987); and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

5. Harmonizing the Waiver of Recovery Provision with the Other Risk Management Provisions

A lease may be drafted to include a typical "return of premises covenant" requiring the tenant at the termination of the lease to return the leased premises in its original condition except for reasonable wear and tear. See Chapter 5 Forms and Commentary, Form 2, State Bar of Texas Real Estate Forms Manual – Retail Lease and Insurance Addendum. The Retail Lease harmonizes the Landlord and Tenant's rebuilding obligations, insurance covenants, release of claims/subrogation provisions by allocating to the party with the rebuilding obligation on casualty loss, whether caused in party by the other party's ordinary negligence, the obligation to maintain property insurance and includes within the waiver of subrogation provision a release of claims for property damage to the extent that they are

> COVERED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. … THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.** (Underlining added by author for emphasis.)

Sometimes the return of premises covenant further qualify the return of premises covenant to except for damage by fire and other casualties. The exception for fire and other casualties presumes the parties have contracted for insurance to cover that risk.

Sometimes the exception for casualty losses is written as follows:

> … return the leased premises in its original condition except for … and damage by casualty not occurring through the tenant's negligence.

Adding an exception for negligence of the tenant (the Protecting Party) to the exception for casualties

damage to the leased premises and landlord's property may potentially conflict with the waiver of recovery/waiver of subrogation provision. The landlord in the waiver of recovery/waiver of subrogation clause may have waived recovery against the tenant for casualty losses caused by the tenant's negligence to the extent insured by property insurance required to be maintained by landlord. [360] In such case the waiver of recovery provision and the return of leased premises covenant are not harmonized.

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CHAPTER 5: FORMS AND COMMENTARY

I. LEASES, CONSTRUCTION DOCUMENTS, SALES DOCUMENTS

The following forms set out insurance specifications for landlords and tenants. The second form has a checklist-style set of insurance specifications, including insurance specifications tenant or its contractor to maintain during the tenant's construction of tenant improvements or alterations. The insurance specifications set out for the tenant improvements are adaptable for owner-contractor construction projects.

A. Leases

1. Lease - Narrative Insurance Specifications

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

LEASE

A. Landlord's Insurance. Landlord shall take out and maintain, at its own cost and expense (subject, however to reimbursement as set forth herein below), (i) Workers' Compensation, (ii) comprehensive automobile liability insurance; (iii) general liability for bodily injury and property damage arising from Landlord's ownership, management, use and/or operation of the Common Areas and/or the Shopping Center with coverage limits equal to those Tenant is required to maintain in accordance with Section B below; and (iv) insurance covering all ~~perils~~ causes of loss insurable under a "Causes of Loss - Special Form" policy, ~~including, but not limited to, fire and such other risks as are from time to time included in standard extended coverage endorsements,~~ insuring in an amount, after completion of construction, of not less than 80% of the full insurable value, or such greater coverage as may be required by Landlord's mortgage. Insurance provided for in this Section A may be carried by inclusion within the coverage of any blanket policy or policies of insurance maintained by Landlord; provided, however, that the coverage afforded will not be reduced or diminished by reason of the use of such blanket policies of insurance. If the insurance policies maintained by Landlord with respect to the Shopping Center contain any nature of deductible feature, then Landlord shall be solely responsible for the payment of any such deductible in the event of a loss to the Leased Premises and/or the Shopping Center.[361]

B. Tenant's Insurance Payment. …

C. Tenant's Insurance. Tenant shall take out and maintain, at its own cost and expense, commercial general liability insurance coverage of $1,000,000 ~~combined single limit~~,[362] which commercial general liability policy shall be on an ISO form CG 00 01, or a substitute providing equivalent coverage, and shall include (i) coverage for bodily injury and death, property damage and personal injury ~~products liability coverage~~;[363] and (ii) contractual liability coverage ~~insuring the obligations of Tenant under the terms of this Lease~~. Such policy shall name Landlord and Landlord's mortgagee~~, as their respective interests may appear~~,[364] as additional insureds, on an ISO form CG 20 11 01 96, or equivalent form. The liability policy shall be endorsed to include a waiver of subrogation by the insurer as to Landlord (the Landlord Parties). This insurance shall be endorsed to provide primary and not requiring contribution by any insurance maintained by the Landlord (or the Landlord Parties). It is the specific intent of the parties to this Lease that all insurance held by Landlord (or the Landlord Parties) shall be excess above the insurance required to be obtained by Tenant by this Lease. The personal injury contractual liability exclusion shall be deleted from the contractual liability coverage. The following exclusions/limitations (or their equivalents) are not permitted: (a) Contractual Liability Limitation, **ISO CG 21 39** or its equivalent; (b) Amendment of Insured Contract Definition, **ISO CG 24 26** or its equivalent; (c) Limitation of Coverage to Designated Premises or Project, **ISO CG 21 44**; (d) any endorsement modifying or deleting the exception to the Employer's Liability exclusion; (e) any "insured vs. Insured" exclusion; and (f) any type of punitive, exemplary or multiplied damages exclusion. All such insurance required to be maintained by Tenant shall be with an insurance company qualified to do business in the state where the Leased Premises is located. Within 30 days following a written request therefore, Tenant shall provide Landlord with an ACORD certificate of all policies required herein, including an endorsement providing

that such insurance shall not be canceled ~~or not renewed~~ [365] except after 30 days' notice in writing to Landlord. Should Tenant fail to maintain such policies as hereinabove provided, Tenant will be deemed to be in default of the provisions of this Section C, and shall, within 30 days following receipt of a written notice of such default, obtain such insurance. Tenant's obligation to carry the insurance provided for above may be satisfied by inclusion of the Leased Premises within the coverage of so-called "blanket" policies of insurance carried and maintained by Tenant. Tenant shall be responsible for the safety and personal well-being of Tenant's agents, servants, employees, customers and invitees within the Leased Premises. Tenant agrees that Landlord shall not be responsible or liable to Tenant or those claiming under Tenant (including, without limitation, Tenant's agents, servants, employees, customers and invitees) for (i) injury, death or damage or loss occasioned by the acts or omissions of persons occupying any other part of the Shopping Center; or (ii) occasioned by the property of any other occupant of any part of the Shopping Center; or (iii) the acts or omissions of any other person or persons present at the Shopping Center who are not occupants of any part thereof, whether or not such persons are present with the knowledge or consent of Landlord.[366] If Tenant is engaged in any way in the manufacture, sale or distribution of alcoholic beverages, either for consumption of alcoholic beverages on or off the Leased Premises, Tenant will also maintain liquor liability insurance on an occurrence basis with the limits of not less than $2,000,000 each common cause and $3,000,000 aggregate. If written on a separate policy from the commercial general liability policy, such policy shall name Landlord and Landlord's mortgagee~~, as their respective interests may appear~~, as additional insured.

(To the extent relevant, insert the following additional insurance specifications for Tenant as set out in **Checklist-Style Insurance Specifications**: the General Insurance Requirements; Business Auto Liability, Workers' Compensation and Employer's Liability, and Environmental Liability; Property Insurance, Business Income and Extra Expense, Boiler & Machinery coverage; Other Insurance; and Tenant's Contractors specifications).[367]

2. State Bar of Texas Real Estate Forms Manual – Retail Lease and Insurance Addendum

RETAIL LEASE [368]

Basic Information

Premises

Approximate square feet:	____ sq. ft.
Name of Shopping Center:	_____
Street address/suite:	_____
City, state, zip:	_____

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: _____.[369]

A. Definitions

…

A.1. "Agent" means agents, contractors, employees, licensees, and to the extent under the control of principal, invitees.[370]

A.3. "Common Areas" means all facilities and areas of the [Shopping Center/Building] and Parking Facilities that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the [Shopping Center/Building], including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

…

A.6. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.[371]

B. Tenant's Obligations

B.1. **Tenant agrees to—**

...

B.1.k. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.[372]

B.1.q.[373] INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING [374] IN ANY PORTION OF THE **PREMISES**.[375] **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE,**[376] **(ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT** [377] **OR SIMILAR EMPLOYEE BENEFIT ACTS,**[378] **(iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART** [379] **BY THE ORDINARY NEGLIGENCE**[380] **OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY** [381] **TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OF LANDLORD AND LIENHOLDER AND THEIR RESPECTIVE AGENTS.**

…

C. Landlord's Obligations

C.1. **Landlord agrees to—**

…

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, and (iv) structural soundness of the exterior walls, excluding windows, store fronts, and doors. [382]

…

C.1.f.[383] INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE **COMMON AREAS**. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

...

D. General Provisions - Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord.[384] Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

…

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

D.4. Release of Claims[385]*/Subrogation.*[386] LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS,[387] FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITH THE SHOPPING CENTER, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE RELEASING PARTY'S PROPERTY INSURANCE [388] OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**[389]

D.5. Casualty/Total or Partial Destruction [390]

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.[391]

Insurance Addendum to Lease [392]

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and/or liability insurance policies [393] required below (mark applicable boxes) and such other insurance coverages and/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance or Endorsement		**Minimum Policy [394] or Endorsement Limit**	
General Liability Insurance Policies Required of Tenant:			
☐	Commercial general liability [395]	Each occurrence: General aggregate:[396]	$_____ $_____
Or			
☐	Business owner's policy [397]	Each occurrence: General aggregate:	$_____ $_____
Required Endorsements to Tenant's General Liability or Business Owner's Policy:			
☐	Designated location(s) general aggregate limit [398]		$_____
☐	_____		$_____
Additional Liability Insurance Policies Required of Tenant:			
☐	Worker's compensation [399]	Statutory limit	
☐	Employer's liability [400]	$_____ each accident for bodily injury by accident/each employee for bodily injury by disease/bodily injury by disease for entire policy	
☐	Business auto liability [401]	$_____	
☐	Excess liability [402]	$_____	

Or

☐	Umbrella liability [403] (occurrence basis) [404]	$_____

Property Insurance Policy Required of Tenant:

☐	Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form) [405]	100 percent of replacement cost [406] of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises

Or

☐	Business owner's policy	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises

Required Endorsements to Tenant's Causes of Loss—[Special Form/Business Owner's] Policy:

☐	Business income [407] and additional expense [408]	Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months
☐	Equipment breakdown (formerly boiler and machinery) [409]	$_____
☐	Flood [410]	$_____
☐	Earth movement	$_____
☐	Increased limits of ordinance or law coverage to cover increased cost of construction [411]	$_____
☐	Increased limits of debris removal [412]	$_____
☐	Plate Glass [413]	Sufficient limits to cover plate glass
☐	Increased limits for signs [414]	Sufficient limits to cover exterior signage

2. Comply with the following additional insurance requirements:

a. The commercial general liability (or business owner's property policy) must be (i) written on an occurrence basis, (ii) endorsed to name of Landlord, Landlord's property manager, if any, and Landlord's Lienholder, if any, as "**additional insureds**," [415] (iii) include **contractual liability** under Coverage A sufficient to respond to a broad-form **indemnity**,[416] (iv) if Tenant operates multiple locations, be endorsed with a Designated Location(s) General Aggregate Limit endorsement, and (v) be primary and noncontributory with Landlord's liability insurance coverage.

b. The commercial property insurance policies must contain (i) optional coverage for agreed value to eliminate the coinsurance clause, (ii) optional coverage for replacement cost, (iii) a **waiver of subrogation clause** in favor of the party not carrying the commercial property insurance, and (iv) waivers of subrogation of claims against Landlord and Lienholder.

c. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

3. Obtain the approval of Landlord [417] and Lienholder with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates, and other evidence of Tenant's Insurance; the amounts of any deductibles or self-insured retentions amounts under Tenant's Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term: [418]

Type of Insurance		**Minimum Policy Limit**	
☐	Commercial general liability [419] (occurrence basis)	Each occurrence: General aggregate:	$_____ $_____
☐	Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form) [420]	100 percent of replacement cost of the [Shopping Center/Building] exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirements of all lessees [421]	

3. Supplement to Manual's Risk Management Provisions

Supplement to Risk Management Provisions [422]

Retail Lease

Date: dd/mm/yy

Landlord: _____

Tenant: _____

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

A. ADDITIONAL DEFINITIONS.

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

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

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

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

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

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

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

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

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

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

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

B. INDEMNITY.

1. INDEMNITY BY TENANT. ¶ *B.1.q* Clause (iv) of the lease is amended to add the words underlined below:

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

2. INDEMNITY BY LANDLORD. ¶ *C.1.f* Clause (iv) of the lease is amended to add the words underlined below:

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

3. ENVIRONMENTAL LAW COMPLIANCE; INDEMNITY. Notwithstanding anything in the lease to the contrary, there is hereby excepted from the mutual indemnities provided by ¶¶ *B.1.q* and *C.1.f* indemnification for Environmental Liabilities. Indemnification for Environmental Liabilities is separately addressed in the Environmental Liability and Indemnification Addendum to this lease.

C. MANAGEMENT OF CLAIMS.

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

2. Indemnifying Person's Assumption of the Defense.

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

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

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

every defense of every nature) the claim of the Indemnified Person, regarding the amount of, reasonableness of, necessity for or the Indemnifying Person's obligation to pay, the costs, fees and expenses, and other damages incurred by the Indemnified Person in defending the Claim or Action for which a defense by this lease was refused by the Indemnifying Person.

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

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

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

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

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

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

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

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

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

6. **Litigation Expenses.**

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

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

7. Compromise and Settlement.

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

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

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

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

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

D. PAYMENT.

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

4. First Generation Space Office Lease - Checklist-Style Insurance Specifications as an Exhibit.

OFFICE LEASE [423]

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

§ 12. INDEMNIFICATION. [424]

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

§ 12.2. Landlord. TO THE EXTENT PERMITTED BY LAW, LANDLORD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS TENANT AND ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS AGAINST ANY CLAIM BY ANY THIRD PARTY FOR INJURY TO ANY PERSON OR DAMAGE TO OR LOSS OF ANY PROPERTY OCCURRING EITHER BEFORE OR AFTER THE TERM IN THE PROJECT AND ARISING IN WHOLE OR IN PART FROM ANY ACT OR OMISSION OR NEGLIGENCE OF ANY OF THE LANDLORD PARTIES.

§ 12.3. Proportionate Responsibility. THE INDEMNITIES CONTAINED IN THIS SECTION ARE (A) INDEPENDENT OF TENANT'S AND LANDLORD'S INSURANCE (AS APPLICABLE), (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, AND (C) WILL SURVIVE THE END OF THE TERM. NOTWITHSTANDING ANYTHING IN THIS LEASE TO THE CONTRARY, TO THE EXTENT THE INDEMNIFIED LIABILITY, LOSS, COST, DAMAGE OR EXPENSE ARISES OUT OF THE JOINT, CONCURRENT OR COMPARATIVE NEGLIGENCE, CAUSATION, RESPONSIBILITY OR FAULT OF TENANT AND LANDLORD, WHETHER NEGLIGENCE, STRICT LIABILITY, BREACH OF WARRANTY, EXPRESS OR IMPLIED, PRODUCTS LIABILITY, BREACH OF THE TERMS OF THIS LEASE OR WILLFUL MISCONDUCT, THEN THE INDEMNIFYING PARTY'S OBLIGATION TO THE INDEMNIFIED PERSONS SHALL ONLY EXTEND TO THE PERCENTAGE OF TOTAL RESPONSIBILITY OF THE INDEMNIFYING PARTY IN CONTRIBUTING TO SUCH LIABILITY, LOSS, COST, DAMAGE OR EXPENSE OF THE INDEMNIFIED PERSONS.

§ 13. Insurance. The parties agree to maintain the property and liability insurance policies specified for the party to maintain in Exhibit A – Insurance Specifications.

§ 14. Destruction. [425]

§ 14.1. Reconstruction.

If the Leased Premises are damaged by fire or other casualty, the same shall be repaired or rebuilt as speedily as practical under the circumstances at the expense of the Landlord [subject to Section 14.3 (Extent of Landlord's Expense to Reconstruct)], unless this Lease is terminated as provided in this Section, and during the period required

for restoration, a just and proportionate part of Base Rental shall be abated until the Leased Premises are repaired or rebuilt.

§ 14.2. Termination Rights.

a. Landlord's Termination Rights. If the Leased Premises and/or any portion of the Project which materially adversely affects Tenant's use of or access to the Leased Premises are (i) damaged to such an extent that repairs cannot, in Landlord's judgment (after consultation, as soon as reasonably practicable after the occurrence of the related damage, with an architect and general contractor of recognized good reputation selected by Landlord), be completed within one year after the date of the casualty or (ii) damaged or destroyed as a result of a risk which is not insured under an ISO causes of loss - special form insurance policy, or (iii) damaged or destroyed during the last 24 months of the Lease Term or the Renewal Term if Tenant exercised or exercises (within 30 days of the date of such casualty) its option to extend, or if the Building is damaged in whole or in part (whether or not the Leased Premises are damaged), to such an extent that the Building cannot, in Landlord's judgment, be operated economically as an integral unit, and Landlord terminates all of the other leases in the Project affected by such casualty in a like manner, then but only in such events, Landlord may at its option terminate this Lease by notice in writing to the Tenant within 60 days after the date of such occurrence.

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

c. Failure to Terminate. Unless Landlord or Tenant elects to terminate this Lease as hereinabove provided, this Lease will remain in full force and effect and Landlord shall repair or rebuild such damage at its expense to the extent required in this Section as expeditiously as possible under the circumstances substantially in accordance with the Base Building Plans and the Plans and Specifications for the Leased Premises [subject to the limitations in Section 14.3 (Extent of Landlord's Expense to Reconstruct)], except to the extent not possible under then applicable law.

§ 14.3. Extent of Landlord's Expense to Reconstruct.

If Landlord should elect or be obligated pursuant to Section 14.1 (Reconstruction) above to repair or rebuild because of any damage or destruction, Landlord's obligation shall be limited to the original Building and the leasehold improvements in the Leased Premises (to the extent such leasehold improvements can be restored for the amount of the Construction Allowance applicable thereto) and shall not extend to any furniture, equipment, supplies or other personal property owned or leased by Tenant, its employees, contractors, invitees or licensees. If the cost of performing such repairs and restoration exceeds the actual proceeds of insurance paid or payable to Landlord on account of such casualty, or if Landlord's mortgagee or the lessor under a ground or underlying lease shall require that any insurance proceeds from a casualty loss be paid to it,[426] and if Landlord terminates all of the other leases, Landlord may terminate this Lease by giving written notice to Tenant not later than 120 days after the date of the casualty or other occurrence.

EXHIBIT A TO OFFICE LEASE - INSURANCE SPECIFICATIONS

A. General Insurance Requirements

1. Definitions. For purposes of this Lease:

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

b. Tenant. "Tenant" means (a) _____ and (b) subtenants of any tier.

c. ISO. "ISO" means Insurance Services Office. [427]

2. Policies.

a. Insurer Qualifications. All insurance required to be maintained by Tenant must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better,[428] and authorized to engage in the business of insurance in the State in which the Improvements are located.[429]

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

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

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

3. Limits, Deductibles and Retentions.

a. Coverage Limits. The limits of liability may be provided by a single policy of insurance or by a combination of primary [430] and excess [431] policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein.

b. Deductible and Retention Limits. No deductible [432] or self-insured retention [433] shall exceed $ without prior written approval of the Landlord, except as otherwise specified herein. All deductibles and/or retentions shall be paid by, assumed by, for the account of, and at the Tenant's sole risk. The Tenant shall not be reimbursed for same.

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

4. Forms.

a. Approved Revisions and Substitutions. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Landlord will have the right to require other equivalent forms.

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

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

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

a. Form. Liability insurance: **ACORD 25** (2014/01) *Certificates of Liability Insurance* for liability coverages. Property Insurance: **ACORD 28** (2014/01) *Evidence of Commercial Property Insurance* for property coverages.[434]

b. Delivery Deadlines. Evidence to be delivered to Landlord prior to entry on Leased Premises and thereafter at least 30 [435] days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Landlord's request for an updated certificate. [436]

c. Certificate Requirements. [437] Certificates must:

(1) Insured. State the insured's name and address. [438]

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

(3) Additional Insured Status and Subrogation Waiver. Specify the additional insured [439] status and waivers of subrogation as required by these specifications.

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

(5) Deductibles and Self-Insured Retentions Stated. State the amounts of all deductibles and self-insured retentions. [440]

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

(7) Notices. Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation [and material change] will be sent to the certificate holder. [441]

(8) Certificate Holder. [442] Be addressed to the Landlord as the certificate holder and show Landlord's correct address. A separate certificate is to be addressed and delivered to Landlord's lender.

(9) Producer. State the producer of the certificate with correct address and phone number listed. [443]

(10) Authorized Representative. Be executed by a duly authorized representative of the insurers. [444]

6. Tenant Insurance Representations to Landlord Parties.

a. Minimum Requirements. It is expressly understood and agreed that the insurance coverages required herein (a) represent Landlord Parties' minimum requirements and are not to be construed to void or limit the Tenant's indemnity obligations as contained in this Lease nor represent in any manner a determination of the

insurance coverages the Tenant should or should not maintain for its own protection; and (b) are being, or have been, obtained by the Tenant in support of the Tenant's liability and indemnity obligations under this Lease. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Tenant, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of this Lease.

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

c. Survival. This Exhibit is an independent contract provision and shall survive the termination or expiration of the Lease. [445]

7. Insurance Requirements of Tenant's Subtenants.

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

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

8. Use of the Landlord's Property.

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

[Optional: 10. Self-Insurance, Large Deductibles and/or Retentions. [446]

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

company would have been obligated to pay those amounts if Tenant had maintained the insurance pursuant to this Exhibit.

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

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

B. Specific Insurance Requirements

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

No.	Specification	Coverages, Limits & Other Requirements	
A. LIABILITY			
§ 1	**Commercial General Liability.** Tenant is to maintain commercial general liability insurance ("CGL")[447] issued on an Occurrence Basis[448] meeting at least the following specifications.		
§ 1.1	**Minimum Limits**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than the following amounts:	
		$ 5,000,000	Per Occurrence.
		$ 5,000,000	General Aggregate.[449]
		$ 5,000,000	Products and Completed Operations Aggregate.
		$ 5,000,000	Personal and Advertising Injury Limit.
§ l.2	**Deductible**	May not contain a SIR.[450] May not contain a deductible greater than $____, which deductible shall be borne by Tenant.	
§ 1.3	**General Aggregate**	If the CGL insurance contains a General Aggregate limit, it shall apply separately to the Leased Premises and Property[451] and shall be provided on ISO CG 25 04 05 09.	
§ 1.4	**Form**	This insurance is to be issued on an ISO form CG 00 01 [, or a substitute providing equivalent coverage][452] and shall cover bodily injury, property damage, and personal and advertising injury liability arising from ownership, use or occupancy of premises, ongoing and completed operations.	
§ 1.5	**Insured Contracts**	Coverage shall apply to but not be limited to liability assumed by Tenant under the	

No.	Specification	Coverages, Limits & Other Requirements	
		Lease (including the tort liability of another assumed in a business contract).[453] Unmodified Separation of Insureds coverage shall be included.	
§ 1.6	**Additional Insureds**	This insurance is to be endorsed with an **ISO CG 20 11** [01 96] [04 13], Additional Insured Endorsement listing Landlord Parties as additional insureds.[454] No language excluding coverage for the acts or omissions of the additional insured shall be contained in the endorsement. The specification above of minimum limits does not limit the limits of coverage to be available to the Landlord Parties as additional insureds. If Tenant's insurance has limits greater than the above limits, the amount of coverage available to Landlord Parties is increased to the limits of Tenant's insurance, including limits under any umbrella or excess policies. Additional insured coverage of the Landlord Parties shall be maintained for the greater of the Term of the Lease, the holding over or possession of the Leased Premises by Tenant, or as long as Tenant is obligated to a Landlord Party for bodily injuries, property damage or other liabilities insurable by an **ISO CG 00 01** CGL policy.	
§ 1.7	**Primary and Noncontributory**	This insurance shall be endorsed to provide primary and non-contributing liability coverage by ISO CG 20 01 04 13. It is the specific intent of the parties to this Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Landlord Parties, with Landlord Parties' insurance being excess, secondary and non-contributing. 455	
§ 1.8	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed with an ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others Endorsement to provide a waiver of subrogation by insurer in favor of Landlord Parties. 456	
§ 1.9	**Deletion of Personal Injury Exclusion to Contractual Liability Coverage**	The personal injury contractual liability exclusion shall be deleted. 457	
§ 1.10	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change]. 458	
§ 1.11	**Prohibited Endorsements**	The following exclusions/limitations (or their equivalents) are not permitted:	
		a.	**ISO CG 21 39** Contractual Liability Limitation.[459]
		b.	**ISO CG 24 26** Amendment Of Insured Contract Definition.[460]
		c.	**ISO CG 21 44** Limitation of Coverage to Designated Premises or Project.[461]
		d.	Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.
		e.	Any "Insured vs. Insured" exclusion except Named Insured v. Named Insured.[462]
		f.	Any type of punitive, exemplary or multiplied damages exclusion.
		g.	Classification or business description.

No.	Specification	Coverages, Limits & Other Requirements
§ 1.12	**Certificate of Insurance**	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Tenant to Landlord.
§ 2	**Business Auto Liability.** [463] Tenant is to maintain business auto insurance, and, if necessary, commercial excess insurance, meeting at least the following specifications.	
§ 2.1	**Minimum Limit**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than $5,000,000 per Accident.
§ 2.2	**Form**	This insurance is to be written on the current ISO edition of ISO CA 00 01.
§ 2.3	**Scope**	This insurance shall cover damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use (1) of any auto, including owned, hired and nonowned autos, and (2) of any mobile equipment subject to compulsory insurance or financial responsibility laws or other motor vehicle insurance laws. 464
§ 2.4	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].
§ 2.5	**Waiver of Right of Recovery and Subrogation; Additional Insureds**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties on ISO form CA 04 44 10 13. The Landlord Parties are to be additional insureds on the Business Auto Policy on ISO form CA 20 48 10 13.
§ 3	**Workers' Compensation and Employer's Liability.** Tenant is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.	
§ 3.1	**WC Limits**	The limits of this insurance shall be no less than the statutory limits. [465]
§ 3.2	**EL Limits**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than $5,000,000 each Accident [466] and Disease. [467]
§ 3.3	**USL&H**	United States Longshoremen and Harbor Workers ("**USL&H**") coverage must be provided where such exposure exists [468] listing the state(s) in which occupancy is to be performed.
§ 3.4	**Territory**	The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.
§ 3.5	**Scope**	This insurance is to cover liability arising out of the Tenant's employment of workers and anyone for whom the Tenant may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance is permitted.
§ 3.6	**Leased Employees**	Where a Professional Employer Organization ("**PEO**") or "leased employees" are utilized, Tenant shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Landlord.

No.	Specification	Coverages, Limits & Other Requirements	
§ 3.7	**Notice**	Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 3.8	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties on form WC 42 03 04 B.	
§ 4	**Liquor Liability.**[469] Tenant is to maintain liquor liability insurance issued on an Occurrence Basis on ISO Liquor Liability Coverage Form CG 00 33 04 13, and if necessary, commercial excess insurance, meeting at least the following specifications.		
§ 4.1	**Minimum Limits**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than:	
		$5,000,000	Each Occurrence.
		$5,000,000	Annual Aggregate.
§ 4.2	**Aggregate Limit**	A Designated Location(s) Aggregate Limit shall be provided on ISO CG 25 14 04 13.	
§ 4.3	**Additional Insureds**	Additional insured status shall be provided in favor of Landlord Parties.	
§ 4.4	**Scope**	This insurance shall cover operations of Tenant at the Leased Premises described by the Lease.	
§ 4.5	**Defense Coverage**	Coverage of defense costs is to be provided outside of the limit of liability coverage.	
§ 4.6	**Notice**	Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.	
§ 4.7	**Waiver of Right of Recovery and Subrogation**	Tenant agrees to waive its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.	
§ 5	**Excess/Umbrella Liability.** If any of the required coverages are to be maintained by and through an excess/umbrella policy,[470] they are to be by a policy issued on an Occurrence Basis meeting at least the following specifications.		
§ 5.1	**Scope**	This insurance shall follow form of the underlying coverages. It shall be excess over and be no less broad than all coverages described above, including but not limited to the required additional insured status, designated construction project(s) or locations(s) general aggregate, or both, waiver of subrogation, notice of cancellation, and prohibited exclusions or limitations. The policy limits required herein may be provided by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident by less than the amount required herein.[471] The specification above of minimum limits does not limit the limits of coverage to be available to the Landlord Parties as additional insureds. If Tenant's insurance has limits greater than the above limits, the amount of coverage available to Landlord Parties is increased to the limits of Tenant's insurance, including limits under any umbrella or excess policies.	
§ 5.2	**Primary**	This insurance shall be endorsed to provide primary and non-contributing liability coverage and not seek contribution from any other insurance (primary, umbrella, contingent or excess) maintained by Landlord Parties. It is the specific intent of the parties to this Agreement that all insurance held by Landlord Parties shall be excess,	

No.	Specification	Coverages, Limits & Other Requirements	
		secondary and non-contributory.	
§ 5.3	**Concurrency**	Such coverage shall have the same inception date as the commercial general liability and employer's liability coverages.	
§ 5.4	**Drop-Down Coverage**	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits.	
§ 5.5	**Defense Costs**	This insurance is to include a duty to defend any insured.	
§ 5.6	**Additional Insureds**	The Landlord Parties are to be additional insureds on this policy.	
§ 5.7	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 5.8	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.	
§ 6	**Pollution/Environmental Liability.** Tenant is to maintain Pollution/Environmental Liability insurance issued on an Occurrence Basis and, if necessary, commercial excess insurance, meeting at least the following specifications.		
§ 6.1	**Minimum Limits**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than:	
		$1,000,000	Each Occurrence.
		$2,000,000	Annual Aggregate.
§ 6.2	**Scope**	This insurance must provide third party liability coverage for bodily injury, property damage, clean up expenses, and defense arising from the operation of Tenant. Mold and/or microbial matter and/or fungus and/or biological substances shall be specifically included within the definition of "Pollutants" in the policy.	
§ 6.3	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Asbestos or lead.
		b.	Contractual assumption of liability.
		c.	Impaired property that has not been physically injured.
		d.	Materials supplied or handled by the named insured.

No.	Specification	Coverages, Limits & Other Requirements	
		e.	Punitive, exemplary or multiplied damages.
§ 6.4	**Defense Costs**	Coverage of defense costs is to be provided outside of the limit of liability coverage.	
§ 6.5	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal [or material change].	
§ 6.6	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.	
§ 6.7	**Additional Insureds**	Landlord Parties shall be provided coverage as additional insureds.	
B. PROPERTY [472]			
§ 1	**Property Insurance on Causes of Loss Special Form.** Tenant is to maintain property insurance on a Causes of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as "all risk".		
§ 1.1	**Scope of Coverage**	This insurance is to be issued for 100% Replacement Cost, on an Agreed Value Basis, and in compliance with all laws, regulations or ordinances affecting such property at any time during the Lease for the [excess] value of the Tenant Improvements to the Leased Premises [over the Construction Allowance provided by Landlord for the initial Tenant Improvements], and all equipment and other property used in connection therewith, including Tenant's business personal property, HVAC, trade fixtures and signs from time to time in, on, adjacent to or upon the Leased Premises, [Tenant is not responsible to insure tenant improvements to the Leased Premises constructed by prior tenants], and all alterations, additions, or changes made by Tenant pursuant to the terms of this Lease and shall not be subject to coinsurance.	
§ 1.2	**Form**	This insurance is to be issued on an **ISO CP 10 30**.	
§ 1.3	**Insureds**	The insureds on this policy are to be Tenant and Landlord, as their interest may appear.	
§ 1.4	**Endorsements or Coverages**	The scope of coverage, at Landlord's option, is to include coverage for Antennas, Earthquake, Flood, Glass, Ordinance or Law, Terrorism, Theft, Signs and Debris Removal with an increased coverage of $____. Tenant at its election may cover loss arising out of cancellation of this Lease, including loss of its undamaged improvements and betterments.	
§ 1.5	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.	
Alternative. The following specification allocates to the Tenant the responsibility for carrying property insurance for the tenant improvements.			
§ 1	**Property Insurance** [473] **on Causes of Loss - Special Form.** Tenant is to maintain property insurance on a Causes		

No.	Specification	Coverages, Limits & Other Requirements
	of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as "all risk".[474]	
§ 1.1	**Scope of Coverage**	This insurance is to be issued for 100% Replacement Cost,[475] on an Agreed Value Basis,[476] and in compliance with all laws, regulations or ordinances affecting such property at any time during the Lease, for the Tenant's improvements and betterments[477], including all the items included in Tenant's Work, and all equipment and other property used in connection therewith, including Tenant's business personal property, HVAC, trade fixtures and signs from time to time in, on, adjacent to or upon the Leased Premises, and all alterations, additions, or changes made by Tenant pursuant to the terms of this Lease,[478] and shall not be subject to coinsurance.[479]
§ 1.2	**Form**	This insurance is to be issued on an **ISO CP 10 30** [, or equivalent form].[480]
§ 1.3	**Insureds**	The insureds on this policy are to be Tenant and Landlord, as their interest may appear.[481]
§ 1.4	**Endorsements or Coverages**	The scope of coverage, at Landlord's option, is to include coverage for Antennas,[482] Earthquake, Flood,[483] Glass,[484] Ordinance or Law,[485] Terrorism,[486] Theft, Signs,[487] and Debris Removal with an increased coverage of $_____.[488] Tenant at its election may cover loss arising out of cancellation of this Lease, including loss of its undamaged improvements and betterments. (See ISO CP 00 60 06 95).
§ 1.5	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.[489]
§ 2	**Business Income and Extra Expense.**[490] Tenant is to maintain business income and extra expense insurance on a Causes of Loss-Special Form meeting at least the following specifications.	
§ 2.1	**Scope**	Coverage is to be provided on all operations at the Leased Premises.
§ 2.2	**Income Coverage Limit**	Coverage is to be provided in an amount of not less than 80% of Tenant's gross annual income at the Leased Premises less non-continuing expenses.
§ 2.3	**Form**	This insurance is to be issued on an **ISO CP 00 30 10 12** Business Income (And Extra Expense Coverage) Form or equivalent form.
§ 2.4	**Valuation Basis**	Insurance is to be issued on an Agreed Value basis.[491]
§ 2.5	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].
§ 2.6	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.
§ 3	**Boiler & Machinery.**[492] Tenant is to maintain boiler and machinery insurance meeting at least the following specifications.	
§ 3.1	**Scope of Coverage**	Coverage is to be provided on all operations at the described Leased Premises.
§ 3.2	**Form**	This insurance is to be written on a Comprehensive Form, including Business

No.	Specification	Coverages, Limits & Other Requirements
		Income and Extra Expense. [493]
§ 3.3	**Valuation Basis**	This insurance is to be issued on a Replacement Cost, Agreed Value basis.
§ 3.4	**Waiver of Right of Recovery and Subrogation**	Tenant agrees to waive its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation in favor of Landlord Parties.
§ 3.5	**Notice of Cancellation**	This insurance shall be endorsed to provide a 30 day notice of cancellation to Landlord.
C. OTHER INSURANCE [494] Such other insurance against other insurable liabilities or hazards as Landlord may from time to time reasonably require.		

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

No.	Specifications	Coverages, Limits & Other Requirements	
A. LIABILITY			
§ 1	**Commercial General Liability.** Tenant's contractor is to maintain commercial general liability insurance ("CGL") issued on an Occurrence Basis meeting at least the following specifications, but only to the extent permitted by law.		
§ 1.1	**Minimum Limits**	The minimum limits of coverage are subject to approval by Landlord, but not are not to be less than the following amounts:	
		$ 5,000,000	Per Occurrence.
		$ 5,000,000	General Aggregate.
		$ 5,000,000	Products-Completed Operations Aggregate. [495]
		$ 5,000,000	Personal and Advertising Injury Limit.
§ 1.2	**General Aggregate**	If the CGL insurance contains a General Aggregate Limit, it shall apply separately to these Premises and Property pursuant to an **ISO CG 25 04 09** Designated Location(s) General Aggregate Limit. [496]	
§ 1.3	**Post-Completion Coverage**	Contractor agrees to maintain Products-Completed Operations coverage with respect to "Bodily Injury" and "Property Damage" caused, in whole or in part, by	

No.	Specifications	Coverages, Limits & Other Requirements	
		Contractor's work at the Premises and Property for a period of __ years after final completion of the construction of the Improvements. This insurance is to be endorsed with an **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement to schedule Landlord Parties for the entirety of this post-completion period.[497]	
§ 1.4	**Form**	This insurance is to be issued on an **ISO CG 00 01**, and shall cover liability arising from premises, ongoing and completed operations, Owner's & Contractor's Protective Liability for contractor's liability arising out of the hire of subcontractors (independent contractors coverage),[498] and incidental design liability arising from the contractor's construction means and methods.[499]	
§ 1.5	**Insured Contracts**	Coverage shall include but not be limited to liability assumed by Tenant's contractor under the construction contract (including the tort liability of another assumed in a business contract). Unmodified Separation of Insureds coverage shall be included.	
§ 1.6	**Additional Insureds**[500]	This insurance is to be endorsed with an **ISO CG 20 10** [07 04][501] [04 13],[502] [or equivalent form], Additional Insured Endorsement listing the Landlord Parties as additional insureds. No exclusion for the acts or omissions of the additional insured.[503]	
§ 1.7	**Primary and Noncontributory**	This insurance shall be endorsed with an **ISO CG 20 01 04 13** Primary and Noncontributory – Other Insurance Condition endorsement for this insurance to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Landlord Parties, with Landlord Parties' insurance being excess, secondary and non-contributing.	
§ 1.8	**Waiver of Right of Recovery and Subrogation**	Tenant's contractor is to agree to waive its rights of recovery and to cause this insurance to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer in favor of Landlord Parties.	
§ 1.9	**Deletion of Personal Injury Exclusion to Contractual Liability Coverage**	The personal injury contractual liability exclusion shall be deleted.	
§ 1.10	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 1.11	**Prohibited Endorsements**	The following exclusions/limitations (or their equivalents) are not permitted:	
		a.	**ISO CG 21 39** Contractual Liability Limitation.[504]
		b.	**ISO CG 24 26** Amendment Of Insured Contract Definition.[505]
		c.	**ISO CG 21 44** Limitation of Coverage to Designated Premises or Project.

No.	Specifications	Coverages, Limits & Other Requirements	
		d.	Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.
		e.	Any "Insured vs. Insured" exclusion except Named Insured v. Named Insured.
		f.	Any type of punitive, exemplary or multiplied damages exclusion.
		g.	**ISO CG 22 34 04 13** Exclusion – Construction Management Errors and Omissions.
		h.	**ISO CG 22 79 04 13** Exclusion – Contractors – Professional Liability.
§ 1.12	**Electronic Data Endorsement**	This insurance is to include an Electronic Data Liability endorsement, ISO CG 04 37 with coverage to the full limits of the policy.	
§ 1.13	**Certificate of Insurance**	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Tenant's contractor to Landlord.	
§ 2	**Business Auto Liability.** Tenant's contractor is to maintain a Business Auto Policy and, if necessary, commercial excess insurance, issued on an Occurrence Basis meeting at least the following specifications.		
§ 2.1	**Minimum Limits**	Limits of coverage are to be not less than $1,000,000 per Accident.	
§ 2.2	**Form**	This insurance is to be issued on the current edition of the ISO CA 00 01.	
§ 2.4	**Waiver of Rights of Recovery and Subrogation; and Additional Insureds**	Tenant's contractor is to agree to waive its rights of recovery and to cause this insurance to be endorsed to waive subrogation by insurer in favor of Landlord Parties. The Landlord Parties are to be additional insureds on the Business Auto Policy.	
§ 3	**Workers' Compensation and Employer's Liability.** Tenant's contractor is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.		
§ 3.1	**WC Limits**	The minimum limits of this insurance shall be no less than the statutory limits.	
§ 3.2	**EL Limits**	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than $1,000,000 each Accident or Disease.	
§ 3.3	**USL&H**	USL&H coverage must be provided where such exposure exists.	

No.	Specifications	Coverages, Limits & Other Requirements	
§ 3.4	**Territory**	The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.	
§ 3.5	**Scope**	This insurance is to cover liability arising out of the Tenant's contractor's employment of workers and anyone for whom the contractor may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance are permitted.	
§ 3.6	**Leased Employees**	Where a Professional Employer Organization ("**PEO**") or "leased employees" are utilized, Tenant's contractor shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Landlord.	
§ 3.7	**Notice**	Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 3.8	**Waiver of Subrogation**	Include a waiver of subrogation by insurer as to the Landlord Parties.	
§ 4	**Professional Liability.** Tenant's contractor is to maintain Professional Liability insurance meeting at least the following specifications.		
§ 4.1	**Minimum Limits**	Limits of coverage shall be no less than:	
		$1,000,000	Each Loss.
		$2,000,000	Annual Aggregate.
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $3,000,000 Each Loss and Aggregate.	
		Such insurance shall cover all services rendered by the Contractor and its subcontractors under the construction contract, including but not limited to design or design/build services.	
		Any retroactive date must be effective prior to beginning of services for the Tenant.	
		This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors.
		b.	Habitational or residential operations.
		c.	Mold and/or microbial matter and/or fungus and/or biological substance.
		d.	punitive, exemplary or multiplied damages.
		A professional liability endorsement to a general liability policy is not acceptable.	
§ 4.5	**Term**	Policies written on a Claims-Made basis shall be maintained for at least two years beyond termination of the construction contract. The purchase of an extended discovery period or an extended reporting period on a Claims-Made policy will not	

No.	Specifications	Coverages, Limits & Other Requirements	
		be sufficient to meet the terms of this provision.	
§ 5	**Pollution Liability.**[506] Contractor is to maintain pollution liability insurance meeting at least the following specifications.		
§ 5.1	**Minimum Limits**	Limits of coverage shall be no less than:	
		$1,000,000	Each Loss.
		$2,000,000	Annual Aggregate.
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $3,000,000 Each Loss and Aggregate.	
§ 5.2	**Form**	This insurance shall include prior acts coverage sufficient to cover all services rendered by the Contractor. This coverage may be provided on a claims-made basis.	
§ 5.3	**Scope**	The policy must provide coverage for:	
		a.	The full scope of the named insured's operations (on-going and completed) as described within the scope of work.
		b.	Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall.
		c.	Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations.
		d.	Diminution of value and Natural Resources damages.
		e.	Contractual liability.
		f.	Claims arising from owned and non-owned disposal sites utilized in the performance of the Work.
		Coverage extensions to the General Liability insurance policy without a separate insurance agreement for Contractors Pollution Liability insurance will not fulfill this requirement.	
§ 5.4	**Additional Insured and Primary and Noncontributory**	The policy must insure contractual liability, name Landlord Parties as an Additional Insureds, and be primary and noncontributory to all coverage available to the Additional Insureds.	
§ 5.5	**Retroactive Date**	If coverage is provided on a Claims Made basis, coverage will at least be retroactive to the earlier of the date of the construction contract or the commencement of contractor services relation to the Work.	
§ 5.6	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	

No.	Specifications	Coverages, Limits & Other Requirements	
		a.	Insured vs. insured actions. However exclusion for claims made between insured within the same economic family are acceptable.
		b.	Impaired property that has not been physically injured.
		c.	Materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval.
		d.	Property damage to the work performed by the contractor.
		e.	Faulty workmanship as it relates to clean up costs.
		f.	Punitive, exemplary or multiplied damages.
		g.	Work performed by subcontractors.
		h.	Liability incurred as a result of an injury to an employee of the insured.
§ 5.7	**Term**	Completed operations coverage shall be maintained for a minimum of 7 years after the completion of work. (The extended reporting period on a claims made based policy does not fulfill this requirement) CPL insurance policies insuring a specific job shall have completed operations coverage for at least the duration of the work plus 7 years.	
§ 5.8	**Notice**	This insurance is to be endorsed to give Landlord at least 30 days' advance notice of cancellation of [or material change] in coverage.	
B. PROPERTY			
§ 1	**Builder's Risk Insurance.**[507] Tenant's contractor or Tenant[508] is to maintain builder's risk insurance meeting at least the following specifications.[509]		
§ 1.1	**Amount**	Limits of coverage are to be the Initial Contract Sum, plus an amount to be acceptable to Landlord, to increase by amount of subsequent modification of the Contract Sum. Coverage shall be provided in amount equal at all times to the full replacement value[510] and costs of debris removal for any single occurrence. Coverage is to include Contractor's overhead and profit.	
§ 1.2	**Covered Property**	The following property is to be insured:	
		a.	All structure(s) under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, pilings, underground pipes and wiring, excavations, grading, backfilling or filling.
		b.	All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.

No.	Specifications	Coverages, Limits & Other Requirements	
		c.	All property including materials and supplies on site for installation.
		d.	All property including materials and supplies at other locations but intended for use at the site.
		e.	All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.
		f.	Other Work at the site identified in the Lease.
		g.	Other property for which an insured is liable regarding the project.
		h.	[Sod, trees, shrubs and plants.]
§ 1.3	**Deductibles**	Deductibles shall not exceed an amount acceptable to Landlord. [511]	
§ 1.4	**Insureds**	Insureds shall include: 512	
		a.	Landlord, Contractor and all Loss Payees and Mortgagees as Named Insureds.
		b.	Tenant, and other tenants designated by Landlord to Contractor.
		c.	Subcontractors of all tiers. [513]
§ 1.5	**Form**	Causes of Loss – Special Form. [514] Coverage on this insurance is to be written to cover "all risks" of physical loss except those specifically excluded in the policy, and all exclusions must be pre-approved by Landlord and Contractor, and coverage shall be at least as broad as an unmodified ISO Causes of Loss – Special Form, and shall insure at least against the perils of fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, theft, vandalism, malicious mischief, and collapse and such additional perils and coverages as indicated below, with each of the perils as added as a cause of loss, if not otherwise listed in the policy as a cause of loss. [515]	
		a.	Completed Value Basis. [516] This insurance is to be written on a Completed-Value, Non-Reporting form basis. [517]
		b.	Insureds Other Insurance Excess and Noncontributing. Builder's Risk shall be primary to any other insurance coverage available to the named insured parties, with that other insurance being excess, secondary and non-contributing.
§ 1.6	**Prohibition**	No protective safeguard warranty is permitted. [518]	
§ 1.7	**Coverage and Minimum Sublimits**	Required Endorsements as to Coverage & Limits. To include	

No.	Specifications	Coverages, Limits & Other Requirements	
		Coverage	Minimum Sublimit [519]
		Additional expenses due to delay in completion of project and contract penalties	Amount subject to approval by Landlord.
		Agreed Value [520]	Included without sublimit.
		Business income/rental value	Amount subject to approval by Landlord.
		Collapse [521]	Included without sublimit.
		Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss	Included without sublimit.
		Debris removal including demolition as may be made legally necessary by operation of any law, ordinance, or regulation [522]	[Included without sublimit.][$___.]
		Earthquake, earth movement	[$___.]
		Earthquake sprinkler leakage	[$___.]
		Existing structures [523]	[Included without sublimit.][$___.]
		Expediting expense [524]	[Included without sublimit.][$___.]
		Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse	Included without sublimit.
		Flood [525]	[$___.]
		Freezing [526]	Included without sublimit.
		[Landscaping] [527]	[$___.]
		Loss of Rents [528]	$___.
		Mechanical breakdown, including hot &	Amount subject to approval by

No.	Specifications	Coverages, Limits & Other Requirements	
		cold testing [529]	Landlord.
		Occupancy pre-completion clause [530]	To be included.
		Ordinance or law [531]	Included without sublimit.
		Pollutant cleanup and removal	$___.
		Property in transit	$___.
		Preservation of property [532]	Included without sublimit.
		Property off premises	$___.
		Replacement cost [533]	To be included.
		Scaffolding and construction forms [534]	[$___.]
		[Sidewalks, curbs, gutters, streets, or parking lots] [535]	[$___.]
		Site preparation costs [536]	To be included.
		Soft costs [537]	Amount subject to approval by Landlord.
		Terrorism	Amount subject to approval by Landlord.
		Theft	Included without sublimit.
		[Volcanic activity]	[$___.]
		Waiver of subrogation [538]	To be included.
§ 1.8	**Waiver of Subrogation**	To the extent of insurance proceeds received, a waiver of subrogation by insurer as to Landlord Parties, Tenant, Tenant's Contractor, its subcontractors of all tiers, and other persons as may be designated by Landlord.	
§ 1.9	**Notices**	30 days prior written notice to each insured of cancellation.	
§ 1.10	**Tenant Finish-Out**	Builder's risk policy shall specifically permit partial occupancy by tenants in connection with construction of finish-out of Leased Premises.	

No.	Specifications	Coverages, Limits & Other Requirements	
§ 1.11	**Term [539] and Termination [540]**	The termination of coverage provision shall be endorsed to permit occupancy of the covered property being constructed. This insurance shall be maintained in effect, unless otherwise provided for the Contract Documents, until the earliest of the following dates:	
		a.	The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;
		b.	The date of final payment, as provided for in the Contract Documents;
		c.	The date on which the insurable interests in the Covered Property of all insureds other than Tenant's Contractor have ceased.
§ 2	**Boiler and Machinery Insurance.** This coverage may be included in the builder's risk policy or be by a separate policy.		
C. OTHER INSURANCE [541] Tenant is to maintain such other insurance against other insurable liabilities or hazards as Landlord may from time to time reasonably require.			

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

No.	Specifications	Coverages, Limits & Other Requirements	
A. LIABILITY			
§ 1	**Commercial General Liability.** Landlord is to maintain commercial general liability insurance ("CGL") issued on an Occurrence Basis meeting at least the following specifications.		
§ 1.1	**Minimum Limits**	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than the following amounts:	
		$__,000,000	Per Occurrence.
		$__,000,000	General Aggregate.
		$__,000,000	Product-Completed Operations Aggregate Limit.
		$_____	Personal and Advertising Injury limit
		$_____	Damage to Premises Rented to You Limit.
		$_____	Medical Expense Limit.

§ 1.2	**General Aggregate**	If the CGL insurance contains a General Aggregate limit, it shall apply separately to this Property.
§ 1.3	**Form**	This insurance is to be on the current edition of an **ISO CG 00 01**.
§ 1.4	**Waiver of Subrogation**	This insurance is to be endorsed with an **ISO CG 24 04** Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to the Landlord Parties and other persons as may be designated by Landlord.
B. PROPERTY		
§ 1	**Property Insurance on Causes of Loss - Special Form.** Landlord is to maintain property insurance on a Causes of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as "all risk". [542]	
§ 1.1	**Coverage**	This insurance is to be issued for 100% of Replacement Cost, [543] on an Agreed Value basis, for the Project including all Buildings [544] [including the leasehold improvements] [up to the amount of the Construction Allowance for the initial Tenant Improvements] [excluding Tenant Improvements and Betterments] [545] and all Landlord-owned equipment and other property used in connection therewith.
§ 1.2	**Form**	This insurance is to be issued on an **ISO CP 10 30**[, or equivalent form].
§ 1.3	**Insureds**	This insurance is to name as insureds Landlord and such other persons as may be designated by Landlord.
§ 1.4	**Required Endorsements as to Coverage/Limits**	This insurance is to be endorsed to include coverages as shall be required by Landlord, but may include Business Income and Extra Expense; Rental Value; Glass; Ordinance or Law; Terrorism; Signs.
§ 1.5	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Landlord, Tenant and other persons as may be designated by Landlord. [546]

B. Construction Documents

1. AIA A201-2017 General Conditions for Construction

AIA Document A201 – 2017 [547]

General Conditions of the Contract for Construction

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§ 3.18 Indemnification [548]

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, 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), but only to the extent caused by the 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 in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

§ 3.18.2 Workers Compensation. In claims against any person or entity indemnified under this Section 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 Section 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' compensation acts, disability benefit acts, or other employee benefit acts.

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ARTICLE 11 INSURANCE AND BONDS

§ 11.1 Contractor's Insurance and Bonds

§ 11.1.1 The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Owner, Architect, and Architect's consultants shall be named as additional insureds under the Contractor's commercial general liability policy or as otherwise described in the Contract Documents.

§ 11.1.2 The Contractor shall provide surety bonds of the types, for such penal sums, and subject to such terms and conditions as required by the Contract Documents. The Contractor shall purchase and maintain the required bonds from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located.

§ 11.1.3 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

§ 11.1.4 Notice of Cancellation or Expiration of Contractor's Required Insurance. Within three (3) business days of the date the Contractor becomes aware of an impending or actual cancellation or expiration of any insurance required by the Contract Documents, the Contractor shall provide notice to the Owner of such impending or actual cancellation or expiration. Upon receipt of notice from the Contractor, the Owner shall, unless the lapse in coverage arises from an act or omission of the Owner, have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by the Contractor. The furnishing of notice by the Contractor shall not relieve the Contractor of any contractual obligation to provide any required coverage.

§ 11.2 Owner's Insurance

§ 11.2.1 The Owner shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Owner shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located.

§ 11.2.2 Failure to Purchase Required Property Insurance. If the Owner fails to purchase and maintain the required property insurance, with all of the coverages and in the amounts described in the Agreement or elsewhere in the Contract Documents, the Owner shall inform the Contractor in writing prior to commencement of the Work. Upon receipt of notice from the Owner, the Contractor may delay commencement of the Work and may obtain insurance that will protect the interests of the Contractor, Subcontractors, and Sub-Subcontractors in the Work. When the failure to provide coverage has been cured or resolved, the Contract Sum and Contract Time shall be equitably adjusted. In the event the Owner fails to procure coverage, the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent the loss to the Owner would have been covered by the insurance to have been procured by the Owner. The cost of the insurance shall be charged to the Owner by a Change Order. If the Owner does not provide written notice, and the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain the required insurance, the Owner shall reimburse the Contractor for all reasonable costs and damages attributable thereto.

§ 11.2.3 Notice of Cancellation or Expiration of Owner's Required Property Insurance. Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the Contract Documents, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of notice from the Owner, shall have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the Contract Time and Contract Sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate Change Order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance.

§ 11.3 Waivers of Subrogation

§ 11.3.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

§ 11.3.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

§ 11.4 Loss of Use, Business Interruption, and Delay in Completion Insurance

The Owner, at the Owner's option, may purchase and maintain insurance that will protect the Owner against loss of use of the Owner's property, or the inability to conduct normal operations, due to fire or other causes of loss. The

Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner's property, due to fire or other hazards however caused.

§11.5 Adjustment and Settlement of Insured Loss [549]

§ 11.5.1 A loss insured under the property insurance required by the Agreement shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.5.2. The Owner shall pay the Architect and Contractor their just shares of insurance proceeds received by the Owner, and by appropriate agreements the Architect and Contractor shall make payments to their consultants and Subcontractors in similar manner.

§ 11.5.2 Prior to settlement of an insured loss, the Owner shall notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds. The Contractor shall have 14 days from receipt of notice to object to the proposed settlement or allocation of the proceeds. If the Contractor does not object, the Owner shall settle the loss and the Contractor shall be bound by the settlement and allocation. Upon receipt, the Owner shall deposit the insurance proceeds in a separate account and make the appropriate distributions. Thereafter, if no other agreement is made or the Owner does not terminate the Contract for convenience, the Owner and Contractor shall execute a Change Order for reconstruction of the damaged or destroyed Work in the amount allocated for that purpose. If the Contractor timely objects to either the terms of the proposed settlement or the allocation of the proceeds, the Owner may proceed to settle the insured loss, and any dispute between the Owner and Contractor arising out of the settlement or allocation of the proceeds shall be resolved pursuant to Article 15. Pending resolution of any dispute, the Owner may issue a Construction Change Directive for the reconstruction of the damaged or destroyed Work.

2. AIA A101 – 2017 Exhibit A Insurance and Bonds

AIA Document A101 – 2017 Exhibit A

Insurance and Bonds [550]

This Insurance and Bonds Exhibit is part of the Agreement, between the Owner and the Contractor, dated the __ day of ___ in the year _____

for the following

PROJECT: _____

THE OWNER: _____

THE CONTRACTOR: _____

TABLE OF ARTICLES

ARTICLE A.1 GENERAL

The Owner and Contractor shall purchase and maintain insurance, and provide bonds, as set forth in this Exhibit. As used in this Exhibit, the term General Conditions refers to AIA Document A201™–2017, General Conditions of the Contract for Construction.

ARTICLE A.2 OWNER'S INSURANCE

§ A.2.1 General

Prior to commencement of the Work, the Owner shall secure the insurance, and provide evidence of the coverage, required under this Article A.2 and, upon the Contractor's request, provide a copy of the property insurance policy or policies required by Section A.2.3. The copy of the policy or policies provided shall contain all applicable conditions, definitions, exclusions, and endorsements.

§ A.2.2 Liability Insurance

The Owner shall be responsible for purchasing and maintaining the Owner's usual general liability insurance.

§ A.2.3 Required Property Insurance

§ A.2.3.1 Unless this obligation is placed on the Contractor pursuant to Section A.3.3.2.1, the Owner shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risks" [551] completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis.[552] The Owner's property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion and thereafter as provided in Section A.2.3.1.3, unless otherwise provided in the Contract Documents or otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds.[553] This insurance shall include the interests of mortgagees as loss payees.

§ A.2.3.1.1 Causes of Loss. The insurance required by this Section A.2.3.1 shall provide coverage for direct physical loss or damage, and shall not exclude [554] the risks of fire, explosion, theft, vandalism, malicious mischief, collapse,

earthquake, flood, or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials. [555] Sub-limits, if any, are as follows:
(Indicate below the cause of loss and any applicable sub-limit.)

Causes of Loss **Sub-Limit**

§ A.2.3.1.2 Specific Required Coverages. The insurance required by this Section A.2.3.1 shall provide coverage for loss or damage to falsework and other temporary structures, and to building systems from testing and startup. The insurance shall also cover debris removal, including demolition occasioned by enforcement of any applicable legal requirements, and reasonable compensation for the Architect's and Contractor's services and expenses required as a result of such insured loss, including claim preparation expenses. Sub-limits, if any, are as follows:
(Indicate below type of coverage and any applicable sub-limit for specific required coverages.)

Coverage **Sub-Limit** [556]

§ A.2.3.1.3 Unless the parties agree otherwise, upon Substantial Completion, the Owner shall continue the insurance required by Section A.2.3.1 or, if necessary, replace the insurance policy required under Section A.2.3.1 with property insurance written for the total value of the Project that shall remain in effect until expiration of the period for correction of the Work set forth in Section 12.2.2 of the General Conditions. [557]

§ A.2.3.1.4 Deductibles and Self-Insured Retentions. If the insurance required by this Section A.2.3 is subject to deductibles or self-insured retentions, the Owner shall be responsible for all loss not covered because of such deductibles or retentions.

§ A.2.3.2 Occupancy or Use Prior to Substantial Completion. The Owner's occupancy or use of any completed or partially completed portion of the Work prior to Substantial Completion shall not commence until the insurance company or companies providing the insurance under Section A.2.3.1 have consented in writing to the continuance of coverage. The Owner and the Contractor shall take no action with respect to partial occupancy or use that would cause cancellation, lapse, or reduction of insurance, unless they agree otherwise in writing.

§ A.2.3.3 Insurance for Existing Structures
If the Work involves remodeling an existing structure or constructing an addition to an existing structure, the Owner shall purchase and maintain, until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, "all-risks" property insurance, on a replacement cost basis, protecting the existing structure against direct physical loss or damage from the causes of loss identified in Section A.2.3.1, [558] notwithstanding the undertaking of the Work. The Owner shall be responsible for all co-insurance penalties.

§ A.2.4 Optional Extended Property Insurance. [559]
The Owner shall purchase and maintain the insurance selected and described below.
(Select the types of insurance the Owner is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance. For each type of insurance selected, indicate applicable limits of coverage or other conditions in the fill point below the selected item.)

[ ] **§ A.2.4.1 Loss of Use, Business Interruption, and Delay in Completion Insurance**, to reimburse the Owner for loss of use of the Owner's property, or the inability to conduct normal operations due to a covered cause of loss.

[ ] **§ A.2.4.2 Ordinance or Law Insurance**, for the reasonable and necessary costs to satisfy the minimum requirements of the enforcement of any law or ordinance regulating the demolition, construction, repair, replacement or use of the Project.

[ ] **§ A.2.4.3 Expediting Cost Insurance**, for the reasonable and necessary costs for the temporary repair of damage to insured property, and to expedite the permanent repair or replacement of the damaged property.

[ ] **§ A.2.4.4 Extra Expense Insurance**, to provide reimbursement of the reasonable and necessary excess costs incurred during the period of restoration or repair of the damaged property that are over and above the total costs that would normally have been incurred during the same period of time had no loss or damage occurred.

[ ] **§ A.2.4.5 Civil Authority Insurance**, for losses or costs arising from an order of a civil authority prohibiting access to the Project, provided such order is the direct result of physical damage covered under the required property insurance.

[ ] **§ A.2.4.6 Ingress/Egress Insurance**, for loss due to the necessary interruption of the insured's business due to physical prevention of ingress to, or egress from, the Project as a direct result of physical damage.

[ ] **§ A.2.4.7 Soft Costs Insurance**, to reimburse the Owner for costs due to the delay of completion of the Work, arising out of physical loss or damage covered by the required property insurance: including construction loan fees; leasing and marketing expenses; additional fees, including those of architects, engineers, consultants, attorneys and accountants, needed for the completion of the construction, repairs, or reconstruction; and carrying costs such as property taxes, building permits, additional interest on loans, realty taxes, and insurance premiums over and above normal expenses.

§ A.2.5 Other Optional Insurance.
The Owner shall purchase and maintain the insurance selected below.
(Select the types of insurance the Owner is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance.)

[ ] **§ A.2.5.1 Cyber Security Insurance** for loss to the Owner due to data security and privacy breach, including costs of investigating a potential or actual breach of confidential or private information.
(Indicate applicable limits of coverage or other conditions in the fill point below.)

[ ] **§ A.2.5.2 Other Insurance**
(List below any other insurance coverage to be provided by the Owner and any applicable limits.)

Coverage	**Limits**

ARTICLE A.3 CONTRACTOR'S INSURANCE AND BONDS

§ A.3.1 General [560]

§ A.3.1.1 Certificates of Insurance. The Contractor shall provide certificates of insurance acceptable to the Owner evidencing compliance with the requirements in this Article A.3 at the following times: (1) prior to commencement of the Work; (2) upon renewal or replacement of each required policy of insurance; and (3) upon the Owner's written request. An additional certificate evidencing continuation of commercial liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment and thereafter upon renewal or replacement of such coverage until the expiration of the periods required by Section A.3.2.1 and Section A.3.3.1. The certificates will show the Owner as an additional insured on the Contractor's Commercial General Liability and excess or umbrella liability policy or policies.

§ A.3.1.2 Deductibles and Self-Insured Retentions. The Contractor shall disclose to the Owner any deductible or self-insured retentions applicable to any insurance required to be provided by the Contractor.[561]

§ A.3.1.3 Additional Insured Obligations.[562] To the fullest extent permitted by law, the Contractor shall cause the commercial general liability coverage to include (1) the Owner, the Architect, and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions for which loss occurs during completed operations. The additional insured coverage shall be primary and non-contributory to any of the Owner's general liability insurance policies and shall apply to both ongoing and completed operations. To the extent commercially available, the additional insured

coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's consultants, CG 20 32 07 04.

§ A.3.2 Contractor's Required Insurance Coverage [563]

§ A.3.2.1 The Contractor shall purchase and maintain the following types [564] and limits of insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:

(If the Contractor is required to maintain insurance for a duration other than the expiration of the period for correction of Work, state the duration.) [565]

§ A.3.2.2 Commercial General Liability [566]

§ A.3.2.2.1 Commercial General Liability insurance for the Project written on an occurrence form with policy limits of not less than ($_____) each occurrence, ($_____) general aggregate, and ($_____) aggregate for products-completed operations hazard, providing coverage for claims including

- **.1** damages because of bodily injury, sickness or disease, including occupational sickness or disease, and death of any person;
- **.2** personal injury and advertising injury;
- **.3** damages because of physical damage to or destruction of tangible property, including the loss of use of such property;
- **.4** bodily injury or property damage arising out of completed operations; and
- **.5** the Contractor's indemnity obligations under Section 3.18 of the General Conditions.[567]

§ A.3.2.2.2 The Contractor's Commercial General Liability policy under this Section A.3.2.2 shall not contain [568] an exclusion or restriction of coverage for the following:

- **.1** Claims by one insured against another insured, if the exclusion or restriction is based solely on the fact that the claimant is an insured, and there would otherwise be coverage for the claim.
- **.2** Claims for property damage to the Contractor's Work arising out of the products-completed operations hazard where the damaged Work or the Work out of which the damage arises was performed by a Subcontractor.
- **.3** Claims for bodily injury other than to employees of the insured.
- **.4** Claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employees of the insured.
- **.5** Claims or loss excluded under a prior work endorsement or other similar exclusionary language.
- **.6** Claims or loss due to physical damage under a prior injury endorsement or similar exclusionary language.
- **.7** Claims related to residential, multi-family, or other habitational projects, if the Work is to be performed on such a project.
- **.8** Claims related to roofing, if the Work involves roofing.
- **.9** Claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces, if the Work involves such coatings or surfaces.
- **.10** Claims related to earth subsidence or movement, where the Work involves such hazards.
- **.11** Claims related to explosion, collapse and underground hazards, where the Work involves such hazards.

§ A.3.2.3 Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Contractor, with policy limits of not less than ($_____) per accident, for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles along with any other statutorily required automobile coverage.

§ A.3.2.4 The Contractor may achieve the required limits and coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided such primary and excess or umbrella insurance policies result in the same or greater coverage as the coverages required under Section A.3.2.2 and A.3.2.3, and in no event shall any excess or umbrella liability insurance provide narrower

coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

§ A.3.2.5 Workers' Compensation at statutory limits.

§ A.3.2.6 Employers' Liability with policy limits not less than ($_____) each accident, ($_____) each employee, and ($_____) policy limit.

§ A.3.2.7 Jones Act, and the Longshore & Harbor Workers' Compensation Act, as required, if the Work involves hazards arising from work on or near navigable waterways, including vessels and docks

§ A.3.2.8 If the Contractor is required to furnish professional services as part of the Work, the Contractor shall procure Professional Liability insurance covering performance of the professional services, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.2.9 If the Work involves the transport, dissemination, use, or release of pollutants, the Contractor shall procure Pollution Liability insurance, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.2.10 Coverage under Sections A.3.2.8 and A.3.2.9 may be procured through a Combined Professional Liability and Pollution Liability insurance policy, with combined policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.2.11 Insurance for maritime liability risks associated with the operation of a vessel, if the Work requires such activities, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.2.12 Insurance for the use or operation of manned or unmanned aircraft, if the Work requires such activities, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.3 Contractor's Other Insurance Coverage

§ A.3.3.1 Insurance selected and described in this Section A.3.3 shall be purchased from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:
(If the Contractor is required to maintain any of the types of insurance selected below for a duration other than the expiration of the period for correction of Work, state the duration.)

§ A.3.3.2 The Contractor shall purchase and maintain the following types and limits of insurance in accordance with Section A.3.3.1.
(Select the types of insurance the Contractor is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance. Where policy limits are provided, include the policy limit in the appropriate fill point.)

[ ] **§ A.3.3.2.1** Property insurance [569] of the same type and scope satisfying the requirements identified in Section A.2.3, which, if selected in this section A.3.3.2.1, relieves the Owner of the responsibility to purchase and maintain such insurance except insurance required by Section A.2.3.1.3 and Section A.2.3.3. The Contractor shall comply with all obligations of the Owner under Section A.2.3 except to the extent provided below. The Contractor shall disclose to the Owner the amount of any deductible, and the Owner shall be responsible for losses within the deductible. Upon request, the Contractor shall provide the Owner with a copy of the property insurance policy or policies required. The Owner shall adjust and settle the loss with the insurer and be the trustee of the proceeds of the property insurance in accordance with Article 11 of the General Conditions unless otherwise set forth below:
(Where the Contractor's obligation to provide property insurance differs from the Owner's obligations as described under Section A.2.3, indicate such differences in the space below. Additionally, if a party other than the Owner will be responsible for adjusting and settling a loss with the insurer and acting as the

trustee of the proceeds of property insurance in accordance with Article 11 of the General Conditions, indicate the responsible party below.)

[ ] **§ A.3.3.2.2 Railroad Protective Liability Insurance**, with policy limits of not less than ($_____) per claim and ($ _____) in the aggregate, for Work within fifty (50) feet of railroad property.

[ ] **§ A.3.3.2.3 Asbestos Abatement Liability Insurance**, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate, for liability arising from the encapsulation, removal, handling, storage, transportation, and disposal of asbestos-containing materials.

[ ] **§ A.3.3.2.4** Insurance for physical damage to property while it is in storage and in transit to the construction site on an "all-risks" completed value form.

[ ] **§ A.3.3.2.5** Property insurance on an "all-risks" completed value form, covering property owned by the Contractor and used on the Project, including scaffolding and other equipment.

[ ] **§ A.3.3.2.6 Other Insurance**
(List below any other insurance coverage to be provided by the Contractor and any applicable limits.)

Coverage	**Limits**

§ A.3.4 Performance Bond and Payment Bond
The Contractor shall provide surety bonds, from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located, as follows:
(Specify type and penal sum of bonds.)

Type	Penal Sum ($0.00)
Payment Bond	
Performance Bond	

Payment and Performance Bonds shall be AIA Document A312™, Payment Bond and Performance Bond, or contain provisions identical to AIA Document A312™, current as of the date of this Agreement.

ARTICLE A.4 SPECIAL TERMS AND CONDITIONS
Special terms and conditions that modify this Insurance and Bonds Exhibit, if any, are as follows:

3. Modified AIA A201-2017 General Conditions § 3.18 Indemnification [570]

The following indemnity is a combination **limited** indemnity and an **intermediate** indemnity. Section 3.18.1.1 is a **limited** indemnity by the Contractor indemnifying the Owner for injuries to the extent caused in whole or in part by the Contractor, Subcontractor and other persons for whom Contractor is legally liable, but not to the extent caused in whole or in part by an Owner-Related Person. Section 3.18.1.2 is an **intermediate** indemnity for injuries to the employees of the Contractor, its agents or its Subcontractors of any tier to the extent caused in whole or in part by the negligence of Contractor, Subcontractors of any tier and all other persons for whom Contractor is legally liability even to the extent caused **in part** by the negligence of an Owner-Related Person.

AIA A201 Article 3 Contractor § 3.18.1 is deleted and replaced with the following:

> **§ 3.18.1.1 INDEMNITY FOR THE NEGLIGENCE OF CONTRACTOR-RELATED PERSONS.** TO THE FULLEST EXTENT PERMITTED BY LAW INCLUDING CHAPTER 151 OF THE TEXAS INSURANCE CODE AND NOT WITHIN THE INDEMNITY SET OUT BELOW IN § 3.18.1.2, CONTRACTOR AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS OWNER, OWNER'S LENDERS, THE ARCHITECT, THEIR RESPECTIVE AGENTS, PARTNERS, PRINCIPALS, EMPLOYEES, SUCCESSORS, AFFILIATES AND ASSIGNS ("*OWNER-RELATED PERSONS*") FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES, LIABILITIES AND EXPENSES (INCLUDING, BUT NOT LIMITED TO, REIMBURSEMENT OF ATTORNEYS' FEES EXPENDED IN LITIGATION OR ARBITRATION OR ENFORCEMENT OF THIS CONTRACT), FOR BODILY INJURY OR DEATH OF PERSONS OTHER THAN AN EMPLOYEE OF CONTRACTOR, ITS AGENTS, OR ITS SUBCONTRACTORS OF ANY TIER, TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS, OF CONTRACTOR, SUBCONTRACTORS AND ALL OTHER PERSONS FOR WHOM CONTRACTOR IS LEGALLY LIABLE (A "*CONTRACTOR-RELATED PERSON*"), BUT NOT TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACT OR OMISSION OF AN OWNER-RELATED PERSON.
>
> **§ 3.18.1.2 INDEMNITY FOR EMPLOYEE CLAIM.** TO THE FULLEST EXTENT PERMITTED BY LAW INCLUDING CHAPTER 151 OF THE TEXAS INSURANCE CODE, CONTRACTOR AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER-RELATED PERSONS FROM AND AGAINST A CLAIM FOR THE BODILY INJURY OR DEATH OF AN EMPLOYEE OF CONTRACTOR, ITS AGENTS, OR ITS SUBCONTRACTORS OF ANY TIER, CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS, OF A CONTRACTOR-RELATED PERSON, EVEN TO THE EXTENT CAUSED IN PART BY THE NEGLIGENT ACT OR OMISSION OF AN OWNER-RELATED PERSON.
>
> THE INDEMNITIES IN THIS SECTION 3.18.1 (INDEMNIFIED LIABILITIES) SURVIVE TERMINATION OF THE AGREEMENT OR COMPLETION OF THE WORK.

The following section is added to AIA A201 Article 3 Contractor § 3.18 Indemnification as AIA A201 § 3.18.3 Enforcement Costs:

> **§ 3.18.3 ENFORCEMENT COSTS.** EXPENSES RECOVERABLE BY THE OWNER-RELATED PERSONS AS PART OF THE CONTRACTOR'S INDEMNITY OBLIGATIONS UNDER THIS AIA A201 SECTION 3.18 (INDEMNIFICATION) SHALL INCLUDE, WITHOUT LIMITATION, ALL ATTORNEYS' FEES AND ANY COSTS INCURRED BY SUCH OWNER-RELATED PERSONS IN ENFORCING THE PROVISIONS OF THE CONTRACTOR'S INDEMNITY OBLIGATIONS.

The following section is added to AIA A201 Article 3 Contractor § 3.18 Indemnification as AIA A201 § 3.18.4 Proceedings:

> **§ 3.18.4 PROCEEDINGS.** THE CONTRACTOR SHALL PROMPTLY ADVISE OWNER AND CONSTRUCTION MANAGER IN WRITING OF ANY ACTION, ADMINISTRATIVE OR LEGAL PROCEEDING OR INVESTIGATION AS TO WHICH THIS INDEMNIFICATION MAY APPLY, AND CONTRACTOR, AT CONTRACTOR'S EXPENSE, SHALL ASSUME ON BEHALF OF THE OWNER-RELATED PERSONS AND CONDUCT WITH DUE DILIGENCE AND IN GOOD FAITH THE DEFENSE THEREOF WITH COUNSEL SATISFACTORY TO OWNER; PROVIDED, HOWEVER, THAT OWNER AND THE OTHER OWNER-RELATED PERSONS SHALL EACH HAVE THE RIGHT, AT THEIR OPTION, TO BE REPRESENTED THEREIN BY LEGAL COUNSEL OF THEIR OWN SELECTION AND AT THEIR OWN EXPENSE. IN THE EVENT OF FAILURE BY THE CONTRACTOR TO FULLY PERFORM IN ACCORDANCE WITH THIS INDEMNIFICATION PARAGRAPH, THE OWNER-RELATED PERSONS, AT THEIR OPTION, AND WITHOUT RELIEVING CONTRACTOR OF

ITS OBLIGATIONS HEREUNDER, MAY SO PERFORM, BUT ALL COSTS AND EXPENSES SO INCURRED BY THE OWNER-RELATED PERSONS IN THAT EVENT SHALL BE REIMBURSED BY CONTRACTOR TO SUCH OWNER-RELATED PERSONS, TOGETHER WITH INTEREST ON THE SAME FROM THE DATE ANY SUCH EXPENSE WAS PAID BY SUCH OWNER-RELATED PERSONS UNTIL REIMBURSED BY CONTRACTOR, AT THE RATE OF INTEREST PROVIDED TO BE PAID AN JUDGMENTS UNDER THE LAWS OF THE STATE OF TEXAS.

The following section is added to AIA A201 Article 3 Contractor § 3.18 Indemnification as AIA A201 § 3.18.5 Chapter 151 Texas Insurance Code:

§ 3.18.5 CHAPTER 151 TEXAS INSURANCE CODE. IT IS THE INTENT OF THE PARTIES TO THIS CONTRACT NOT TO VIOLATE THE PROVISIONS OF CHAPTER 151 OF THE TEXAS INSURANCE CODE. IN THE EVENT THAT ANY PROVISION OF THIS CONTRACT VIOLATES THE PROVISIONS OF CHAPTER 151 OF THE TEXAS INSURANCE CODE, THIS CONTRACT SHALL BE REVISED TO LIMIT THIS CONTRACT TO COMPLY WITH CHAPTER 151 OF THE TEXAS INSURANCE CODE.

The following section is added to AIA A201 Article 3 Contractor § 3.18 Indemnification as § 3.18.6 Survival:

§ 3.18.6 SURVIVAL. THE INDEMNITIES IN THIS SECTION 3.18 (INDEMNIFICATION) SURVIVE COMPLETION OF THE WORK. THE PROVISIONS CONTAINED AIA 201 SECTION 3.18 (INDEMNIFICATION) SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT, THE FINAL COMPLETION OF THE WORK, AND ANY OTHER SERVICES TO BE PROVIDED PURSUANT TO THE CONTRACT DOCUMENTS.

4. AIA B103-2017 Architect Agreement – Indemnity [571]

This provision is contained in the AIA B103 is the pattern language used in AIA architect agreement forms. This language creates a "**limited form indemnity**", since it does not provided for the Architect's assumption of the Owner's tort liability, but is an indemnity for liabilities to the extent caused by the negligent acts or omissions of the Architect. Also note the language **bolded** below, as the AIA has sought to limit its member's exposure to "**the available proceeds of insurance coverage**." Also, note that the AIA form provides for a mutual waiver of consequential damages.

§ 8.1.3 The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement. **The Architect's duty to indemnify the Owner under this provision shall be limited to the available proceeds of insurance coverage**.

§ 8.1.4 The Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.

(Author added **bold** for emphasis.)

B103 As Required by a National Architecture Firm.

The following provisions are taken from a B103 with a national stature architectural firm. Note that the architect liability provisions are bifurcated:

- 12.4.1 is an indemnity by the Architect for liabilities incurred by the Owner to third parties caused by the Architect's negligence, but the Architect's liability is **capped** at $3,000,000. This results in a waiver and release of the Architect of liability to the Owner for third party liabilities above $3,000,000 even though the Architect has insurance above that amount.

- 12.4.1.1 imposes a $5,000,000 limitation on the Architect's liability to the Owner for any liabilities incurred by the Owner from any causes include due to the Architect's professional negligence and/or breach of contract even though the Architect has insurance above that amount; but also it provides for a sublimit cap of $3,000,000 for its liability caused by its MEP consultant. Its MEP had only $3,000,000 in professional liability insurance.

§ 12.4. MUTUAL INDEMNITIES.
§ 12.4.1 By Architect. TO THE EXTENT PERMITTED BY LAW THE ARCHITECT AGREES TO INDEMNIFY AND HOLD THE OWNER HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, SUITS, DEMANDS, LOSSES, DAMAGES, COSTS, AND EXPENSES ARISING FROM CLAIMS BY THIRD PARTIES (INCLUDING REASONABLE ATTORNEYS' FEES AND COSTS) TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS, ERRORS, OR OMISSIONS OF THE ARCHITECT OR ANYONE FOR WHOSE ACTS IT IS LEGALLY LIABLE, BUT ARCHITECT'S INDEMNITY IS CAPPED NOT TO EXCEED THREE MILLION DOLLARS ($3,000,000) ("CAP").

§ 12.4.1.1 Limitation of Liability. The Parties hereby further agree that the Architect's total liability to the Owner for any and all injuries, claims losses, costs, expenses or damages arising out of or in any way related to the Project or this Agreement, from any cause or causes including, but not limited to professional negligence and/or breach of contract shall not exceed Five Million Dollars ($5,000,000). Notwithstanding the foregoing, for any and all injuries, claims, losses, costs, expenses or damages arising out of or in any way related to the Project or this Agreement, from any cause or causes alleging errors or omissions by the MEP Consultant, including breach of contract or professional negligence, the Architect's total liability shall not exceed Three Million Dollars ($3,000,000).

§ 12.4.2 By Owner. TO THE EXTENT PERMITTED BY LAW THE OWNER AGREES TO INDEMNIFY AND HOLD THE ARCHITECT HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, SUITS, DEMANDS, LOSSES, DAMAGES, COSTS, AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES AND COSTS), TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS, ERRORS, OR OMISSIONS OF THE OWNER OR ANYONE FOR WHOSE ACTS IT IS LEGALLY LIABLE. ADDITIONAL INSURED COVERAGE OF ARCHITECT IS NOT TO BE LIMITED BY THE TERMS OF THE OWNER'S INDEMNITY.

§ 12.4.3 Proportionate Responsibility. NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, TO THE EXTENT THE INDEMNIFIED CLAIM, LIABILITY, SUIT, DEMAND, LOSS, DAMAGE COST OR EXPENSE IS CAUSED BY THE JOINT, CONCURRENT OR COMPARATIVE OR COMPARATIVE NEGLIGENCE, CAUSATION, RESPONSIBILITY OR FAULT OF ARCHITECT AND OWNER, WHETHER NEGLIGENCE, BREACH OF THIS AGREEMENT OR WILLFUL MISCONDUCT, THEN THE INDEMNIFYING PARTY'S OBLIGATION TO THE INDEMNIFIED PERSON SHALL ONLY EXTEND TO THE PERCENTAGE OF THE TOTAL RESPONSIBILITY OF THE INDEMNIFYING PARTY IN CONTRIBUTING TO SUCH CLAIM, LIABILITY, SUIT, DEMAND, LOSS, DAMAGE COST OR EXPENSE OF THE INDEMNIFIED PERSONS.

5. Case Study – Construction Documents

a. The Project

The following discussion reviews the risk management objectives and issues that were addressed by the authors and an insurance consultant hired by the project owner in the negotiation and documentation of the construction documents for a to-be-built high rise office building [572] on a prime location. [573] The project was built under an AIA A133 Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price.

b. Owner Objectives

The owner had the following objectives:

(1) Cost Confirmation: Cost confirmation versus cost savings, but cost savings, if achievable;

(2) Protection Against Identified Risks: Contractual and insurance protection against identified risks;

(3) Completion by Deadline: Occupancy by a bona fide relocation deadline; and

(4) Post-Completion Continued Operations Protection: Protection against the risk of interruption of business after construction completion due to construction defects interrupting operations.

c. Identified Risks and Parties' Approach

As to these objectives, the parties identified the following risks and insurance or contractual agreements to address the owner's objectives: [574]

Risk	Contractor	Owner
(1) Cost Confirmation	GMP vs. Stipulated Sum [575]	Budget making process [576]
(2) Protection Against Identified Risk		

***Negligently Caused Injury and Property Damage Liability Risk*:** Job site injuries to workers and third parties arising out of the operations or work of the contractor and its subcontractors and injuries arising out of the use by these forces of automobiles	CCIP as to CGL risks (contractor and subcontractors of all tiers) [577] with owner as an additional insured on CCIP and BAP [578] Workers compensation insurance/employer's liability insurance [579] with waiver of subrogation as to claims against owner Business auto policy [580] with owner as additional insured Indemnification of owner [581]	
***Damage to the Work Risk*:** Damage to the project arising from fire, nature, and other causes of loss	Builder's risk insurance [582] Named insured on contractor obtained builder's risk insurance [583]	
***Environmental Liability Risks*:** Discovery during the course of construction of adverse environmental conditions	Indemnification of owner [584] Contractor's environmental liability insurance [585]	Indemnification of contractor [586] Owner's pollution legal liability insurance [587]
***Mechanic's Lien Risks*:** Mechanic's liens filed due to disputes with subcontractors or failure of subcontractors to pay lower tier subcontractors and suppliers.	Payment Bond [588] Retainage [589] Periodic Waivers and Releases of Liens [590]	
(3) Completion by Deadline Construction completion; construction delays; cost overruns	Deadlines and liquidated damages [591] Bonus [592] Subguard and Bonds [593]	
(4) Post-Completion Continued Operations Protection	Professional liability insurance [594] Consequential damages [595]	

d. Construction Documents

The following are the primary risk management provisions in the A133 and A201 construction documents negotiated by the parties in the case study. They are not held out as "model" provisions, but are set out as a sample. The following conventions are used to illustrate the parties' drafting: AIA form language that is deleted is shown as ~~strike outs~~ and new language is shown as underlined or introduced as ***NEW*** without underlining the text (in order to reduce the visual effect of extensive underlining). Headings added to the AIA provisions have not been underlined although new. Insurance specifications not contained in the case study are set out in Exhibit A in brackets as [] and are set out to show additional coverages that might be sought in other projects.

(1) AIA A133 – 2009 Standard Form Of Agreement Between Owner And Construction Manager As Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

ARTICLE 2 CONSTRUCTION MANAGER RESPONSIBILITIES

…

NEW: **§ 2.2.10 GMP Proposals for Work Phases.** As noted in Section 2.1.4, some phases of the Work may be ready for construction before it is appropriate to arrive at an overall Guaranteed Maximum Price for the entire Project. If the Owner elects to proceed with any packages of the Work before the parties arrive at an overall Guaranteed Maximum Price, the Construction Manager shall develop Guaranteed Maximum Price proposals for any phases of the Work identified by the Owner.

NEW: **§ 2.2.10.1 Work Authorization Amendments.** Until a Guaranteed Maximum Price for the entire Project has been established and accepted by the Owner, the Construction Manager and Owner agree to use the Work Authorization Amendment in a mutually acceptable format to authorize work to begin based on a specified scope and a specified "not to exceed" price. The price, Contract Time, scope of Work and other terms identified in each previously approved Work Authorization Amendment will be included in the Guaranteed Maximum Price Amendment for the entire Project at the time the Contract Documents are sufficiently complete to establish the overall Guaranteed Maximum Price ("**GMP**"), subject to any limitation on the Construction Manager's contingency as provided in Section 2.2.4 above. Prior to the Owner's acceptance of the Guaranteed Maximum Price for the entire Project, Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work for Construction Phase services, except as the Owner may specifically authorize in an executed Work Authorization Amendment as required herein.

NEW: **§ 2.2.10.2 Aggregating Approved Proposals into the GMP Amendment.** Except as otherwise agreed by Owner and Construction Manager, when a Guaranteed Maximum Price proposal for any portion of the Work is agreed upon by the parties pursuant to a Work Authorization Amendment, the Guaranteed Maximum Price amounts, including any of the Construction Manager's General Conditions (if segregated from the other Cost of the Work), for those portions which have been previously approved by the Owner shall be combined and shall be used to develop the overall Guaranteed Maximum Price proposal for the entire Project, subject to any limitation on the Construction Manager's contingency as provided in Section 2.2.4 above, and all separate Work Authorization Amendments previously agreed to by the parties shall be of no further force and effect. Notwithstanding any provision of the Contract Documents to the contrary, each Work Authorization Amendment and the final GMP Amendment shall be cumulative, incorporating and building upon the price, scope and other terms of each preceding Amendment, such that there shall at no time be more than one GMP and Contract Time for the Work of this Contract.

NEW: **§ 2.2.11 Milestones.** Except to the extent that Owner and Construction Manager agree otherwise in a Work Authorization Amendment or Guaranteed Maximum Price Amendment, the Work shall be substantially completed as follows, as such Contract Time may be amended from time to time in accordance with the Contract Documents:

Milestones	Substantial Completion Dates (From Commencement of the Construction Phase)
Building Dry-In ("**MS 1**")	On or before 359 days from commencement
TCO (including Fire, Life and Safety inspections) for the Garage, Lobby and Floors 7-9 ("**MS 2**")	On or before 433 days from commencement
TCO (including Fire, Life and Safety inspections) for Floors 1 and 10-13 ("**MS 3**")	On or before 472 days from commencement

Substantial Completion of the entire Work	On or before 487 days from commencement

The Guaranteed Maximum Price Proposal shall include an Add/Alternate of $244,233.24 (which includes a $50,000.00 allowance for Subcontractor production loss and premium cost, such production loss and premium to be verified by Subcontractors once under contract to perform the Work) to reduce the overall Contract Time from 487 days to 454 days from the commencement of the Construction Phase. If this Add/Alternate is not accepted prior to the parties' execution of the Guaranteed Maximum Price Amendment and included in the Guaranteed Maximum Price at that time, it shall be deemed rejected. In the event Owner accepts this Add/Alternate prior to execution of the Guaranteed Maximum Price Amendment, the above-referenced Substantial Completion Dates shall be adjusted accordingly.

…

NEW: **§ 2.3.3.2 Timely Completion.** Time is the essence of this Agreement. The Construction Manager shall diligently prosecute the Work and achieve Substantial Completion of the Work within the Contract Time requirements set forth in the applicable Work Authorization Amendment or GMP Amendment (as the case may be), subject to adjustments as provided in the Contract Documents. After Substantial Completion, the Construction Manager shall diligently continue to prosecute the Work to final completion and shall achieve final completion of the punch list within 30 days of Substantial Completion and final completion of all other requirements of the Contract Documents within 60 days of Substantial Completion, subject to adjustments as provided in the Contract Documents.

NEW: **§ 2.3.3.3 Identification of Critical Milestones.** Owner retains the right to identify specific areas for early Substantial Completion sufficient to allow for installation of Owner's equipment, phased use or partial occupancy of the facility, or providing access to tenants' construction managers for tenant finish-out. The parties acknowledge that a Work Authorization Amendment or Modification of the Agreement may create milestones requiring certain phases or scopes of work to be substantially performed or completed at certain specified times. Collectively, the times required for early Substantial Completion and the milestones described above are referred to in the Contract Documents as "**Critical Milestones**". The Critical Milestones made a part of the Agreement are critical elements of the Contract Time requirements under the Agreement and are "of the essence" of the Agreement.

NEW: **§ 2.3.3.4 Owner's Modification of Milestones.** The Owner reserves the right to modify or revise the Critical Milestones and any agreed construction schedule by written notice to Construction Manager. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Critical Milestones or the construction schedule, the Construction Manger shall comply with the notice requirements set forth in Section 15.1.2 of A201-2007.

NEW: **§ 2.3.3.5 Recovery of Contractor's Schedule.** In the event Construction Manager shall fall behind schedule for any reason which does not justify an extension under Section 8.3 of A201-2007 of the Substantial Completion Date, Construction Manager shall, within 10 days after written request of Owner, develop and deliver a recovery plan to the Owner with a recovery schedule and a program describing the additional manpower, overtime, material expediting, re-sequencing of the Work and other steps Construction Manager shall meet the requirements of the Contract with regard to the Contract Time. Construction Manager shall not be entitled to compensation from the Owner or any increase in the Contract Sum for the schedule recovery efforts, except as to causes of delay for which a time extension is allowed under Section 8.3 of A201-2007. No approval or consent by the Owner or any plan for re-sequencing or acceleration of the Work submitted by Construction Manager pursuant to this Section shall constitute a waiver by Owner of any damages or losses which Owner may suffer by reason of such re-sequencing or the failure of the Construction Manager to meet the Substantial Completion Date.

NEW: **§ 2.3.3.5.1 Owner Directed Acceleration.** Owner shall additionally be entitled to direct the acceleration or re-sequencing of the Work in order to achieve completion prior to the required date for Substantial Completion, and Construction Manager shall be reimbursed for all additional costs actually incurred in respect thereto plus Construction Manager's Fee, and Construction Manager shall be entitled to an increase adjustment to the GMP therefor. Before proceeding with any such Owner-directed acceleration plan under this subsection, the Construction Manager shall have received a Change Order equitably adjusting the GMP in accordance with this Section 2.3.3.5.1.

NEW: **§ 2.3.3.5.2 Simultaneously Caused Delays.** Notwithstanding any provision of the Contract Documents to the contrary, to the extent the Work is simultaneously delayed by a cause of delay for which Construction Manager is

responsible and a cause of delay for which a time extension is allowed under Section 8.3 of the A201-2007, Construction Manager's sole remedy will be an extension of the Contract Time.

NEW: **§2.3.3.6 Adverse Weather Days.** The Substantial Completion Dates set forth in Section 2.2.11 hereof anticipate that the Work will be delayed by the following number of days each month due to adverse weather and/or resulting site conditions:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4	4	4	4	6	4	3	3	4	4	3	4

Work shall be considered delayed due to adverse weather and/or resulting site conditions only if Construction Manager is prevented from performing critical path activities for 50% or more of a day on which Construction Manager had scheduled to perform Work. Construction Manager will record on a daily basis whether its job progress has been materially affected by such conditions or resulting site conditions. Any such day lost due to adverse weather conditions or resulting site conditions shall, if reasonably possible, be made up by Construction Manager performing work on the ensuing Saturday or by extended hours during that week, and treating such as a work day for the purpose of complying with and meeting Construction Manager's construction schedule, it being understood that no application for extension of time will be made unless the critical path of the Project is affected. The Construction Manager will provide written explanation and CPM schedule evidencing such impact has occurred. Construction Manager will notify Owner of any such delay in writing, and on a monthly basis submit a report to the Owner substantiating any days claimed to have been lost, over and above those allotted for in in this Section 2.3.3.6, due to adverse weather conditions and resulting site conditions. Each month, the parties shall execute a Change Order equitably adjusting the Contract Time for the delay.

NEW: **§ 2.3.3.7 Liquidated Damages.** The Construction Manager acknowledges and agrees that, if the Construction Manager fails to achieve Substantial Completion of a Milestone or the entire Work in accordance Section 2.2.11, as such dates may be amended from time to time in accordance with the Contract Documents, the Owner will sustain extensive damages and serious loss as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Owner and Construction Manager agree that, if the Construction Manager shall neglect, fail or refuse to achieve Substantial Completion of a Milestone or the entire Work by the date required by the Contract Documents for Substantial Completion of such Milestone or the entire Work, subject to adjustments in the Contract Time as provided in the Contract Documents, then the Construction Manager (and the Construction Manager's surety in the case of default) agrees to pay to the Owner as liquidated damages, and not as a penalty or forfeiture, the sum(s) set forth in the table below per calendar day for each day of such delay, subject to the limitations and potential reductions set forth in this Section 2.3.3.7. Such liquidated damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work. The Owner may deduct liquidated damages described in this Subsection from any unpaid amounts then or thereafter due the Construction Manager under this Agreement. Any liquidated damages not so deducted from any unpaid amounts due the Construction Manager shall be payable to the Owner at the demand of the Owner, together with interest from the date of the demand at a rate equal to the highest lawful rate of interest payable by the Construction Manager. The liquidated damages established in this Section 2.3.3.7 shall be the Construction Manager's sole liability for delay in achieving Substantial Completion of the Work by the date required by the Contract Documents. In no event shall Construction Manager be liable for aggregate liquidated damages in excess of $2,000,000.

Milestone	**Liquidated Damages**
MS 1	$10,000 per day
MS 2	$10,000 per day
MS 3	$5,000 per day
Substantial Completion of the Entire Work	$3,000 per day

Notwithstanding any provision of the Contract Documents to the contrary, in the event multiple Milestones are subject to an unexcused delay, the Construction Manager shall only be assessed liquidated damages in connection with the Milestone for which the highest total liquidated damages are owed. For example, if MS 1 is delayed by 6 days and MS 2 is delayed by 5 days, Construction Manager shall be assessed $60,000 in liquidated damages (*i.e.* 6 days x $10,000). MS 1, MS 2 and MS 3 shall have the meanings assigned to them in Section 2.2.11 herein.

NEW: **§ 2.2.3.8 Discretionary Bonus.** Owner may, in its sole and absolute discretion, award a bonus not to exceed $240,000 ("**Discretionary Bonus**") based on the performance of Construction Manager and others in connection with the Project. Owner's decision to award such bonus shall be based 50% on the degree to which the Work was substantially completed ahead of schedule, and 50% on following criteria:

- Collaboration and cooperative partnership between Construction Manager, Subcontractors, Owner and the Owner's design team;
- Presentation of problems or issues with solutions in mind;
- Accurate and timely submission of change order pricing with appropriate breakdowns; and
- Timely submission of other documentation.

The Owner may pay 10% of any Discretionary Bonus to its Architect, and the balance of any such Discretionary Bonus shall be paid to Construction Manager. Construction Manager shall distribute to its "**Key Subcontractors**" a total of 50% of any Discretionary Bonus paid to Construction Manager ("**Key Subcontractor Discretionary Bonus**"). The term "**Key Subcontractors**" refers to those Subcontractors performing the following scope(s) of Work: concrete, structural steel, pre-cast, metal studs, drywall, curtain-wall, mechanical, plumbing and electrical. Each Key Subcontractor's shall be paid a portion of any Key Subcontractor Discretionary Bonus equal to the ratio that such Key Subcontractor's Subcontract Sum bears to the sum of all Key Subcontractor Subcontract Sums.

ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1.1 Construction Manager's Fee. The Construction Manager's Fee:

NEW: The "**Construction Manager's Fee**" for the Work shall be ___ % of the Cost of the Work (including Construction Manager's General Conditions, bonds and insurance). The Construction Manager's Fee shall be the Construction Manager's complete fee (inclusive of compensation for profit and indirect overhead) and, together with the payment for the Cost of the Work for those costs which are expressly set forth in Article 6 of this Agreement, shall constitute Construction Manager's sole reimbursement for the performance of the Work.

ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

§ 6.1.1 Cost of the Work. The term "**Cost of the Work**" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates set forth herein or otherwise not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7 and Exhibit B hereto.

NEW: Owner and Construction Manager have segregated and categorized on **Exhibit B** General Conditions Worksheet) certain of the Cost of the Work to be incurred by the Construction Manager for administrative and supervisory personnel costs, direct overhead, and other costs and expenses included in the Cost of the Work and incurred by Construction Manager in the performance of its administrative, supervisory, and management responsibilities under the Agreement (called in the Contract Documents "**General Conditions**") and have agreed that such General Conditions are reimbursable by Owner to the Construction Manager as a stipulated sum in the amount of $_____, subject to adjustments as expressly authorized by the provisions of the Contract Documents. The General Conditions are to be paid by Owner to the Construction Manager in equal monthly payments over the Contract Time.

§ 6.6 Miscellaneous Costs

§ 6.6.1 Insurance and Bonds. ~~Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract. Self-insurance for either full or partial amounts of the coverage required by the Contract Documents, with the Owner's prior approval.~~

NEW: Amounts for

(1) Construction Manager's insurance coverage program, including but not limited to, General Liability insurance for both Contractor and Subcontractors (as described in the **CCIP Manual**) at the rate of 1.06% of the Contract Sum;

(2) Builder's Risk insurance at the rate of .145% of the Contract Sum;

(3) Construction Manager's Payment and Performance Bonds at the rate of .63% of the Contract Sum; and

(4) Subcontractor Default Program at the rate of .55% of Subcontract and supplier agreement values, provided Owner shall not be required to pay more than $160,000 for such Subcontract Default Program.

Certain insurance coverages for Contractor and Subcontractors shall be provided through a Contractor Controlled Insurance Program ("**CCIP**"). If Contractor is providing Workers Compensation insurance through its CCIP, Contractor shall have the right to apply the amounts paid by Owner for Contractor's insurance coverage plus the amounts included in its subcontractors' prices for such insurance, and retain those amounts to pay the cost of the CCIP. Contractor shall bear any increase in insurance premiums resulting from an audit.

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ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of AIA Document A201–2007 and as set forth in the Insurance and Bond Specifications attached hereto as **Exhibit A** hereto and fully incorporated herein.

The following are the primary risk management provisions in the A133 and A201 construction documents negotiated by the parties in the case study. They are not held out as "model" provisions, but are set out as a sample. The following conventions are used to illustrate the parties' drafting: AIA form language that is deleted is shown as ~~strike-outs~~ and new language is shown as underlined or introduced as ***NEW*** without underlining the text (in order to reduce the visual effect of extensive underlining). Headings added to the AIA provisions have not been underlined although new. Insurance specifications not contained in the case study are set out in Exhibit A in brackets as [] and are set out to show additional coverages that might be sought in other projects.

(2) AIA A201 – 2007 General Conditions of the Contract for Construction

§ 3.18 INDEMNIFICATION [596]

§ 3.18.1 Contractor's Indemnity of Owner Parties. TO THE FULLEST EXTENT PERMITTED BY LAW THE CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER, ~~ARCHITECT, ARCHITECT'S CONSULTANTS, AND AGENTS AND EMPLOYEES OF ANY OF THEM FROM AND AGAINST~~ ITS EMPLOYEES, AND SUCCESSORS ("**OWNER PARTIES**") FROM AND AGAINST,

.1 ALL CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES ARISING, OR ALLEGED TO ARISE, FROM ANY OF THE FOLLOWING (THE "**INDEMNIFIED MATTERS**"):

(A) THE ACTS OR OMISSIONS, INCLUDING THE ONGOING OR COMPLETED OPERATIONS, OF CONTRACTOR, SUBCONTRACTORS AND ALL OTHER PERSONS FOR WHOM CONTRACTOR IS LEGALLY LIABLE (A "**CONTRACTOR-RELATED PERSON**");

(B) NEGLIGENCE, FRAUD, BREACH OF FIDUCIARY DUTY, WILLFUL, RECKLESS, OR CRIMINAL MISCONDUCT, OR ANY ACTIONS OF ANY CONTRACTOR-RELATED PERSON BEYOND THE SCOPE OF WORK;

(C) DEFAULT BY CONTRACTOR UNDER THIS AGREEMENT;

(D) FAILURE BY CONTRACTOR OR ANY SUBCONTRACTOR TO MAINTAIN INSURANCE REQUIRED TO BE MAINTAINED BY IT PURSUANT TO THIS AGREEMENT;

(E) CONTRACTOR'S, SUBCONTRACTOR'S, OR A CONTRACTOR-RELATED PERSON'S VIOLATION OF ANY ORDINANCE, REGULATION, STATUTE OR OTHER LEGAL REQUIREMENTS; OR

(F) RELEASE OR DISTURBANCE OF HAZARDOUS MATERIALS OR SUBSTANCES THAT OCCURS IN OR FROM THE PROPERTY AND ARISES FROM CONTRACTOR'S, SUBCONTRACTOR'S, OR A CONTRACTOR-RELATED

PERSON'S ACTIVITIES OR OPERATIONS OR THE REMEDIATION OF SUCH RELEASE OR DISTURBANCE ARISING OUT OF OR RESULTING FROM PERFORMANCE OF THE WORK;

PROVIDED TO THE EXTENT 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), IT IS ~~but only to the extent~~ CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF CONTRACTOR, SUBCONTRACTOR, OR A CONTRACTOR-RELATED PERSON ~~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. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party described in this Section 3.18~~.

.2 REGARDLESS OF

(A) WHETHER THE CLAIM IS ALSO CAUSED IN PART BY THE ORDINARY, ACTIVE OR PASSIVE, JOINT, CONCURRENT OR COMPARATIVE NEGLIGENCE OF AN OWNER PARTY;

(B) WHETHER LIABILITY WITHOUT FAULT OR STRICT LIABILITY IS IMPOSED UPON OR ALLEGED AGAINST THE OWNER PARTY; AND

(C) THE SCOPE OF ANY PERSON'S INSURANCE AND IS INDEPENDENT OF INSURANCE;

.3 BUT WILL NOT BE ENFORCED TO THE FOLLOWING EXTENT ("**EXCLUDED MATTERS**"):

(A) OF OWNER'S BREACH OF THIS CONTRACT; OR

(B) A CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED IN WHOLE OR IN PART BY THE MISCONDUCT OR NEGLIGENCE OF AN OWNER PARTY.

IF LOSSES, DAMAGES, LIABILITIES AND EXPENSES ARISE OUT OF THE CONCURRENT NEGLIGENCE OF BOTH OWNER AND CONTRACTOR OR THE RESPECTIVE PARTIES FOR WHOM EACH IS RESPONSIBLE, CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER PARTIES ONLY TO THE EXTENT OF CONTRACTOR'S OWN NEGLIGENCE OR THOSE FOR WHICH IT IS RESPONSIBLE HEREUNDER OR UNDER APPLICABLE LAW; PROVIDED, HOWEVER, CONTRACTOR SHALL PROVIDE OWNER AND/OR THE OWNER PARTIES WITH A COMPLETE DEFENSE OF SUCH CONCURRENT NEGLIGENCE CLAIM UNTIL THE CLAIM IS SETTLED OR A FINAL JUDGMENT IS ENTERED ON SUCH CLAIM, AT WHICH TIME OWNER AND/OR ITS INSURANCE CARRIER(S) SHALL REIMBURSE CONTRACTOR AND/OR ITS INSURANCE CARRIER(S) FOR DEFENSE COSTS PROPERLY ALLOCATED TO OWNER AND/OR THE OWNER PARTIES. CONTRACTOR'S INDEMNITY HEREIN IS EXPRESSLY INTENDED TO CONSTITUTE A WAIVER OF ANY IMMUNITY IT MAY HAVE UNDER THE LAW TO THE EXTENT NECESSARY TO PROVIDE OWNER WITH A COMPLETE INDEMNITY FOR THE NEGLIGENCE OF CONTRACTOR OR CONTRACTOR'S EMPLOYEES, TO THE EXTENT OF THEIR NEGLIGENCE.

NEW: **§ 3.18.2 Not Limited by Workers' Compensation, Employee Liability Insurance or Other Benefit Acts.** In claims against any person or entity indemnified under this Section 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 Section 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' compensation acts, disability benefit acts or other employee benefit acts.

NEW: **§ 3.18.3 Legal Proceedings Costs Covered; Survival.** Expenses recoverable by the Owner Parties as part of the Contractor's indemnity obligations under this Section 3.18 shall include, without limitation, reasonable attorney's fees and any other costs incurred by such Owner Parties in a legal proceeding brought against the Contractor to enforce this Section 3.18.3. The provisions contained herein shall survive the expiration or earlier termination of this Agreement, the final completion of the Work, and any other services to be provided pursuant to the Contract Documents.

NEW: **§ 3.18.4 Defense of Owner.** The Contractor shall promptly advise Owner in writing of any action, administrative or legal proceeding or investigation as to which this indemnification may apply, and Contractor, at Contractor's expense, shall assume on behalf of the Owner Parties and conduct with due diligence and in good faith the defense thereof with counsel satisfactory to Owner; provided, however, that Owner and the other Owner Parties shall each have the right, at their option, to be represented therein by legal counsel of their own selection and at their own expense. In the event of failure by the Contractor to fully perform in accordance with this Indemnification section, the Owner Parties, at their option, and without relieving Contractor of its obligations hereunder, may so perform, but all costs and expenses so incurred by the Owner Parties in that event shall be reimbursed by Contractor to such Owner Parties, together with interest on the same from the date any such expense was paid by such Owner Parties until reimbursed by Contractor, at the rate of interest provided to be paid an judgments under the laws of the State of [Texas].

NEW: **§ 3.18.5 CONTRACTOR INDEMNIFICATION OF CERTAIN THIRD PARTIES.** CONTRACTOR AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE THIRD PARTIES FROM AND AGAINST ANY CLAIMS, DAMAGES OR EXPENSES ATTRIBUTABLE TO BODILY INJURY, DEATH OR DAMAGE TO TANGIBLE PROPERTY TO THE EXTENT SUCH CLAIMS, DAMAGES OR EXPENSES WERE CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF CONTRACTOR OR ITS SUBCONTRACTORS OF ANY TIER, INCLUDING BUT NOT LIMITED TO IN THE OPERATION OF A TOWER CRANE, IN CONNECTION WITH THE PROJECT. CONTRACTOR SHALL NAME THE THIRD PARTIES AS ADDITIONAL INSUREDS ON CONTRACTOR'S COMMERCIAL GENERAL LIABILITY AND EXCESS LIABILITY INSURANCE POLICIES FOR ONGOING OPERATIONS. [597] The "**Third Parties**" means the following persons: _____ [the adjoining landowners over which the contractor's crane is to swing].

ARTICLE 9 PAYMENTS AND COMPLETION

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§ 9.3 APPLICATIONS FOR PAYMENT

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NEW: **§ 9.3.3.1 Submittals.** With each Application for Payment, and as a condition to such payment by the Owner, Contractor shall submit the following:

(1) a conditional lien waiver/release from Contractor and such first-tier Subcontractors performing Work during the period covered by the Application for Payment. Such conditional mechanic's lien waivers and releases shall cover the overall Application for Payment amount submitted by the Contractor.

(2) In additional, Contractor shall provide Owner with copies of preliminary notices and conditional lien releases received from Sub-subcontractors and material suppliers during the period covered by such Application for Payment.

(3) Signed and notarized unconditional mechanic's lien waivers and releases with respect to the full amount paid to the Contractor, or otherwise paid by the Owner on account of, with the prior Application for Payment shall be delivered by the Contractor to the Owner.

(4) Contractor shall deliver to the Owner signed and notarized unconditional mechanic's lien waivers and releases from all first-tier Subcontractors, and material suppliers for Work covered in the prior Application for Payment. Owner shall be entitled to withhold payment to Contractor on any subsequent Applications for Payment in the amount of any unconditional Subcontractor and material supplier lien waiver not provided until Contractor delivers to Owner such required unconditional mechanic's lien waivers and releases or other security legally sufficient to protect the Owner and the Project from claims by the subject Subcontractor or material supplier (such as a valid Payment Bond complying with and recorded in accordance with Subchapter I of Chapter 53 of the Texas Property Code), and the Contractor shall not have the right to stop work on account of such withheld payment.

Contractor shall execute and submit mechanic's lien waivers and releases in the form attached to the Agreement as **Exhibit D.** Subcontractor's and material suppliers shall execute and submit to Contractor mechanic's lien waivers and releases on Contractor's standard form, which form shall substantially comply with Texas law.

§ 9.10 FINAL COMPLETION AND FINAL PAYMENT

NEW: **§ 9.10.2 Submittals.** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Owner (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may shall furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees. Additionally, Contractor shall, as a condition precedent to final payment, deliver or furnish to Owner: (1) such documentation and assignments with regard to warranties as required by Section 3.5.1 and Section 5.4.4; (2) such drawings and record documents as required by Section 3.19 or as otherwise required by the Contract Documents; (3) such operations and maintenance manuals, records, instructions, and data, as required by the Contract Documents; (4) keys, access cards, and any other items for access to and security of the premises; (5) such other close-out submittals or documentation required by the Contract Documents; and (6) a duly executed Affidavit of Completion in form dictated by the Texas Property Code and ready for filing in the Official Public Records of Travis County, Texas, signifying that the Work under the Contract is complete under the applicable mechanic's lien laws.

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NEW: **§ 9.10.7 Final Payment.** Upon satisfaction of these conditions, final payment is to be made after 31 days have elapsed since final completion without Owner or Contractor having received notice of claim of a Subcontractor or other person relating to the Work of non-payment for the Work performed or labor or materials furnished by such person; provided, however, if the Contractor has provided the Owner with (a) consent of surety, if requested by Owner, and (b) security legally sufficient to hold Owner and its property harmless from such claim, the Owner shall not withhold final payment on the basis of such claim. Final payment shall not be deemed a waiver by Owner of defects in construction or performance of the Work by Contractor or of any other breach of this Contract by Contractor. If any Subcontractor or other person refuses to furnish a release or waiver of lien as of the date of final completion, Contractor shall furnish a bond satisfactory to Owner to indemnify against the lien.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

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§ 10.3 HAZARDOUS MATERIALS

§ 10.3.1 Hazardous Materials Handling. The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. If the Contractor encounters a pre-existing hazardous material or substance not addressed in the Contract Documents and 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. The term "**hazardous materials**" shall mean any flammables, explosive, radioactive materials, petroleum based materials exceeding applicable federal, state, or local regulatory limits, asbestos, toxic substances or related materials, including without limitation, substances defined as "*hazardous wastes*," "*hazardous substances*," "*hazardous materials*," "*toxic substances*" or "*solid wastes*" in the Comprehensive Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C.A. Section 9601 *et. seq.*; the Resource Conservation and Recovery Act, 42 U.S.C.A. Section 2601, *et seq.*; and any other applicable laws statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, an amendments and revisions thereto. Contractor shall obtain from manufacturers and furnish to Owner Material Safety Data Sheets (OSHA Form 20) for all materials incorporated into the Project by the Contractor.

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§ 10.3.3 OWNER'S INDEMNITY OF CONTRACTOR AND OTHERS. ~~To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and~~

~~employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from 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 Section 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), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.~~ TO THE FULLEST EXTENT PERMITTED BY LAW, THE OWNER SHALL INDEMNIFY AND HOLD HARMLESS THE CONTRACTOR, SUBCONTRACTORS, ARCHITECT, ARCHITECT'S CONSULTANTS AND AGENTS AND EMPLOYEES OF ANY OF THEM FROM AND AGAINST CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES, ARISING OUT OF OR RESULTING FROM 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 SECTION 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 DAMAGE TO OR DESTRUCTION OF TANGIBLE PROPERTY (OTHER THAN THE WORK ITSELF), EXCEPT TO THE EXTENT THAT SUCH DAMAGE, LOSS OR EXPENSE IS DUE TO THE FAULT OR NEGLIGENCE OF THE PARTY SEEKING INDEMNITY.

NEW: **Notwithstanding any provision of the Contract Documents to the contrary, Contractor's recovery from the Owner under this Section 10.3.3 and Section 10.3.6 hereof is limited to coverage available to Owner under Owner's Pollution Liability insurance, including any deductible required by such policy.** The Owner shall purchase a Pollution Liability insurance policy for this Project with project-specific limits of $2,000,000 each loss and a $2,000,000 policy aggregate. Such policy shall be written on an occurrence basis and shall include contractual liability coverage. A certificate of insurance evidencing such coverage and copy of such policy shall be provided to Contractor prior to commencement of the Construction Phase. The Owner will maintain such Pollution Liability insurance until the Work is substantially complete. The policy will be endorsed to provide Contractor with at 30 days' notice of cancellation.

§ 10.3.4 Materials Brought to Site by Contractor and Subcontractors. The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor ~~brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances~~ or a Contractor-Related Person brings to the site.

§ 10.3.5 CONTRACTOR'S INDEMNITY OF OWNER PARTIES. ~~The Contractor shall indemnify the Owner for the cost and expense~~ THE CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER PARTIES AGAINST

.1 THE CLAIM AND FOR THE LOSS THE OWNER INCURS (1) FOR REMEDIATION OF A MATERIAL OR SUBSTANCE THE CONTRACTOR OR A CONTRACTOR-RELATED PARTY BRINGS TO THE SITE, OR (2) WHERE THE CONTRACTOR FAILS TO PERFORM ITS OBLIGATIONS UNDER SECTION 10.3.1 ~~except to the extent that the cost and expenses are due to the Owner's fault or negligence~~ OR AS REQUIRED BY LAW OR REGULATION

.2 REGARDLESS OF

(A) WHETHER LIABILITY WITHOUT FAULT OR STRICT LIABILITY IS IMPOSED UPON OR ALLEGED UPON CONTRACTOR OR AGAINST THE OWNER PARTY, AND

(B) THE SCOPE OF ANY PERSON'S INSURANCE AND IS INDEPENDENT OF INSURANCE;

.3 BUT WILL NOT BE ENFORCED TO THE FOLLOWING EXTENT ("**EXCLUDED MATTERS**"):

(A) OF OWNER'S BREACH OF THIS CONTRACT; OR

(B) A LOSS IS CAUSED IN WHOLE OR IN PART BY THE WILLFUL MISCONDUCT OR NEGLIGENCE OF AN OWNER PARTY.

NEW: NOTWITHSTANDING THE FOREGOING LIMITATIONS ON THE INDEMNIFICATION, THE OBLIGATIONS OF THE CONTRACTOR UNDER THIS INDEMNIFICATION WITH REGARD TO THOSE CLAIMS OR LOSSES ASSERTED AGAINST OR INCURRED BY AN OWNER PARTY DUE TO OR ARISING OUT OF (A) ALLEGED FAILURE BY THAT INDEMNIFIED PARTY TO SUPERVISE, MONITOR, OR CONTROL CONTRACTOR'S OR ANY SUBCONTRACTOR'S ACTIVITIES ON OR ABOUT THE SITE OR

OTHERWISE IN RESPECT TO PERFORMANCE OF THE WORK, OR (B) ALLEGED FAILURE BY THAT OWNER PARTY TO ENFORCE THE CONTRACTOR'S OBLIGATIONS UNDER THE CONTRACT DOCUMENTS SHALL NOT BE REDUCED BY THE COMPARATIVE NEGLIGENCE OF THE OWNER PARTY ATTRIBUTABLE TO OR RESULTING FROM SUCH OWNER'S ALLEGED FAILURE TO SUPERVISE, MONITOR OR CONTROL THE CONTRACTOR OR SUBCONTRACTOR OR ALLEGED FAILURE TO ENFORCE CONTRACTOR'S OBLIGATIONS UNDER THE CONTRACT DOCUMENTS.

§ 10.3.6 OWNER'S INDEMNITY OF CONTRACTOR IF SOLELY DUE TO PERFORMANCE OF THE WORK. SUBJECT TO SECTION 10.3.3 AND SECTION 10.3.4, IF, WITHOUT NEGLIGENCE ON THE PART OF THE CONTRACTOR, THE CONTRACTOR IS HELD LIABLE BY A GOVERNMENTAL AGENCY FOR THE COST OF REMEDIATION OF A HAZARDOUS MATERIAL OR SUBSTANCE SOLELY BY REASON OF PERFORMING THE WORK AS REQUIRED BY THE CONTRACT DOCUMENTS, THE OWNER SHALL INDEMNIFY THE CONTRACTOR FOR ALL COST AND EXPENSE THEREBY INCURRED.

***NEW:* § 10.3.7 Contractor's Compliance with Environmental Laws and Contract Documents.** Contractor agrees that it shall not transport to, use, generate, dispose of, or install at the Project site any hazardous materials or substances, except in accordance with applicable environmental laws. Further, in performing the Work, Contractor shall not cause any release of hazardous materials into, or contamination of, the environment, including the soil, the atmosphere, any water course or ground water unless required by the Contract Documents.

ARTICLE 11 INSURANCE AND BONDS

***NEW:* § 11.0 INSURANCE SPECIFICATIONS.** Attached hereto as **Exhibit A** to Agreement are specifications for insurance and bonds to be obtained and maintained by the party identified in the Exhibit. The specifications are in addition to the requirements set out in this Article 11. In the event of any conflict between the specifications in the Exhibit and the requirements set out in the below sections of Article 11, the specifications in **Exhibit A** to the Agreement control and amend and supersede the conflicting requirements set out in the below sections of Article 11. Commercial General Liability, Worker's Compensation, Automobile Liability and Excess/Umbrella insurance will be provided by or on behalf of all 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 herein defined), as required by this Agreement. Contractor will make such certificates and evidence of insurance available to Owner Parties upon request. 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 a party to demand full compliance by the other party with respect to the minimum coverages outlined in Exhibit A will not constitute a waiver with respect to the other party's obligation to maintain such coverages. Contractor's or its Subcontractors' failure to obtain and maintain the required insurance will constitute a material breach of, and default under, this Agreement. If Contractor or any of its Subcontractors fail to remedy such breach within 5 days after notice from Owner, Owner may, in addition to any other remedy available to it, at the Owner's option, purchase such insurance, at the Contractor's expense. The Contractor will indemnify the Owner, its officers and employees against any Claims arising from the Contractor's failure to purchase and/or maintain the insurance coverages required by this Agreement.

§ 11.1 CONTRACTOR'S LIABILITY INSURANCE

§ 11.1.1 Insurance for Certain Types of Claims. 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 [598] such insurance as ~~will protect the Contractor~~ expressly required by the insurance requirements in the Agreement and as will protect the Contractor and the Owner Parties from claims set forth below which may arise out of or result from the Contractor's ongoing operations [599] and completed operations [600] under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor of any tier 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 that are applicable to the Work to be performed; [601]

.2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees; [602]

.3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees; [603]

.4 Claims for damages insured by usual personal injury liability coverage; [604]

.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; [605]

.7 Claims for bodily injury or property damage arising out of completed operations; [606] and

.8 Claims involving contractual liability insurance applicable to the Contractor's obligations under Section 3.18. [607]

§ 11.1.2 Coverage Limits; Coverage Period; Occurrence Basis. The insurance required by Section 11.1.1 and the Agreement 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 the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's completed operations coverage,[608] until the expiration of **10 years** after final completion of the construction of the Improvements ~~the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents~~. Notwithstanding the foregoing, such coverage required hereunder shall not be written on a claims-made basis without the advance express written consent of Owner, except for the professional liability and pollution liability insurance which may be written on a claims-made basis.[609]

§ 11.1.3 Certificates of Insurance. Certificates of insurance [610] acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled ~~or allowed to expire~~ by the insurer until at least 30 days' prior written notice has been given to the Owner. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. 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. See attached insurance specifications requirement that the General Aggregate is to be dedicated to this Project.[611]

§ 11.1.4 Additional Insured Protections. The Contractor shall cause the commercial liability, auto and umbrella liability coverage [612] required by the Contract Documents to include (1) the **Owner Parties** (as defined in the Contract Documents), ~~the Architect and the Architect's consultants~~ as additional insureds [613] for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner Parties as ~~an~~ additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions ~~during~~ arising as to the Contractor's completed operations. [614] All such liability policies carried and maintained by Contractor must be endorsed to be primary and noncontributory [615] to any liability insurance policies carried by the additional insureds with respect to Contractor's operations hereunder. Waivers of subrogation shall be provided in favor of the Owner Parties on general, auto, workers' compensation/employers, umbrella and all other liability policies carried and maintained by Contractor where allowed by law. [616]

NEW: **§ 11.1.5 Owner Force-Placed Insurance.** If the Contractor fails to purchase and maintain, or require to be purchased and maintained, any insurance required under this Article 11 or the insurance requirements in the Agreement, Owner may, but shall not be obligated to, upon 5 days' written notice to the Contractor, purchase such insurance on behalf of the Contractor and shall be entitled to be reimbursed by the Contractor upon demand.

NEW: **§ 11.1.6 Renewal or Replacement Policies.** When any required insurance, due to the attainment of a normal expiration date or renewal date shall expire, the Contractor shall supply the Owner with certificates of insurance and amendatory riders or endorsements that clearly evidence the continuation of all coverage in the same manner, limits of protection, and scope of coverage as was provided by the previous policy. In the event any renewal or replacement policy, for whatever reason obtained or required, is written by a carrier other than that with whom the coverage was previously placed, or the subsequent policy differs in any way from the previous policy, the Contractor shall also furnish the Owner with a certified copy of the renewal or replacement policy unless the Owner provides the Contractor with prior written consent to submit only a certificate of insurance for any such policy. All renewal and replacement policies shall be in form and substance satisfactory to the Owner and written by carriers acceptable to the Owner.

§ 11.2 OWNER'S LIABILITY INSURANCE

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

§ 11.3 PROPERTY INSURANCE

§ 11.3.1 Builder's Risk Insurance. ~~Unless otherwise provided, the Owner~~ Contractor 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 [617] "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, including the value of the existing structure on a replacement cost basis without optional deductibles, except as may be approved by Owner. Such property 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 Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

§ 11.3.1.1 Scope of Coverage. 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, increased cost of construction and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss. Such property insurance shall not cover any tools, apparatus, machinery, scaffolding, hoists, forms, staging, shoring and similar items commonly referred to as construction equipment, which may be on the site and the capital value of which is not included in the Work. The Contractor shall make its own arrangements for any insurance it may require on such construction equipment. Any such policy obtained by the Contractor under this paragraph shall include a waiver of subrogation in accordance with the requirements of Section 11.3.7.

§ 11.3.1.2 Contractor Force-Placed Insurance. [Intentionally deleted.] ~~If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.~~

§ 11.3.1.3 Deductibles. If the property insurance requires deductibles, the ~~Owner~~ Contractor shall pay the deductible. ~~Owner shall pay costs not covered because of such deductibles.~~

§ 11.3.1.4 Work Off-Site; In Transit. This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

§ 11.3.1.5 Partial Occupancy. Partial occupancy [618] or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall ~~take reasonable steps to~~ obtain consent of the insurance company or companies ~~and shall, without mutual written consent, take no action with respect to~~ for partial occupancy in accordance with Section 9.9 as a condition of placing the builder's risk policy with the insurer ~~or use that would cause cancellation, lapse or reduction of insurance~~.

§ 11.3.2 BOILER AND MACHINERY INSURANCE [619]

~~The Owner~~ Contractor shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

§ 11.3.3 LOSS OF USE INSURANCE [620]

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards, however caused, except as set forth in Section 15.1.6 hereof.

§ 11.3.4 Addition of Covered Risks. If the ~~Contractor~~ Owner requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the ~~Owner~~ Contractor shall, if possible, include such insurance, and the cost thereof shall be charged to the ~~Contractor~~ Owner by appropriate Change Order.

§ 11.3.5 Post-Completion Coverage; Waiver of Subrogation. ~~If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or~~ If, after final payment, Owner provides property insurance for the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

§ 11.3.6 Copy of Policy, Endorsements. Before an exposure to loss may occur, the ~~Owner~~ Contractor shall file with the ~~Contractor~~ Owner a copy of each policy that includes coverages required by this Section 11.3. 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~~ Owner.

§ 11.3.7 ~~WAIVERS OF SUBROGATION~~ WAIVERS OF RECOVERY AND SUBROGATION [621]

THE OWNER AND CONTRACTOR (THE "**RELEASING PARTY**") WAIVE ALL RIGHTS AGAINST THE FOLLOWING PERSONS (THE "**RELEASED PERSONS**"): (1) EACH OTHER AND ANY OF THEIR SUBCONTRACTORS, SUB-SUBCONTRACTORS, AGENTS AND OFFICERS, DIRECTORS AND EMPLOYEES, EACH OF THE OTHER, AND (2) THE ~~ARCHITECT, ARCHITECT'S CONSULTANTS~~ SEPARATE CONTRACTORS DESCRIBED IN ARTICLE 6, IF ANY, AND ANY OF THEIR SUBCONTRACTORS, SUB-SUBCONTRACTORS, AGENTS AND EMPLOYEES, FOR ~~DAMAGES CAUSED BY FIRE OR OTHER CAUSES OF LOSS~~ LOSSES AND CLAIMS FOR DAMAGE TO THE WORK UNDER CONSTRUCTION, DAMAGE TO THE COMPLETED WORK, AND DAMAGE TO OR LOSS OF FIXTURES OR MATERIALS, EQUIPMENT OR OTHER PERSONAL PROPERTY TO THE EXTENT ~~COVERED~~ PAID BY PROPERTY INSURANCE OBTAINED PURSUANT TO THIS SECTION 11.3 OR OTHER PROPERTY INSURANCE APPLICABLE TO THE WORK, EXCEPT SUCH RIGHTS AS THEY HAVE TO PROCEEDS OF SUCH INSURANCE HELD BY THE OWNER ~~AS FIDUCIARY~~ OR CONTRACTOR IN GOOD FAITH ~~AS A FIDUCIARY~~. IN THE EVENT OF PROPERTY DAMAGE POTENTIALLY COVERED BY A PARTY'S PROPERTY INSURANCE POLICY, SUCH PARTY SHALL SUBMIT A CLAIM WITH ITS PROPERTY INSURANCE CARRIER AND USE COMMERCIALLY REASONABLE EFFORTS TO SECURE PAYMENT FROM SUCH CARRIER BEFORE PURSUING ANY CLAIM AGAINST THE OTHER PARTY. SUBJECT TO SECTION 11.3.1.3, COSTS NOT COVERED BECAUSE OF DEDUCTIBLES OR SELF-INSURED RETENTIONS SHALL BE "PAID BY PROPERTY INSURANCE" FOR PURPOSES OF THIS SECTION 11.3.7. 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 THE RELEASED PERSONS ~~OTHER PARTIES~~ ENUMERATED HEREIN. THE POLICIES SHALL PROVIDE SUCH WAIVERS OF SUBROGATION BY ENDORSEMENT OR OTHERWISE. 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. **THE RELEASE IN THIS SECTION WILL APPLY EVEN IF THE LOSS IS CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PERSON.** THE RELEASE IN THIS SECTION SURVIVES COMPLETION OF THE WORK OR TERMINATION OR EXPIRATION OF THIS AGREEMENT. IN NO EVENT SHALL THIS SECTION 11.3.7 OR SECTION 11.3.5 BE INTERPRETED TO WAIVE ANY CLAIM OWNER MAY HAVE AGAINST CONTRACTOR FOR "LOSS OF USE" DAMAGES PURSUANT TO SECTION 15.1.6 HEREOF.

§ 11.3.8 Loss Adjustment. A loss insured under the property insurance shall be adjusted by the Contractor ~~Owner~~ as fiduciary and made payable to the Contractor ~~Owner~~ as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.3.10. The Contractor shall pay Subcontractors and Owner their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner. ~~Contractor shall bear and pay the portion of the loss falling within the deductible of the property insurance.~~

§ 11.3.9 Replacement of Damaged Property. If required in writing by a party in interest, the Contractor ~~Owner~~ as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Contractor's ~~Owner's~~ duties. ~~The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or as determined in accordance with the method of binding dispute resolution selected in the Agreement between the Owner and Contractor.~~ The cost of required bonds shall be charged against proceeds received as fiduciary. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

§ 11.3.10 Objection to Contractor Adjusting Loss. The Contractor ~~Owner~~ as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Contractor's ~~Owner's~~ exercise of this power; if such objection is made, the dispute shall be resolved in the manner selected by the Owner and Contractor as the method of binding dispute resolution in the Agreement. ~~If the Owner and Contractor have selected arbitration as the method of binding dispute resolution, the Owner as fiduciary shall make settlement with insurers or, in the cases of a dispute over distribution of insurance proceeds, in accordance with the directions of the arbitrators.~~

§ 11.4 PERFORMANCE BOND AND PAYMENT BOND

§ 11.4.1 Required Bonds. The Owner ~~shall have the right to require~~ requires the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

NEW: The payment bond shall be in the statutorily required amount and form and issued by an issuer acceptable to Owner. The payment bond shall not be on an AIA bond form. Any person, firm or corporation executing a performance or payment bond upon the Contractor's Work under the Agreement, shall be deemed to have consented in advance to any changes in the Work made by order of the Owner; any such changes shall in no way alter or impair the obligations of such person, firm or corporation executing such a bond. The amount of the bonds shall be written to increase with Change Orders. Contractor shall obtain and file with Owner bond increase riders for any increases in the Contract Sum as may be necessary to effectuate coverage for increases in the Contract Sum. Issuer must be at least *a Best's Key Rating Guide* A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list). The payment bond shall meet the requirements of Section 53.201 *et seq.* of the Texas Property Code.

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§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

Except as otherwise provided in this Section 15.1.6, the Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

The foregoing Sections 15.1.6.1 and 15.1.6.2 notwithstanding, no waiver contained in this Section 15.1.6 shall be interpreted against Owner to be a waiver of benefit of the bargain damages arising from Contractor's performance of

the Work, including but not limited to diminution in the value of the Project resulting from defective construction by Contractor.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents. Notwithstanding any provision of the Contract Documents to the contrary, the Owner does not waive Claims against Contractor for "loss of use" damages incurred by the Owner as a result of a construction defect provided such damages are (a) covered by and **within the limits of the insurance** required by the Contract Documents, and (b) incurred within 24 months of Substantial Completion. [622]

c. Exhibit A - Insurance Specifications to the Case Study Construction Contract

This Exhibit is attached as an Exhibit to the AIA A133 and its AIA A201 as part of the Contract Documents executed by and between Owner and Construction Manager (also referred to as the "**Contractor**"). References to sections ("**§**") below are references to sections in the A201. In the event of conflict between any of the following Insurance Specifications with any provision in the Contract Documents, these Insurance Specifications control, amend and supplement the conflicting provision.

A. Specific Requirements.

The following insurance shall be maintained by the party specified below with limits not less than those set forth below for the time periods set forth below.

No.	Specifications	Coverages, Limits & Other Requirements	
A. LIABILITY			
§ 1.	**Commercial General Liability.** Construction Manager [623] is to maintain commercial general liability insurance ("**CGL**") [624] issued on an Occurrence Basis [625] meeting at least the following specifications, but only to the extent permitted by law.		
§ 1.1	**Minimum Limits**	The limits of coverage are not to be less than the following amounts:	
		$5,000,000	Per Occurrence.
		$5,000,000	General Aggregate. [626]
		$5,000,000	Products/Completed Operations Aggregate. [627]
		$2,000,000	Personal and Advertising Injury Limit.
		The minimum limits are increased to $40,000,000 by Umbrella Policy (See **4.1** below - Liability insurance may be written on a combination of primary and excess limits to meet the total limit requirement). Construction Manager shall provide CGL and Umbrella/Excess insurance coverage for the on-site exposures of Construction Manager and all enrolled Subcontractors through a Contractor Controlled Insurance Program ("**CCIP**"). Construction Manager's CCIP is further described in its **CCIP Manual** entitled "Controlled Insurance Program Requirements & Forms for General Liability Only" (Oct. 8, 2012 ed.), which manual is hereby incorporated by reference as if fully set forth at this point. A copy of Construction Manager's CCIP Manual will be provided to the Owner.	

No.	Specifications	Coverages, Limits & Other Requirements
§ 1.2	**Deductible**	May not contain a SIR.[628] May not contain a deductible greater than $500,000, which deductible shall be borne by Construction Manager.
§ 1.3	**General Aggregate**	If the CGL insurance contains a General Aggregate Limit, it shall apply separately to this Project and job site by an aggregate limit per project endorsement on ISO form **ISO CG 25 04 05 09**, or equivalent form.[629]
§ 1.4	**Post-Completion Coverage**[630]	Construction Manager agrees to maintain Products-Completed Operations coverage with respect to "Bodily Injury" and "Property Damage" caused, in whole or in part, by Construction Manager's work at the Premises and Property for a period of 10 years after final completion of the construction of the Improvements. This insurance is to be endorsed with an **ISO CG 20 37 07 04** Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement, or equivalent form, to schedule Owner as an additional insured for the entirety of this post-completion period.
§ 1.5	**Form**	This insurance is to be issued on an **ISO CG 00 01** or a substitute providing equivalent coverage,[631] and shall insure liability arising from premises, operations, Owner's & Contractor's Protective Liability for contractor's liability arising out of the hire of subcontractors (independent contractors coverage), [632] incidental design liability arising from the contractor's construction means and methods,[633] products-completed operations, personal and advertising injury, and liability assumed under an insured contract (including tort liability of another assumed in a business contract).[634]
§ 1.6	**Insured Contracts**	Coverage shall include, but not be limited to, liability assumed by Construction Manager under the Construction Documents (including the tort liability of another assumed in a business contract).[635] The contractual liability exclusion with respect to personal injury will be deleted.
§ 1.7	**Additional Insureds**[636]	This insurance is to be endorsed with an **ISO CG 20 10 07 04**[637] (as to ongoing operations) and ISO CG 20 37 04 13 (as to completed operations) [, or equivalent forms], Additional Insured Endorsements listing the Owner Parties as additional insureds. There shall be no exclusion for the acts or omissions of the additional insured. Defense will be provided as an additional benefit and not included within the limit of liability.
§ 1.8	**Primary**	This insurance shall be endorsed with an **ISO CG 20 01 04 13** Primary and Noncontributory – Other Insurance Condition, or equivalent form, to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance held by Owner Parties shall be excess, secondary and non-contributory.[638]
§ 1.9	**Waiver of Subrogation**	This insurance is to be endorsed with an **ISO CG 29 88 10 93** Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to the Owner Parties.[639]
§ 1.10	**Deletion of Personal Injury Exclusion to Contractual Liability Coverage**	The personal injury contractual liability exclusion shall be deleted.
§ 1.11	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Owner required for cancellation.[640]

No.	Specifications	Coverages, Limits & Other Requirements	
§ 1.12	**Prohibited Endorsements**	The following exclusions/limitations (or their equivalents) are not permitted:	
		a.	**ISO CG 21 39** Contractual Liability Limitation. [641]
		b.	**ISO CG 24 26** Amendment Of Insured Contract Definition. [642]
		c.	**ISO CG 21 44** Limitation of Coverage to Designated Premises or Project. [643]
		d.	Any endorsement modifying the Employer's Liability exclusion or deleting the exception to it.
		e.	Any "Named Insured vs. Named Insured" exclusion. [644]
		f.	Any type of punitive, exemplary or multiplied damages exclusion.
		g.	Limiting the scope of coverage for liability arising from explosion, collapse, underground property damage, or damage to work.
		h.	**ISO CG 22 34** Exclusion – Construction Management Errors and Omission.
		i.	**ISO CG 22 94** or **CG 22 95** Exclusion – Damage to Work Performed by Subcontractors On Your Behalf.
		j.	**ISO CG 21 42** or **CG 21 43** Exclusion – Explosion, Collapse and Underground Property Damage Hazard.
		k.	Any Classification limitation.
		l.	Any Habitational or Residential Exclusion.
		m.	Any Subsidence exclusion.
§ 1.13	**Electronic Data Endorsement**	This insurance is to include an **ISO CG 04 37** Electronic Data Liability endorsement with coverage to the full limits of the policy.	
§ 1.14	**Certificate of Insurance** [645]	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Contractor to Owner.	
§ 2.	**Business Auto Liability.** [646] Contractor is to maintain a Business Auto Policy issued on an Occurrence Basis meeting at least the following specifications.		

No.	Specifications	Coverages, Limits & Other Requirements	
§ 2.1	**Minimum Limits**	Limits of coverage are to be not less than $1,000,000 per Accident and increased to $25,000,000 by Umbrella Policy.	
§ 2.2	**Form**	This insurance is to be issued on the current edition of the **ISO TE 00 01**.	
§ 2.3	**Scope**	This insurance is to cover damages because of Bodily Injury or Property Damages caused by an accident and resulting from the ownership, maintenance or use of any auto, including owned, hired and non-owned. [647]	
§ 2.4	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties issued on an ISO [Texas: **TE 20 46A**] Change in Transfer of Rights of Recovery Against Others To Us.	
§ 2.5	**Additional Insureds**	Owner and Owner's Project Manager are to be listed as additional insureds on a [Texas: **TE 99 01B**] Additional Insured – Business Auto Coverage Form.	
§ 3.	**Workers' Compensation and Employer's Liability.** Construction Manager is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.		
§ 3.1	**WC Limits**	The limits of this insurance shall be no less than the statutory limits. [648]	
§ 3.2	**EL Limits**	The limits are not to be less than $1,000,000 each Accident [649] or Disease. [650]	
§ 3.3	**Territory**	Where work is to be performed must be listed under Item 3.A. on the Information Page of the policy.	
§ 3.4	**Scope**	This insurance is to cover liability arising out of the Construction Manager's employment of workers and anyone for whom the contractor may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance is permitted.	
§ 3.5	**Leased Employees**	Where a Professional Employer Organization ("**PEO**") or "leased employees" are utilized, Construction Manager shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Owner.	
§ 3.6	**Notice**	Contain a provision for 30 days' prior written notice by insurance carrier to the Owner required for cancellation.	
§ 3.7	**Waiver of Subrogation**	Include a waiver of subrogation by insurer as to the Owner Parties and other persons as may be designated by Owner to Construction Manager.	
§ 4.	**Umbrella.** Construction Manager is to maintain liability coverage under an umbrella policy [651] issued on an Occurrence basis meeting at least the following specifications.		
§ 4.1	**Scope of Coverage**	The limits of coverage are not to be less than the following amounts:	
		$40,000,000	Per Occurrence.

No.	Specifications	Coverages, Limits & Other Requirements	
		$40,000,000	General Aggregate.
		Liability insurance may be written on a combination of primary and excess limits to meet the total limit requirement. Such insurance shall be excess over and be no less broad than all coverages described above. [652]	
§ 4.2	**Coverage Period**	Inception and expiration dates will be the same as the CGL insurance.	
§ 4.3	**Following Form**	Coverage must "drop down" for exhausted aggregate limits under the liability coverages referenced above; and must contain "follow form" statement.	
§ 4.4	**Limits Allocated to Project**	Aggregate limit of insurance per project endorsement.	
§ 4.5	**Waiver of Subrogation**	Include a waiver of subrogation by insurer as to the Owner Parties and other persons as may be designated by Owner to Construction Manager.	
§ 4.6	**Additional Insureds**	Policy shall list as additional insureds and shall insure such persons as additional insureds as they are required above to be listed as additional insureds on the CGL policy.	
§ 4.7	**Notice**	Contain a provision for 30 days' prior written notice by insurance carrier to the Owner required for cancellation.	
§ 5.	**Professional Liability.** Construction Manager is to maintain professional liability insurance meeting at least the following specifications.		
§ 5.1	**Limits**	The limits of coverage are not to be less than the following amounts:	
		$2,000,000	Per Claim.
		$2,000,000	General Aggregate.
§ 5.2	**Scope of Coverage**	Such insurance shall cover all services rendered by the Contractor and its Subcontractors under the Contract Documents. This insurance shall not include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors.
		b.	Habitational or residential operations.
		c.	Mold, microbial matter, fungus or biological substance.
		d.	Punitive, exemplary or multiplied damages.
§ 5.3	**Coverage Period**	Coverage is to be retroactive to the earlier of the date of this Construction Contract or the commencement of the Construction Manager's services for the Project.	

No.	Specifications	Coverages, Limits & Other Requirements	
§ 5.4	**Post-Completion Coverage**	Policy to be maintained for **10 years** after the date of final payment under the Construction Contract.	
§ 5.5	**Claims Made**	Policies written on a claims-made basis shall have an extended reporting period of at least two years beyond termination of the Agreement. Vendor shall trigger the extended reporting period if identical coverage is not otherwise maintained with the expiring retroactive date.	
§ 6.	**<u>Pollution Liability</u>.** Construction Manager is to maintain pollution liability insurance meeting at least the following specifications.		
§ 6.1	**Limits**	The minimum limits of coverage are not to be less than the following amounts:	
		$2,000,000	Per Claim
		$2,000,000	General Aggregate
§ 6.2	**Scope of Coverage**	Policy must provide coverage for:	
		a.	The full scope of the Named Insured's operations (ongoing and completed) as described within the scope of work for this Agreement.
		b.	Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall.
		c.	Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations.
		d.	Diminution of value and Natural Resources damages.
		e.	Contractual liability.
		f.	Claims arising from owned and non-owned disposal sites utilized in the performance of this Agreement.
§ 6.3	**Prohibited Matters**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Insured vs. insured actions. However exclusion for claims made between insured within the same economic family are acceptable.
		b.	Impaired property that has not been physically injured.
		c.	Materials supplied or handled by the Named Insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the Insured shall be reviewed by the Owner for approval.
		d.	Property damage to the Work performed by the Construction Manager.

No.	Specifications	Coverages, Limits & Other Requirements	
		e.	Faulty workmanship as it relates to clean up costs.
		f.	Punitive, exemplary or multiplied damages.
		g.	Work performed by Subcontractors.
§ 6.4	**Waiver of Subrogation**	Include a waiver of subrogation by insurer as to the Owner Parties and other persons as may be designated by Owner to Construction Manager.	
§ 6.5	**Additional Insureds**	Owner Parties shall be listed as additional insureds and be primary and noncontributory to all coverage available to the additional insureds. There shall be no separate limitation for the time period of this additional insured status within the additional insured endorsement.	
§ 6.6	**Notice**	This insurance is to be endorsed to give Owner at least 30 days' advance notice of cancellation.	
§ 6.7	**Claims made**	If coverage is provided on a claims-made basis, coverage will at least be retroactive to the earlier of the date of this Agreement or the commencement of Construction Manager's services.	
§ 6.8	**Reporting**	The policy will offer an extended discovery or extended reporting clause of at least three years.	
§ 6.9	**Completed Operations**	Completed operations coverage shall be maintained through the purchase of renewal policies to protect the insured and the additional insureds for at least two years after the Owner accepts the Project or this Agreement is terminated. The purchase of an extended discovery period or an extended reporting period on a claims made policy or the purchase of occurrence based Contractors Environmental Insurance will not be sufficient to meet the terms of this provision.	
§ 7.	**Subcontractor's Insurance.** Construction Manager will provide enrolled Subcontractors' on-site CGL coverage through the Construction Manager's CCIP. Enrolled and non-enrolled Subcontractors shall be required to provide certain other coverages as outlined in the Construction Manager's CCIP.		
§ 7.1	**Coverage**	Construction Manager shall cause each Subcontractor employed by it to purchase and maintain insurance of the type in Construction Manager's CCIP Manual.	
§ 7.2	**Waiver of Subrogation**	Each Subcontractor's insurance shall contain a waiver of subrogation by its insurer as to the Construction Manager, Construction Manager's other Subcontractors of every tier, the Owner Parties, Owner's consultants, the Architect, the Architect's consultants, their officers, directors and employees, and other persons as may be designated by Owner.	
§ 7.3	**Evidence of Insurance**	Construction Manager shall provide Owner certificates of insurance as to each first tier Subcontractor performing Work prior to the Subcontractor's entry on the Project.	
B. PROPERTY			
§ 1.	**Builder's Risk Insurance.** Construction Manager is to maintain builder's risk insurance [653] meeting at least the following specifications.		

No.	Specifications	Coverages, Limits & Other Requirements	
§ 1.1	**Amount**	Limits of coverage is to be the initial Contract Sum, plus an amount to be acceptable to Owner, to increase by amount of subsequent modification of Contract Sum. Coverage shall be provided in amount equal at all times to the full replacement value [654] and costs of debris removal for any single occurrence. Coverage is to include Construction Manager's overhead and profit.	
§ 1.2	**Covered Property**	The following property is to be insured: [655]	
		a.	All structure(s) under construction, including the existing structure itself, retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, pilings, underground pipes and wiring, excavations, grading, backfilling or filling.
		b.	All temporary structures (*e.g.*, fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.
		c.	All property including materials and supplies on site for installation.
		d.	All property including materials and supplies at other locations but intended for use at the site.
		e.	All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.
		f.	Other Work at the site.
		g.	Other property for which an insured is liable regarding the project.
		h.	Sod, trees, shrubs and plants.
§ 1.3	**Deductibles**	Deductibles shall not exceed the following:	
		Coverage	Maximum Deductible
		All risk of direct damage per Occurrence	$ 10,000
		Flood per Occurrence	$ 25,000
		Earthquake and earthquake sprinkler leakage per Occurrence	$ 25,000
		Water damage	$100,000
		Named windstorm	$ 25,000
§ 1.4	**Insureds**	Insureds shall include: [656]	
		a.	Owner, Construction Manager and all Loss Payees and Mortgagees as Named Insureds.

No.	Specifications	Coverages, Limits & Other Requirements	
		b.	Subcontractors and suppliers of all tiers. [657]
§ 1.5	**Form**	Causes of Loss – Special Form. [658] Coverage on this insurance is to be written to cover "**all risks**" [659] of physical loss except those specifically excluded in the policy, and all exclusions must be pre-approved by Owner and Construction Manager and coverage shall be at least as broad as an unmodified ISO Causes of Loss – Special Form, and shall insure at least against the perils of fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, theft, vandalism, malicious mischief, and collapse and such additional perils and coverages as indicated below with each of the perils added as a cause of loss, if not otherwise listed in the policy as a cause of loss.	
		a.	Completed Value Basis. [660] This insurance is to be written on a Completed-Value, Non-Reporting form basis. [661]
		b.	Insureds Other Insurance Excess and Noncontributing. Builder's Risk shall be primary to any other insurance coverage available to the named insured parties, with that other insurance being excess.
		c.	Prohibited. No protective safeguard warranty is permitted. [662]
		d.	Required Endorsements as to Coverage & Limits. To include secondary and non-contributing.
		Coverage	Minimum Sublimit [663]
		Additional expenses due to delay in completion of project and contract penalties	25% of the loss subject to a maximum limit of $5,000,000.
		Agreed Value [664]	Included without sublimit.
		Business income/rental value	$7,113,570.
		Collapse [665]	Included without sublimit.
		Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse.	Included without sublimit.
		Debris removal including demolition as may be made legally necessary by operation of any law, ordinance, or regulation. [666]	25% of the loss subject to a maximum limit of $10,000,000.
		Expediting/extra expense.	25% of the loss subject to a maximum limit of $5,000,000.

No.	Specifications	Coverages, Limits & Other Requirements	
		Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse and ensuing loss.	Included without sublimit.
		Flood [667]	Included without sublimit.
		Freezing	Included without sublimit.
		Mechanical breakdown, including [hot &] cold testing.	Included without sublimit.
		Occupancy pre-completion clause [668]	Included.

Ordinance or law [669]	$5,000,000.
Pollutant cleanup and removal	$500,000.
Property in transit	$___.
Preservation of property	$250,000.
Property off premises	$___.
Replacement cost [670]	Included.
Soft costs [671]	As declared. Including in Business Income - Rental Value Limit.
Terrorism [672]	Included without sublimit.
Testing	No sublimit.
Theft	Included without sublimit.

§ 1.6	**Waiver of Subrogation** [673]	To the extent of insurance proceeds received, a waiver of subrogation by insurer as to Construction Manager, Construction Manager's Subcontractors of all tiers, Owner Parties, Owner's subcontractors of any tier, Owner's consultants (including the Project Representative, their officers, directors and employees, and other persons as may be designated by Owner.
§ 1.7	**Notices**	30 days prior written notice to each insured of cancellation.

§ 1.8	**Term and Termination** [674]	The termination of coverage provision shall be endorsed to permit occupancy of the covered property being constructed. This insurance shall be maintained in effect, unless otherwise provided for the Contract Documents, until the earliest of the following dates:	
		a.	The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;
		b.	T he date of final payment, as provided for in the Contract Documents;
		c.	The date on which the insurable interests in the Covered Property of all insureds other than Construction Manager have ceased.
§ 1.9	**Tenant Finish-Out**	Builder's risk policy shall specifically permit partial occupancy by tenants in connection with construction of finish-out of leased premises.	
§ 2.	**Boiler and Machinery Insurance.**[675] Construction Manager is to maintain is to maintain boiler and machinery insurance during installation and until final acceptance by Owner. This risk may be included in the builder's risk policy.		
§ 3.	**Owner's Pollution Legal Liability.** Owner is to maintain pollution legal liability insurance issued on an Occurrence Basis meeting at least the following specifications.		
§ 3.1	**Minimum Limits**	The minimum limits of coverage are not to be less than	
		$2,000,000	Each Claim
		$2,000,000	Annual Aggregate
§ 3.2	**Scope**	This insurance is to cover any environmental loss to the Property.	
§ 3.3	**Defense Costs**	Coverage of defense costs is to be provided outside of the limit of liability coverage.	
§ 3.4	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal [or material change].	
§ 3.5	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Contractor.	

C. BONDS

§ 1	**General**	Construction Manager is required to arrange and furnish separate performance and payment bonds, each for the full amount of the Contract Sum guaranteeing the faithful performance of all of the provision of the Agreement as well as payment to all persons for labor and material used in the performance of the Agreement. The bonds shall be executed by a surety company acceptable to Owner, on a form acceptable to Owner, and shall become a part of the Agreement. Owner may withhold payments on account until such time as said bonds have been furnished and accepted. No change, alteration or modification in the terms and conditions of the Agreement, or in the terms or manner of payment shall in any way exonerate or release, in whole or in part, any surety on any bond furnished on behalf of Construction Manager. The cost of the bonds is included in the Contract Sum.

§ 2	**Payment Bond**	The Payment Bond is to conform to the following requirements.
§ 2.1	**Form**	The Payment Bond is to be in statutory form. The AIA form is not acceptable.
§ 2.2	**Coverage**	The Payment Bond is to include coverage for consequential and delay damages due to Construction Manager's default.
§ 2.3	**Rating**	The issuer must be at least *a* Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas.
§ 2.4	**Term**	The Payment Bond is to be in effect for the period required by the Texas Property Code.
§ 2.5	**Multiple Obligees**	The Payment Bond is to name as additional obligees such persons as designated by the OwneR, including its lender.
§ 2.6	**Recorded**	The Payment Bond and all required attachments (issuer's agent's power of attorney and memorandum of the Agreement) is to be recorded in the County's Official Public Records.
§ 3.	**Performance Bond**	The Performance Bond is to conform to the following requirements.
§ 3.1	**Form**	The Performance Bond is to be on the AIA form or equivalent. The Performance Bond is to cover Construction Manager's express warranty and obligations to correct defective Work arising under the Agreement.
§ 3.2	**Rating**	The issuer must be at least a Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas.
§ 3.3	**Extended Coverages**	The Performance Bond is to cover risk of contract penalties and delay damages.
§ 3.4	**Term**	The Performance Bond is to be in effect for a period of not less than one year following Final Completion.
§ 3.5	**Multiple Obligees**	The Performance Bond is to name as additional obligees such persons as designated by Owner including its lender.
C. SUBGUARD POLICY		
§ 1	**Policy**	Construction Manager is to obtain and maintain Subguard insurance for the duration of the Project to protect the Project against damages covered by such insurance arising out of default by subcontractor. Owner will be added as an additional insured. The terms and conditions of the Subguard Policy are be subject to Owner's review and approval prior to commencement of the Work, not to be unreasonably withheld. Construction Manager shall pay to Owner ___ % of all monies refunded or rebated to Construction Manager by the Subguard insurer.
§ 2	**Copy**	Construction Manager is to provide Owner a copy of the Subguard Policy and with all notices sent by the issuer to the Construction Manager and all notices sent by Construction Manager to the Subcontractors as to defaults insured by Subguard.

B. <u>General Insurance Requirements</u>.

1. <u>Definitions</u>. For purposes of the Contract Documents:

a. Owner Parties. "**Owner Parties**" means (a) _____ ("**Owner**"), (b) _____, Owner's Project Manager, (c) _____, the licensor under the Crane Swing License and Site Staging License, (d) any lender whose loan is secured by a lien against the Property, (e) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, and (f) any directors, officers, employees, or agents of such persons or entities.

b. Construction Manager. "**Construction Manager**" means (a) _____ and (b) subcontractors of any tier.

c. ISO. "**ISO**" means Insurance Services Office. [676]

2. Policies.

a. Insurer Qualifications. [677] All insurance required to be maintained by Construction Manager must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in the State in which the Improvements are located. [678]

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

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

d. Occupancy. Commencement of occupancy without provision of the required certificate of insurance and/or required endorsements, or without compliance with any other provision of the Contract Documents, shall not constitute a waiver by any Owner Party of any rights. The Owner shall have the right, but not the obligation, of prohibiting the Construction Manager or any subtenant from occupying the Property until the certificate of insurance and/or required endorsements are received and approved by the Owner.

3. Limits, Deductibles and Retentions.

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

b. Deductible and Retention Limits. No deductible or self-insured retention shall exceed the amount specified in Paragraph A without the prior written approval of the Owner, except as otherwise specified herein. All deductibles and/or retentions shall be paid by, assumed by, for the account of, and at the Construction Manager's sole risk. The Construction Manager shall not be reimbursed for same.

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

4. Forms.

a. Approved Revisions and Substitutions. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Owner will have the right to require other equivalent forms.

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

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

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

a. Form. Liability insurance: ACORD™ Form 25 (2014/01) *Certificates of Liability Insurance* for liability coverages. Property Insurance: ACORD™ Form 28 (2014/01) *Evidence of Commercial Property Insurance* for property coverages.

b. Delivery Deadlines. Evidence to be delivered to Owner prior to entry on Property and thereafter at least [30] days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Owner's request for an updated certificate.

c. Certificate Requirements. Certificates must:

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

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

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

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

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

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

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

(8) Certificate Holder. [679] Be addressed to the Owner as the certificate holder and show Owner's correct address. A separate certificate is to be addressed and delivered to Owner's lender.

(9) Producer. [680] State the producer of the certificate with correct address and phone number listed.

(10) Authorized Representative. [681] Be executed by a duly authorized representative of the insurers.

6. Construction Manager Insurance Representations to Owner.

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

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

c. Survival. This Exhibit is an independent contract provision and shall survive the termination or expiration of the Construction Contract.

D. <u>Completed Operations Coverage</u>.

This endorsement, effective 12:01 A.M. 03/31/2012
Forms a part of Policy GL ____
Issued to (_____)
By AMERICAN HOME ASSURANCE COMPANY

COMPLETED OPERATIONS EXTENSION
CONTROLLED INSURANCE PROGRAM (MULTIPLE PROJECTS)
This Endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE:
All (_____) Projects with construction values $15,000,000 and above.

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

All terms and conditions remain unchanged.

C. Sales Documents

1. Commercial Contract – Improved Property (Modified TAR Form)

COMMERCIAL CONTRACT- IMPROVED PROPERTY[682]

(Modified TAR Form)

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1. PARTIES: Seller agrees to sell and convey to Buyer the Property described in Paragraph 2 (Property). Buyer agrees to buy the Property from Seller for the sales price stated in Paragraph 3 (Sales Price). The parties to this contract are:

"**Seller**": [*Seller of 100 East Avenue*]
Address:
Phone: Email:
Fax: Other:

"**Buyer**": [*Buyer of 100 East Avenue*] and/or its assigns as permitted in Paragraph 22E
Address:
Phone: Email:
Fax: Other:

2. PROPERTY:

A. Land: "**Property**" means that real property situated in Travis County, Texas at 100 East Avenue, Austin, Texas and that is legally described on the attached **Exhibit A** (Property Description) attached hereto (the "**Land**") and the Additional Property described in Paragraph 2B (Additional Property) "**Real Property**" means the Land, Improvements and Appurtenances.

B. Additional Property: Seller will sell and convey the Property together with the following (the "**Additional Property**"):

(1) Improvements: ~~all~~ Seller's interest in buildings, improvements, and fixtures on the Land, subject to Tenant's interest under the Lease identified in Paragraph 8 (Leases) ("**Improvements**");

(2) Appurtenances: Seller's interest in all rights, privileges, and appurtenances pertaining to the Property, including Seller's right, title, and interest in any minerals, utilities, adjacent streets, alleys, strips, gores, and rights-of-way ("**Appurtenances**");

(3) Lease, Rents and Security Deposits: Seller's interest in the lease identified in Paragraph 8 (Leases) (the "**Lease**") and all other leases entered into after the effective date of this contract if approved by Buyer as provided in Paragraph 8 (Leases), the rents thereunder, and the security deposits thereunder for all or part of the Property ("**Lease, Rents and Security Deposits**");

(4) Licenses and Permits: ~~Seller's interest in all licenses and permits related to the Property;~~ Seller's interest in all licenses, permits, franchises issued by any governmental authority, all governmental approvals, development and redevelopment rights, air rights and tax abatement rights, all surveys, soil information and all instruments and documents of title related to the Property to the extent freely transferable by Seller without need of any additional consents of or action by Seller or any third parties ("**Licenses and Permits**");

(5) Warranties and Guaranties: Seller's interest in all third party warranties or guaranties, to the extent freely transferable by Seller without need of any additional consents of or action by Seller or any third parties, relating to the Property or any fixtures ("**Warranties and Guaranties**");

(6) Trade Names: Seller's interest in any trade names, to the extent freely transferable by Seller without need of any additional consents of or action by Seller or any third parties, used in connection with the Property ("**Trade Names**"); and

(7) Tangible Personal Property: Seller's interest in all Seller's tangible personal property located on the Property that is used in connection with the Property's operations ("**Tangible Personal Property**") except: _____. Any personal property belonging to Seller not included in the sale must be removed by Seller prior to closing.

(Describe any exceptions, reservations, or restrictions in Paragraph 12 or an addendum.)
(If mineral rights are to be reserved an appropriate addendum should be attached.)
(If the Property is a condominium, attach Commercial Contract Condominium Addendum (TAR-1930).)

3. SALES PRICE: At or before closing, Buyer will pay the following sales price for the Property:

A. Cash: Cash portion payable by Buyer at closing ..... $_____

B. Financing: Sum of all financing described in Paragraph 4 ..... $_____

C. Sales Price: "**Sales price**" (sum of 3A and 3B) ..... $_____

4. FINANCING: Buyer will finance the portion of the sales price under Paragraph 3B as follows:

☐ A. Third Party Financing: ~~One or more third party loans in the total amount of $ _____.~~ This contract:
☒ (1) is not contingent upon Buyer obtaining third party financing.
☐ ~~(2) is contingent upon Buyer obtaining third party financing in accordance with the attached Commercial Contract Financing Addendum (TAR-1931).~~

☐ B. Assumption: ~~In accordance with the attached Commercial Contract Financing Addendum (TAR1931), Buyer will assume the existing promissory note secured by the Property, which balance at closing will be $_____.~~

☐ C. Seller Financing: ~~The delivery of a promissory note and deed of trust from Buyer to Seller under the terms of the attached Commercial Contract Financing Addendum (TAR-1931) in the amount of $_____.~~

5. EARNEST MONEY:

A. Initial Earnest Money Deposit: ~~Not later than 3 days after the effective date~~ Concurrently with the execution hereof, Buyer must deposit $ 50,000.00 as earnest money (the "**Initial Earnest Money Deposit**") with _____ Title Company ("**title company**") at , _____ (address) _____ (closer), whose wire transfer instructions are being provided to Buyer. If Buyer fails to timely deposit the earnest money, Seller may terminate this contract ~~or exercise any of Seller's other remedies under Paragraph 15 by providing written notice to Buyer~~ before Buyer deposits the earnest money, as Seller's sole and exclusive remedy.

B. Additional Earnest Money Deposit: Buyer will deposit an additional amount of $_____ with the title company ("**additional earnest money**") to be made part of the earnest money on or before:
☐ ~~(i) _____ days after Buyer's right to terminate under Paragraph 7B expires; or~~
☒ (ii) one business day after the expiration of the feasibility period, as the same may be extended, unless Buyer has terminated this contract as provided for herein, which, if and when paid, shall be nonrefundable to Buyer (except in the event of a default by Seller or as otherwise expressly stated in this contract), but shall be applied against the sales price at closing. The additional earnest money shall become part of the earnest money for all purposes hereunder.

Buyer will be in default if Buyer fails to deposit the additional earnest money required by this Paragraph 5B ~~within 3 days after Seller notifies Buyer that Buyer has not timely deposited the additional amount~~.

C. Interest Bearing Depository Account: Buyer may instruct the title company to deposit the earnest money in an interest-bearing account at a federally insured financial institution and to credit any interest to Buyer.

D. Insured Closing Services Letter: The title company is hereby directed to have the Title Underwriter issue an insured closing services letter in favor of Seller and Buyer.

6. TITLE POLICY, SURVEY, AND UCC SEARCH:

A. Title Policy:

(1) Title Policy: The title company, at ~~Seller's~~ Buyer's expense, will furnish Buyer an Owner's Policy of Title Insurance (the "**title policy**") issued by Chicago Title Insurance Company or another underwriter of the title company in the amount of the sales price ("**Title Underwriter**"), dated at or after closing, insuring Buyer against loss under the title policy, subject only to the following exceptions ("**Exceptions to Title Insurance**"):

(a) Permitted Exceptions: (1) the Lease; (2) all matters that a correct survey would show; (3) all matters shown on the Existing Survey provided by Seller to Buyer; and (4) those title exceptions permitted by this contract or as may be approved by Buyer in writing ("**Permitted Exceptions**");

(b) Promulgated Exceptions: the standard printed exceptions contained in the promulgated form of title policy ("**Promulgated Exceptions**") unless this contract provides otherwise;

(c) Restrictions: The exception relating to restrictions against the Property shall be deleted, except for such restrictions as may be included in the Permitted Exceptions;

(d) Taxes: The exception relating to standby fees and ad valorem taxes shall except only to taxes owing for the current year and subsequent assessments for prior years due to change in land usage or ownership;

(e) Survey Exception: The survey exception shall be deleted except "shortages in area" as provided below provided Buyer obtains the survey and provided the title company may list as exceptions specific boundary line conflicts, encroachments or protrusions based on its review of the survey, however, such listing does not waive Buyer's right to object thereto as provided in Paragraph 7D;

(f) Possession: If approved by the title company, there shall be no exception for rights of parties in possession or for visible or apparent roadways or easements not shown on the survey obtained by Buyer or determined by the title company pursuant to an inspection of the Property; and

(g) Lease: The Lease and any other lease permitted by Paragraph 8 (Leases).

(2) Promulgated Survey Exception: The standard printed exception as to discrepancies, conflicts, or shortages in area and boundary lines, or any encroachments or protrusions, or any overlapping improvements ("**Promulgated Survey Exception**"):

☐ (a) ~~will not be amended or deleted from the title policy.~~

☒ (b) will be amended to read "shortages in areas" at the expense of ☒ Buyer ☐ Seller, provided Buyer provides to the title company the survey.

(3) Commitment: Seller has provided to Buyer a title commitment and copies of the recorded documents listed in the title commitment as part of the Provided Information pursuant to Paragraph 7D. The title company will be requested by Seller to furnish to Buyer within 15 days after the effective date, a

commitment for title insurance (the "**commitment**") with effective date of the commitment after the effective date of this contract and will be requested to furnish legible copies of recorded documents evidencing title exceptions. Seller authorizes the title company to deliver the commitment and related documents to Buyer at Buyer's address.

B. Survey: Within 30 days after the effective date:

☒ (1) Buyer may ~~will~~ obtain a survey of the Property at Buyer's expense and deliver a copy of the survey to Seller (the "**survey**"). The survey must be made in accordance with the: (i) ALTA/ACSM Land Title Survey standards, or (ii) Texas Society of Professional Surveyors' standards for a Category 1A survey under the appropriate condition. Seller will NOT reimburse Buyer ~~0~~ *(insert amount)* ~~of~~ the cost of the survey ~~at closing, if closing occurs~~. The field notes prepared by the surveyor shall control any conflicts or inconsistencies with the legal description contained herein or in the title commitment and such field notes shall be incorporated herein by this reference upon completion and include as the Property description in the deed and the title policy. Seller will provide to Buyer and the title company a copy of the survey identified in **Exhibit F** (the "**Existing Survey**").

☐ (2) ~~Seller, at Seller's expense, will furnish Buyer a survey of the Property dated after the effective date. The survey must be made in accordance with the: (i) ALTA/ACSM Land Title Survey standards, or (ii) Texas Society of Professional Surveyors' standards for a Category 1A survey under the appropriate condition.~~

☐ (3) ~~Seller will deliver to Buyer and the title company a true and correct copy of Seller's most recent survey of the Property along with an affidavit required by the title company for approval of the existing survey. If the existing survey is not acceptable to the title company, Seller, at Seller's expense, will obtain a new or updated survey acceptable to the title company and deliver the acceptable survey to Buyer and the title company within 20 days after Seller receives notice that the existing survey is not acceptable to the title company. The closing date will be extended daily up to 20 days if necessary for Seller to deliver an acceptable survey within the time required. Buyer will reimburse Seller _____ *(insert amount)* of the cost of the new or updated survey at closing, if closing occurs.~~

C. UCC Search:

☒ (1) Within 15 days after the effective date, Seller, at Seller's expense, will furnish Buyer a Uniform Commercial Code ("**UCC**") search prepared by a reporting service and dated after the effective date ("**UCC Search**"). The search must identify documents that are on file with the Texas Secretary of State and the county where the Property is located that relate to all personal property on the Property and show, as debtor, Seller and all other owners of the personal property in the last 5 years.

☐ (2) ~~Buyer does not require Seller to furnish a UCC search.~~

D. Buyer's Objections to the Commitment, Survey, and UCC Search:

(1) Buyer's Objections: Within 10 days after the later of (a) when Buyer receives the commitment and copies of the documents evidencing the title exceptions or (b) 30 days after the effective date of the contract~~, the property information and the survey, whichever is received last any required survey, and any required UCC search~~, Buyer may object to matters disclosed therein ("**Buyer's Objections**"). ~~in the items if: (a) the matters disclosed are a restriction upon the Property or constitute a defect or encumbrance to title to the real or personal property described in Paragraph 2 other than those permitted by this contract or liens that Seller will satisfy at closing or Buyer will assume at closing; or (b) the items show that any part of the Property lies in a special flood hazard area (an "A" or "V" zone as defined by FEMA). If Paragraph 6B(1) applies, Buyer is deemed to receive the survey on the earlier of: (i) the date Buyer actually receives the survey; or (ii) the deadline specified in Paragraph 6B(1).~~

(2) Seller's Cure of Buyer's Objections: Seller may, but is not obligated to, cure Buyer's Objections on or before closing. If Seller fails to cure the objections by the business day before the expiration of the feasibility period, Buyer shall have the following options: (a) to accept a conveyance of the Property subject to the matter objected to by Buyer which Seller did not cure and without reduction in the Sales Price, or (b) to terminate this contract by providing written notice to Seller on or before the expiration of the feasibility period. If Buyer so terminates, the earnest money and any Extension Fees deposited by Buyer with the title company, less the Independent Consideration under Paragraph 7B(1), will be refunded to Buyer. Seller may give notice to Buyer that one or more of Buyer's Objections will not be cured, whereupon this contract shall terminate and the earnest money less the Independent Consideration will be refunded to Buyer, unless Buyer waives the objections, that Seller has given notice of which Seller will not cure, by notice to Seller and the title company within 10 business days after Buyer's receipt of such notice form Seller.

(3) Waiver of Buyer's Right to Object: Buyer's failure to timely object or terminate under this Paragraph 6D(2) is a waiver of Buyer's right to object thereto and all such matters are a "**Permitted Exception**", except that Buyer will not waive the requirements in Schedule C of the commitment and all items on Schedule C that relate to the Seller shall be removed or satisfied by Seller prior to closing.

7. PROPERTY CONDITION:

A. Present Condition: Buyer accepts the Property As Is (as defined in Paragraph 12D (As Is) ~~except that Seller, at Seller's expense, will complete the following before closing~~.

B. Feasibility Period: ~~Buyer may terminate this contract for any reason within _____ days after the effective date (feasibility period) by providing Seller written notice of termination. *(Check only one box.)*~~

☐ (1) ~~If Buyer terminates under this Paragraph 7B, the earnest money will be refunded to Buyer less $_____ that Seller will retain as independent consideration for Buyer's unrestricted right to terminate. Buyer has tendered the independent consideration to Seller upon payment of the amount specified in Paragraph 5A to the title company. The independent consideration is to be credited to the sales price only upon closing of the sale. If no dollar amount is stated in this Paragraph 7B(1) or if Buyer fails to deposit the earnest money, Buyer will not have the right to terminate under this Paragraph 7B.~~

☐ (2) ~~Not later than 3 days after the effective date, Buyer must pay Seller $_____ as independent consideration for Buyer's right to terminate by tendering such amount to Seller or Seller's agent. If Buyer terminates under this Paragraph 7B, the earnest money will be refunded to Buyer and Seller will retain the independent consideration. The independent consideration will be credited to the sales price only upon closing of the sale. If no dollar amount is stated in this Paragraph 7B(2) or if Buyer fails to pay the independent consideration, Buyer will not have the right to terminate under this Paragraph 7B.~~

Buyer may terminate this contract for any reason within 60 days after the effective date of this contract ("**feasibility period**") by providing Seller written notice of termination prior to the expiration of the feasibility period (as may be extended pursuant to the Extension Options).

(1) Independent Consideration; Earnest Money Becoming Non-Refundable: If Buyer terminates under this Paragraph 7B any time during the first 30 days of the feasibility period, the earnest money will be refunded to Buyer less the sum of $_____,000, which Seller shall receive as independent consideration (the "**Independent Consideration**") for Buyer's unrestricted right to terminate this contract during the feasibility period. Following the expiration of the first 30 days of the feasibility period, the sum of $___,000 of the earnest money shall become non-refundable to Buyer should Buyer elect to terminate this contract prior to the expiration of the feasibility period (except due to a Seller default or as otherwise expressly stated in this contract), and if Buyer elects to so terminate this contract following the 30th day of the feasibility period but prior to the expiration of the feasibility period, then Buyer shall receive back the earnest money less such non-refundable portion of the earnest money and less the Independent Consideration, such amounts to

be promptly delivered to Seller by the title company. Upon the expiration of the feasibility period (as the same may be extended), the entire earnest money shall be non-refundable to Buyer, but applicable to the sales price at closing (except in the event of a Seller default or as otherwise expressly stated in this contract).

(2) Feasibility Period Extension Options: Notwithstanding anything contained herein to the contrary, Buyer shall have the right to extend the feasibility period for up to two additional periods of 45 days each (each, an "**Extension Option**" and collectively, the "**Extension Options**") by, in each instance, (i) delivering to Seller and the title company written notice of Buyer's election to extend the feasibility period, prior to the expiration of the feasibility period then in effect, and (ii) depositing with title company the sum of $_____,000 for each such Extension Option (each, an "**Extension Fee**" and collectively, the "**Extension Fees**"), prior to the expiration of the feasibility period then in effect. If and when paid, the Extension Fee(s) shall be nonrefundable to Buyer (except in the event of a default by Seller or as otherwise expressly stated in this contract), but shall be applied against the sales price at closing.

C. Inspections, Studies, or Assessments:

(1) Inspections, Studies, or Assessments: During the feasibility period and thereafter to closing, Buyer, at Buyer's expense, may complete or cause to be completed any and all inspections, studies, or assessments of the Property (including all improvements and fixtures) and of the adjoining public right of way, provided, Buyer complies with the Protocols and other requirements set out in this contract.

(2) Turn On Utilities: Seller, at Seller's expense, will turn on all utilities necessary for Buyer to make inspections, studies, or assessments.

(3) Protocols: Buyer agrees that it and its agents and contractors will comply with the following protocols in conducting the inspections, studies, and assessments ("**Protocols**"):

(a) employ only trained and qualified inspectors and assessors;
(b) notify Seller, a reasonable time in advance, of when the inspectors or assessors will be on the Property, and permit a representative of Seller to be present;
(c) abide by any reasonable entry rules or requirements of Seller;
(d) not interfere with existing operations or occupants of the Property;
(e) will comply with the access provisions of the Lease and will not violate the Lease;
(f) may not contact the Tenant until the third business day following the effective date of this contract;
(g) not conduct invasive or destructive testing of the Real Property, including the following types of testing are not permitted ("**Prohibited Test**"): soil tests, ground water testing, Phase II environmental assessments;
(h) restore the Property to substantially its original condition, if altered due to inspections, studies, or assessments;
(i) a Phase I environmental site assessment ("**Phase I**") may be conducted as to the Real Property by Terracon or other environmental professional reasonably acceptable to Seller ("**Environmental Professional**"), but a Phase II environmental site assessment ("**Phase II**") is not permitted and is a Prohibited Test; and provided the Phase I is commenced by the Environmental Professional within five business days of the effective date of this contract and results in a Phase I Environmental Report delivered to Seller and Buyer within 15 business days of the effective date of this contract; and
(j) a Phase I and Phase II may be conducted as to properties adjoining the Real Property and may include soil tests and ground water testing. Seller will be, at no cost to Seller, a separate addressee and "**user**" (as defined under the ASTM E1527-13 standard) of the environmental report produced by the Environmental Professional (Buyer agrees that Seller may provide this Environmental Report to other prospective buyers of the Property).

(4) INDEMNITY: EXCEPT FOR THOSE MATTERS THAT ARISE IN WHOLE OR IN PART FROM THE NEGLIGENCE OF SELLER OR SELLER'S AGENTS, BUYER IS RESPONSIBLE FOR ANY CLAIM, LIABILITY, ENCUMBRANCE, CAUSE OF ACTION, AND EXPENSE RESULTING FROM BUYER'S INSPECTIONS, STUDIES, OR ASSESSMENTS, INCLUDING ANY PROPERTY DAMAGE OR PERSONAL INJURY TO THE EXTENT IT ARISES IN WHOLE OR IN PART FROM THE NEGLIGENCE OF BUYER, BUYER'S AGENTS OR CONTRACTORS. BUYER WILL INDEMNIFY, HOLD HARMLESS, AND DEFEND SELLER AND SELLER'S AGENTS AND THE TENANT AGAINST ANY CLAIM INVOLVING A MATTER FOR WHICH BUYER IS RESPONSIBLE UNDER THIS PARAGRAPH. NOTWITHSTANDING THE PRECEDING SENTENCE, IN NO EVENT SHALL BUYER'S INDEMNIFICATION CONTAINED THEREIN CREATE ANY LIABILITY OF BUYER TO SELLER FOR CLAIMS ARISING IN WHOLE OR IN PART FROM THE DISCOVERY OF CONDITIONS OF OR AFFECTING THE PROPERTY AND/OR IMPROVEMENTS THEREON (EXCEPT TO THE EXTENT ASSUMED AND INDEMNIFIED BY BUYER UNDER THE ENVIRONMENTAL LIABILITY ASSUMPTION, RELEASE AND INDEMNITY EXECUTED BY BUYER AT CLOSING). THIS PARAGRAPH SURVIVES TERMINATION OF THIS CONTRACT.

(5) Insurance: Prior to the entry or access to the Property by Buyer or any of Buyer's employees, agents, experts, consultants, or contractors, such parties, as applicable, shall maintain not less than $500,000 commercial general liability insurance, shall insure Seller and Tenant as an additional insured and which contains a waiver of subrogation as to claims against Seller or Tenant, or both. Prior to entry or access to the Property, Buyer is to provide Seller with a certificate of insurance from the agent for the insurer certified to Seller as Certificate Holder certifying the existence of this coverage.

(6) RELEASE: BUYER HEREBY RELEASES SELLER FROM ALL LIABILITIES, OBLIGATIONS AND CLAIMS OF ANY KIND OR NATURE ARISING OUT OF OR IN CONNECTION WITH THE ENTRY OF BUYER OR ITS AGENTS OR CONTRACTORS ONTO THE REAL PROPERTY INCLUDING WITHOUT LIMITATION ALL LIABILITIES, OBLIGATIONS AND CLAIMS ARISING OUT OF ANY NEGLIGENCE ON THE PART OF SELLER, IT BEING EXPRESSLY AGREED AND UNDERSTOOD THAT THIS PROVISION SHALL BE EFFECTIVE TO RELEASE SELLER FROM CLAIMS ARISING OUT OF SELLER'S OWN NEGLIGENCE.

(7) Environmental Reports. As additional consideration for the transaction contemplated by this contract, Buyer agrees that it will provide to Seller, immediately following the receipt of same after the effective date of this contract by Buyer, copies of any and all reports, tests or studies relative to the Property and involving, directly or indirectly, environmental laws or the presence or absence of Hazardous Materials at the Property, in East Avenue, and off the Property potentially affecting the Property ("**Environmental Reports**") and Buyer shall provide Seller within five business days of the effective date of this contract all Environmental Reports Buyer has in its possession on the effective date of this contract. Not in limitation of the foregoing, conditioned on Seller, Buyer and the Owner of 508 East Avenue executing the Environmental Information Mutual Confidentiality Agreement attached hereto as **Exhibit I** (Environmental Information Mutual Confidentiality Agreement), (a) Buyer is required hereby to deliver Environmental Reports it now or hereafter has as to 508 East Avenue and any other property as may impact the environmental condition of 100 East Avenue; (b) Seller authorizes Buyer to share with representatives of Starting From Scratch, Inc. Seller's existing Phase I report for the Property and the subsequent Phase I report when obtained by Buyer as provided herein. Buyer authorizes the Environmental Engineer to discuss its analysis with Seller. If Buyer does not deliver to Seller a fully executed original of the Environmental Information Mutual Confidentiality Agreement on or before 10 days of the effective date of this contract, Seller may terminate this contract at any time thereafter prior to delivery of the fully executed Environmental Information Mutual Confidentiality Agreement to Seller. If Seller so terminates this contract, the earnest money less the Independent Consideration shall be returned by the title company to Buyer and the Independent Consideration shall be paid to Seller.

D. Property Information:

(1) Delivery of Property Information: Within 10 days after the effective date, Seller will deliver to Buyer *(Check all that apply.)* the following information as to the Property (the "**Property Information**") after a bona fide search of Seller's reasonably available records:

☒ (a) a current rent roll of all leases affecting the Property certified by Seller as true and correct;
☒ (b) copies of all current leases pertaining to the Property, including any modifications, supplements, or amendments to the leases;
☐ (c) a current inventory of all personal property to be conveyed under this contract and copies of any leases for such personal property;
☐ (d) copies of all notes and deeds of trust against the Property that Buyer will assume or that Seller will not pay in full on or before closing;
☐ (e) copies of all current service, maintenance, and management agreements relating to the ownership and operation of the Property;
☐ (f) copies of current utility capacity letters from the Property's water and sewer service provider;
☐ (g) copies of all current warranties and guaranties relating to all or part of the Property;
☒ (h) copies of the declaration's page to Seller's fire, hazard, liability, and other insurance policies that currently relate to the Property;
☐ (i) copies of all leasing or commission agreements that currently relate to the tenants of all or part of the Property;
☐ (j) a copy of the "as-built" plans and specifications and plat of the Property (Seller does not have "as-built" plans in its possession);
☒ (k) copies of ~~all invoices~~ Seller's Quickbook reports for utilities and repairs incurred by Seller for the Property in the 24 months immediately preceding the effective date;
☒ (l) a copy of Seller's income and expense statement for the Property from January 1, 2016 to June 30, 2017;
☒ (m) copies of ~~all~~ previous environmental assessments, geotechnical reports, studies, or analyses made on or relating to the Property including existing Phase 1 ESA report;
☒ (n) real & personal property tax statements for the Property for the previous 2 calendar years;
☐ (o) Tenant reconciliation statements including, operating expenses, insurance and taxes for the Property from _____ to _____;
☒ (p) Current tax assessment; and
☒ (q) existing survey of the Property.

Attached as **Exhibit F** (List of Provided Property Information) is a listing of Property Information to be delivered to Buyer prior to the expiration of the 10 day period as determined by Seller's search of its records. Seller calls Buyer's attention to the following: (1) all or a portion of the Property is in the flood plain; (2) there are Heritage trees on the Property and on adjoining properties; and (3) the City of Austin and the State of Texas impose height restrictions on properties affecting their development including view protection of the Capitol building. Notwithstanding any provision in this contract to the contrary, Buyer agrees and acknowledges that: (i) except for the disclosure by Buyer to Starting From Scratch, Inc. of the Phase I reports as to the Property as permitted by the Environmental Information Mutual Confidentiality Agreement, Buyer will not disclose the Property Information or any of the provisions, terms or conditions thereof, or any information disclosed therein or thereby, to any party outside of Buyer's organization, other than Buyer's lenders, proposed lenders, consultants, attorneys, engineers and agents involved with Buyer in the acquisition of the Property; and (ii) within Buyer's organization, the Property Information will be disclosed and exhibited only to those persons who are responsible for determining the feasibility of Buyer's acquisition of the Property. The feasibility period will not be extended in the event of any failure by Seller to furnish any Property Information which may be required under this contract. Buyer's sole and exclusive remedy for any failure by Seller to furnish any Property Information which may be required under this contract will be Buyer's right to terminate this contract on or before the final day of the feasibility period pursuant to the terms and provisions of this contract.

(2) Return of Property Information: If this contract terminates for any reason, Buyer will, not later than 10 days after the termination date: *(Check all that apply.)*

☒ (a) return to Seller all those items described in Paragraph 7D(1) that Seller delivered to Buyer in other than an electronic format and all copies that Buyer made of those items; and

☒ (b) delete or destroy all electronic versions of those items described in Paragraph 7D(1) that Seller delivered to Buyer or Buyer copied.~~; and~~

☐ (c)~~ deliver copies of all inspection and assessment reports related to the Property that Buyer completed or caused to be completed~~.

This Paragraph 7D(2) survives termination of this contract.

E. Operations:

(1) Operation Standard: Until closing or sooner termination of this contract, Seller: (1) will operate the Property in the same manner as on the effective date under reasonably prudent business standards; and (2) will not transfer or dispose of any part of the Property, any interest or right in the Property, or any of the personal property or other items described in Paragraph 2B (Additional Property) or sold under this contract except in the ordinary course of prudent business.

(2) Dealing with Contracts other than this Contract: After the ~~feasibility period ends~~ effective date and until closing or sooner termination of this contract, Seller may not enter into, amend, or terminate any other contract, lease or license, whether oral or written, of any portion of the Property that affects the operations of the Property which would become binding on Buyer upon closing, without Buyer's written approval which will not be unreasonably withheld. Seller further covenants and agrees with Buyer that, from the date hereof until closing, Seller shall not sell, assign or convey any right, title or interest whatsoever in or to the Property, or create or permit to exist any lien, security interest, easement, encumbrance, charge or condition affecting the Property (other than the Permitted Exceptions) without promptly discharging the same prior to closing.

F. Buyer Due Diligence Materials: All studies, reports, analyses, market information, engineering work product, conceptual plans, conceptual drawings, architectural renderings, building elevations, construction drawings, construction plans, construction specifications, landscaping plans, site plans, site development permits, subdivision plats, and other data, materials and/or information of any kind or nature which Buyer or any employee, agent, representative or consultant of Buyer generates or acquires in connection with the Property and/or the transaction evidenced by this contract are referred to herein collectively as the "**Buyer Due Diligence Materials**". Buyer shall pay all expenses incurred in connection with the Buyer Due Diligence Materials and Seller will have no obligation to pay any such expenses. In addition, Buyer shall provide copies of the survey, any update of the survey, and the Phase I and any update of the Phase I of the Property to Seller as and when the same become available, whether during or after the feasibility period.

8. LEASES:

A. The Existing Lease and Future Leases: The Real Property is leased by Seller to_____, pursuant to the Commercial Lease dated_____, 2017 (the "**Lease**") which Lease was assigned to _____("**Tenant**") by Assignment and Assumption Agreement dated_____, 2017, a copy of which Lease and Assignment and Assumption Agreement has been delivered to Buyer. After the effective date of this contract, Seller may not enter into any new lease, fail to comply with the existing lease, or make any amendment or modification to any lease without Buyer's written consent, which will not be unreasonably withheld. Seller agrees to disclose to Buyer, in writing, if any of the following subsequently occur as to the Lease or any new lease before closing ("**Lease Events**") to the extent of Seller's current actual knowledge:

(1) Default by Seller: any failure by Seller to comply with Seller's obligations under the lease;

(2) Termination, Offset and Damage Entitlement Circumstances: any circumstances under the lease that entitle the Tenant to terminate the lease or seek any offsets or damages;

(3) Non-Occupancy: any non-occupancy of the leased premises by Tenant;

(4) Advance Payments: any advance sums paid by Tenant under the lease, other than the security deposit which is to be delivered to Buyer at closing;

(5) Concessions: any concessions, bonuses, free rents, rebates, brokerage commissions, or other matters that affect any lease; and

(6) Assignment of Amounts Payable: any amounts payable under the leases that have been assigned or encumbered, except as security ~~for loan(s) assumed or taken subject to under this contract~~ to the extent as will be released on or before closing.

B. Estoppel Certificates: Within 50 days after the effective date, Seller will use its good faith efforts to obtain and deliver to Buyer estoppel certificates signed not earlier than the effective date of this contract by each tenant that leases space in the Property. The estoppel certificates must include the certifications contained in the version of TAR Form 1938 - Commercial Tenant Estoppel Certificate, a copy of which is attached hereto as **Exhibit E** (Form of Estoppel Certificate), and any additional information reasonably requested by a third party lender providing financing if the third party lender requests such additional information at least 10 days prior to the earliest date that Seller may deliver the signed estoppel certificates. In the event one or more tenants are not willing to execute an Estoppel Certificate or if one or more of the tenants include statements to the effect that Seller is in default under its lease, Seller will not be deemed to have defaulted on this contract, but Buyer shall either (a) terminate this contract within 10 days of the request to the tenant, in which case the earnest money shall be refunded to Buyer or (b) close the purchase subject to such circumstance without recourse against the Seller for the condition stated by the tenant or the failure of tenant to execute an Estoppel Certificate.

9. BROKERS:

A. Identification of Brokers: The brokers to this sale are:

Principal Broker: _____	**Cooperating Broker:** _____
_____	_____
Agent: _____	Agent: _____
Address: _____	Address: _____
_____	_____
Phone & Fax: _____	Phone & Fax: _____
E-mail: _____	E-mail: _____
License No.: _____	License No.: _____

Principal Broker: *(Check only one box.)*
☒ represents Seller only.
☐ represents Buyer only.
☐ is an intermediary between Seller and Buyer.

Cooperating Broker represents Buyer.

B. Fees: *(Check only (1) or (2) below.)*

(Complete the Agreement Between Brokers on page 14 only if (1) is selected.)

☐ (1) Seller will pay Principal Broker the fee specified by separate written commission agreement between Principal Broker and Seller. Principal Broker will pay Cooperating Broker the fee specified in the Agreement Between Brokers found below the parties' signatures to this contract.

☒ (2) Payment By Seller: At the closing of this sale, Seller will pay:

Principal Broker a total cash fee of:	Cooperating Broker a total cash fee of:
☒ 2 % of the sales price.	☒ 2 % of the sales price.
☐ _____.	☐ _____.

The cash fees will be paid in Travis County, Texas. Seller authorizes the title company to pay the brokers from the Seller's proceeds at closing.

NOTICE: Chapter 62, Texas Property Code, authorizes a broker to secure an earned commission with a lien against the Property.

C. Broker's Consent Required: The parties may not amend this Paragraph 9 (Brokers) without the written consent of the brokers affected by the amendment.

D. Buyer Representation and Each Party's Commission Indemnity: See Paragraph 12E(7) (Brokers) for Seller's Representations as to brokers. Buyer represents to Seller that Buyer has not contracted with a broker to pay a sales commission other than as set out in Paragraph 9A (Identification of Brokers) with respect to this contract. Each party shall indemnify and hold the other harmless from and against any and all liabilities arising from any claims caused or incurred by it (including, without limitation, the costs of attorneys' fees in connection therewith) as a result of a breach by it of its representation as to brokers and commissions. This Paragraph 9D shall survive closing.

10. CLOSING:

A. Closing Date: ~~The date of the closing of the sale will be on or before the later of:~~

~~(1) ☐ _____ days after the expiration of the feasibility period.~~
~~☐ _____ *(specific date)*; or~~
~~☒ _____.~~
~~(2) at Seller's option 7 days after objections made under Paragraph 6D have been cured or waived.~~

The closing ("**closing**") hereunder shall take place in the offices of the title company on a date ("**closing date**") that is selected by Buyer which is on or before 45 days following the expiration of the feasibility period (as the same may be extended). Buyer shall notify Seller at least 5 days in advance of the exact closing date, which closing date may occur prior to the expiration of the feasibility period (as the same may be extended), at Buyer's election; provided that if no such notice is given, then the closing date shall be on the date which is the 45th day following the expiration of the feasibility period (as the same may be extended). At closing, the title company shall record the Deed, Assignment of Lease, and Memorandum of Environmental Liability Assumption, Release and Indemnity Agreement.

B. Remedies if Party Fails to Close: If either party fails to close by the closing date, the non-defaulting party may exercise the remedies in Paragraph 15 (Default).

C. Deed: At closing, Seller will execute and deliver to Buyer, at Seller's expense, a ☐ general ☒ special warranty deed (the "**deed**") in form attached hereto as **Exhibit B** (Deed). The deed must include a vendor's lien if any part of the sales price is financed. The deed must convey good and indefeasible title to the Property and show no exceptions other than those permitted under Paragraph 6 (Title Policy, Survey, and UCC Search) or other provisions of this contract. Seller must convey the Property:

(1) No Liens: with no liens, assessments, or Uniform Commercial Code or other security interests against the Property which will not be satisfied out of the sales price~~, unless securing loans Buyer assumes~~; and

(2) Possession: with no persons in possession of any part of the Property as lessees, tenants at sufferance, or trespassers except tenants under the written leases assigned to Buyer under this contract and except subject to the rights of the holders of the Permitted Exceptions.

D. Other Seller Deliverables: At closing, Seller, at Seller's expense, will also deliver to Buyer:

(1) Tax Statements: tax statements showing no delinquent taxes on the Property;

(2) Bill of Sale: execute a bill of sale and assignment (the "**bill of sale and assignment**") ~~with warranties to title conveying title, free and clear of all liens,~~ to any personal property defined as part of the Property in Paragraph 2 or sold under this contract in the form attached hereto as **Exhibit C** (Form of Bill of Sale and Assignment);

(3) Assignment of Lease: execute an assignment of all leases to or on the Property pursuant to the assignment form attached as an **Exhibit D** (Form of Assignment of Lease) to this contract (the "**assignment of lease**");

(4) Assignment: to the extent that the following items are freely assignable, without need of additional consents of or actions by Seller or any third parties, an assignment to Buyer pursuant to the bill of sale and assignment form attached as an **Exhibit C** (Form of Bill of Sale and Assignment) executed by Seller of the following items as they relate to the Property or its operations:

(a) Licenses and Permits;
(b) Seller's interest in maintenance, management, and other contracts approved by Buyer; and
(c) Warranties and Guaranties;

(5) Rent Roll: a rent roll current on the day of the closing certified by Seller as true and correct;

(6) Seller's Authority and Entity Documents: evidence that the person executing this contract is legally capable and authorized to bind Seller;

(7) Non-Foreign Person Affidavit: an affidavit acceptable to the title company executed by Seller stating that Seller is not a foreign person or, if Seller is a foreign person, a written authorization for the title company to: (i) withhold from Seller's proceeds an amount sufficient to comply applicable tax law; and (ii) deliver the amount to the Internal Revenue Service together with appropriate tax forms;

(8) Closing Agreement: execute the Closing Agreement as provided for in Paragraph 14D (CAM Charges and Additional Rents);

(9) Memorandum: execute the Memorandum of Environmental Liability Assumption, Release and Indemnity Agreement (the "**Memorandum**") in the form attached as **Exhibit J** as to the provisions of the Environmental Liability Assumption, Release and Indemnity attached as **Exhibit H** (the "**Agreement**");

(10) Environmental Liability Assumption, Release and Indemnity: execute the Environmental Liability Assumption, Release and Indemnity; and

(11) Other Required Closing Items: any notices, statements, certificates, affidavits, releases, and other documents required by this contract, the commitment, or law necessary for the closing of the sale and the issuance of the title policy, all of which must be completed and executed by Seller as necessary and in form acceptable to the title company.

E. Buyer's Deliverables: At closing, Buyer will:

(1) Sales Price: pay the sales price in good funds acceptable to the title company;

(2) Buyer's Authority and Entity Documents: deliver evidence that the person executing this contract is legally capable and authorized to bind Buyer;

(3) Notice to Tenants: sign and send to each tenant in the Property a written statement that:

(a) acknowledges Buyer has received and is responsible for the tenant's security deposit; and
(b) specifies the exact dollar amount of the security deposit;

(4) Assumption of Lease: assume all leases by signing the assignment of leases in the form attached hereto as **Exhibit D** (Form of Assignment of Lease);

(5) Closing Agreement: execute the Closing Agreement as provided for in Paragraph 14D (CAM Charges and Additional Rents);

(6) Environmental Liability Assumption, Release and Indemnity Agreement: execute the Environmental Liability Assumption, Release and Indemnity as provided for in Paragraph 12G and in the form attached **Exhibit H**;

(7) Memorandum: execute the Memorandum of Environmental Liability Assumption, Release and Indemnity Agreement in the form attached as **Exhibit J** as to the provisions of the Environmental Liability Assumption, Release and Indemnity attached as **Exhibit H**; and

(8) Other Required Closing Items: execute and deliver any notices, statements, certificates, or other documents required by this contract or law necessary to close the sale.

F. Conditions to Buyer's Obligation to Close. The obligation of Buyer to close under the contract shall, at the option of Buyer, be subject to the following conditions precedent, unless waived by Buyer:

(1) Seller's Representations and Warranties Materially True and Correct: All of Seller's Representations and Seller's Warranties to be included in the closing documents of Seller set forth in the contract shall be true and correct in all material respects as of the effective date hereof and at closing;

(2) Seller's Material Compliance with Conditions and Agreements: Seller shall not have on or prior to closing, failed to meet, comply with or perform in any material respect any conditions or agreements on Seller's part as required by the terms of the contract;

(3) No Material Adverse Change in the Commitment: There shall be no material adverse change in the matters reflected in the commitment, and there shall not exist any encumbrance or title defect affecting the Property not described in the commitment except for the Permitted Exceptions or matters that will be satisfied as of closing;

(3) No Material Adverse Change in Surveyed Matters: There shall be no material adverse changes in the matters reflected in the survey obtained by Buyer, and there shall not exist any easement, right-of-way, encroachment, waterway, pond, flood plain, conflict or protrusion with respect to the Property not shown on the survey obtained by Buyer (this condition does not apply if Buyer does not obtain a survey as provided for in this contract); and

(4) No Material Adverse Change as to the Property: No material adverse change shall have occurred with respect to the Property after the feasibility period, which would in any way affect the findings made in the inspection of the Property made by Buyer (this condition shall not apply if the material adverse change occurs prior to the expiration of the feasibility period).

If any such condition is not fully satisfied by closing, Buyer may at its discretion either (a) waive the failed condition and close or (b) terminate the contract by written notice to Seller whereupon this contract shall be cancelled, the entire earnest money deposit, the additional earnest money and the Extension Fees (if any) (less the Independent Consideration under Paragraph 7B (Feasibility Period) of the contract) shall be returned to Buyer by the title company and thereafter neither Seller nor Buyer shall have any continuing obligations one unto the other, except for those obligations that expressly survive the termination of the contract. If Buyer waives a condition, Buyer shall not have any further claims arising out of the failed condition, except as specifically set forth in this contract.

After the expiration of the feasibility period, Buyer's obligations under this contract are not conditioned on securing or closing financing.

11. POSSESSION: Seller will ~~deliver~~ relinquish its possession of the Property to Buyer upon closing and funding of this sale in its present As Is condition ~~with any repairs Seller is obligated to complete under this contract, ordinary wear and tear excepted. Any possession by Buyer before closing or by Seller after closing that is not authorized by a separate written lease agreement is a landlord tenant at sufferance relationship between the parties.~~

12. SPECIAL PROVISIONS: The following special provisions apply and will control in the event of a conflict with other provisions of this contract. (*If special provisions are contained in an Addendum, identify the Addendum here and reference the Addendum in Paragraph 22D.*)

A. Seller's Reservation of Right to Continue Marketing the Property: There shall be no limitation on Seller's right to market the Property and accept back-up offers, provided that Seller shall expressly provide in such back-up offers that such back-up offers are subject to this contract.

B. Mutual Confidentiality Agreement: Buyer and Seller agree that the Mutual Confidentiality Agreement dated_____, 2018 continues in full effect and is incorporated herein by this reference. Notwithstanding the foregoing, the terms of the term sheet provided by Seller to Buyer on_____, 2018 maybe offered to other potential buyers and their agents; provided, however, that all agreed-upon terms of this contract and the identity of the parties here to shall not be disclosed except that Seller will notify tenant and prospective buyers negotiating back-up contracts of the dates on which this contract may terminate if Buyer were to elect not to proceed to closing and the Property would then be available for purchase by a party other than Buyer.

C. Governmental Approvals:

(1) Seller Protections: During the pendency of the contract, Buyer may obtain, at Buyer's sole cost and expense, such governmental consents or approvals including without limitation platting, zoning and variance requests with respect to Buyer's proposed development of the Property as Buyer may so desire (collectively, "**Governmental Approvals**") and contact appropriate governmental authorities in connection therewith; provided, however, that (the "**Seller Protections**"): (x) Buyer shall pay all fees and expenses incurred by Buyer in attempting to obtain any Governmental Approvals and (y) such Governmental Approvals shall not be binding upon the Property until closing of the Buyer's acquisition of title to the Property, and at Seller's option do not bind Seller or the Property if the closing does not occur. Without limiting the foregoing, and provided that Buyer complies with the Seller Protections, Buyer shall have the right to prepare applications, plats and related documents necessary for and contact relevant governmental authorities with respect to (i) platting of the Property, (ii) rezoning of the Property, (iii) obtaining necessary variances with respect to the Property, (iv) obtaining a site development permit for Buyer's proposed use of the Property and (v) obtaining building permits for construction of improvements on the Property. Under no circumstances will Buyer seek or obtain platting of the Property or rezoning of the Property that will take effect before closing.

(2) Seller Cooperation: Seller, at no out of pocket expense to Seller, shall reasonably cooperate with Buyer and join with Buyer, within five business days following Buyer's request and reasonable

demonstration to Seller that the proposed action shall not be binding upon the Property or Seller if Buyer does not close the purchase of the Property, in executing any such applications, plats, or related documents necessary to obtain any Governmental Approvals.

(3) Keeping Seller Informed: Buyer shall keep Seller informed of the status of the Governmental Approvals, including providing Seller with a copy of all written responses by the City to Buyer's submissions for Governmental Approvals. Buyer will use its good faith efforts to provide Seller with reasonable advance notice of all public hearings as to the Governmental Approvals.

(4) Assignment: In addition, at the closing if requested by Buyer, Seller shall assign to Buyer Seller's interest in Governmental Approvals; and such assignment to be in form reasonably acceptable to the parties to this contract and the form of which is agreed upon within 30 days of the effective date of this contract (Buyer shall tender the proposed form to Seller within 20 days of the effective date of this contract).

D. As Is. SUBJECT TO SELLER'S REPRESENTATIONS IN PARAGRAPH 12E (SELLER'S REPRESENTATIONS) AND THE SPECIAL WARRANTY OF TITLE IN THE DEED, THE BILL OF SALE LIMITED WARRANTY AND THE ASSIGNMENT OF LEASES LIMITED WARRANTY TO BE INCLUDED IN THE CLOSING DOCUMENTS ("**SELLER'S WARRANTIES**") AND SATISFACTION OF SELLER'S COVENANTS IN THIS CONTRACT, SELLER SELLS THE PROPERTY AND BUYER BUYS THE PROPERTY AS IS. "**As Is**" MEANS FOR THIS CONTRACT AND THE CLOSING THE FOLLOWING:

(1) DISCLOSED MATTERS: NOTWITHSTANDING ANY PROVISION TO THE CONTRARY SET OUT IN THIS PARAGRAPH 12D OR SET OUT ELSEWHERE IN THIS CONTRACT, IT IS AGREED AND UNDERSTOOD THAT THE SALE OF THE PROPERTY TO BUYER, THE SELLER'S REPRESENTATIONS, AND THE SELLER'S WARRANTIES TO BE INCLUDED IN THE CLOSING DOCUMENTS ARE TO BE GIVEN BY SELLER AND ACCEPTED BY BUYER SUBJECT TO THE FOLLOWING (THE "**DISCLOSED MATTERS**"):ALL MATTERS WHICH APPEAR IN OR ARE DISCLOSED PURSUANT TO THIS CONTRACT, THE PROPERTY INFORMATION, THE BUYER DUE DILIGENCE MATERIALS AND THE PERMITTED EXCEPTIONS.

(2) SUBSEQUENT CURRENT ACTUAL KNOWLEDGE: IF PRIOR TO CLOSING SELLER RECEIVES OR GAINS CURRENT ACTUAL KNOWLEDGE OF ANY FACTS OR CIRCUMSTANCES THAT WOULD MAKE ANY OF SELLER'S REPRESENTATIONS INACCURATE OR INCOMPLETE IN ANY MATERIAL RESPECT, AND NOT OTHERWISE DISCLOSED TO BUYER BY THE DISCLOSED MATTERS, SELLER WILL NOTIFY BUYER IN WRITING OF THE EXISTENCE OF SUCH FACTS AND CIRCUMSTANCES PRIOR TO CLOSING, AND BUYER MUST, WITHIN FIVE BUSINESS DAYS AFTER BUYER'S RECEIPT OF SUCH NOTICE (THE "**FIVE BUSINESS DAY PERIOD**"), EITHER: (A) ACCEPT SUCH MODIFIED REPRESENTATION CONSISTENT WITH THE FACTS AND CIRCUMSTANCES SET OUT IN SELLER'S NOTICE AND CLOSE UNDER THIS CONTRACT, WAIVING BUYER'S RIGHTS TO OBJECT TO ANY MATTERS WHICH ARE NOT COVERED BY SUCH MODIFICATION ("**OPTION A**"); OR (B) TERMINATE THIS CONTRACT AND RECEIVE A REFUND OF THE EARNEST MONEY (LESS THE INDEPENDENT CONSIDERATION) AND ANY EXTENSION FEES, AS BUYER'S SOLE AND EXCLUSIVE REMEDY ("**OPTION B**"). IF BUYER FAILS TO DELIVER TO SELLER A WRITTEN NOTICE WITHIN THE FIVE BUSINESS DAY PERIOD ELECTING OPTION A OR OPTION B, THEN BUYER SHALL BE DEEMED TO HAVE ELECTED OPTION A.

(3) GENERAL DISCLAIMER: BUYER ACKNOWLEDGES AND AGREES THAT BUYER WILL INDEPENDENTLY CAUSE THE PROPERTY TO BE INSPECTED, STUDIED AND ASSESSED ON BUYER'S BEHALF DURING THE FEASIBILITY PERIOD AND THAT BUYER HAS NOT ENTERED INTO THIS CONTRACT BASED ON ANY REPRESENTATION, WARRANTY, AGREEMENT, STATEMENT OR EXPRESSION OF OPINION BY SELLER OR BY ANY PERSON OR ENTITY ACTING OR ALLEGEDLY ACTING FOR OR ON BEHALF OF SELLER, OTHER THAN THE SELLER'S REPRESENTATIONS, THE SELLER'S WARRANTIES TO BE INCLUDED IN THE CLOSING DOCUMENTS AND PERFORMANCE OF SELLER'S COVENANTS. BUYER UNDERSTANDS, AGREES AND ACKNOWLEDGES THAT THE PROPERTY IS TO BE SOLD AND ACCEPTED BY BUYER AT THE CLOSING (A) **AS IS, WHERE IS, WITH ALL FAULTS, IF ANY, AND WITHOUT ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, OTHER THAN THE SELLER'S REPRESENTATIONS AND SELLER'S WARRANTIES TO BE INCLUDED IN THE CLOSING**

DOCUMENTS; AND (B) SUBJECT TO THE DISCLAIMED MATTERS, THE DISCLAIMERS SET OUT IN THIS CONTRACT AND THE DISCLOSED MATTERS.

(4) DISCLAIMED MATTERS: BUYER ACKNOWLEDGES AND AGREES THAT SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO THE FOLLOWING (THE "**DISCLAIMED MATTERS**"):

(A) THE ADEQUACY, COMPLETENESS, ACCURACY OR CONTENT OF THE PROPERTY INFORMATION;

(B) THE NATURE, QUALITY OR CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY;

(C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH BUYER MAY CONDUCT THEREON;

(D) THE COMPLIANCE OR NONCOMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY;

(E) THE HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, OR ANY OTHER MATTER WITH RESPECT TO THE PROPERTY;

(F) THE MANNER, CONSTRUCTION, CONDITION, STATE OF REPAIR OR LACK OF REPAIR OF ANY IMPROVEMENTS LOCATED ON THE PROPERTY OR THE ADEQUACY OF PARKING OR ACCESS;

(G) THE INCOME OR EXPENSES OF THE PROPERTY OR ITS PROFITABILITY;

(H) THE ENVIRONMENTAL CONDITION OF THE PROPERTY, INCLUDING BUT NOT LIMITED TO, THE PRESENCE OR ABSENCE OF ANY HAZARDOUS MATERIALS ON, IN, UNDER OR ADJACENT TO THE PROPERTY;

(I) THE CONTENT, COMPLETENESS OR ACCURACY OF THE PROPERTY INFORMATION OR OTHER DUE DILIGENCE MATERIALS PROVIDED BUYER;

(J) THE CONFORMITY OF ANY IMPROVEMENTS TO ANY PLANS OR SPECIFICATIONS FOR THE PROPERTY, INCLUDING ANY PLANS AND SPECIFICATIONS THAT MAY HAVE BEEN OR MAY BE PROVIDED TO BUYER;

(K) THE CONFORMITY OF THE PROPERTY TO PAST, CURRENT OR FUTURE APPLICABLE ZONING OR BUILDING REQUIREMENTS;

(L) DEFICIENCY OF ANY DRAINAGE;

(M) THE EXISTENCE OF VESTED LAND USE, ZONING OR BUILDING ENTITLEMENTS AFFECTING THE PROPERTY; AND

(N) EXCEPT AS SET OUT IN PARAGRAPH 12E(5), SELLER HAS NOT MADE, AND DOES NOT MAKE ANY REPRESENTATIONS REGARDING SOLID WASTE, AS DEFINED BY THE U. S. ENVIRONMENTAL PROTECTION AGENCY REGULATIONS AT 40 C.F.R., PART 261, OR THE DISPOSAL OR EXISTENCE, IN OR ON THE PROPERTY, OF ANY THE FOLLOWING ("**HAZARDOUS MATERIALS**"): "**HAZARDOUS SUBSTANCE**", AS DEFINED BY THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, AND APPLICABLE STATE LAWS, AND REGULATIONS PROMULGATED THERE UNDER, OR AS TO ANY OTHER

POLLUTANT, TOXIC SUBSTANCE, HAZARDOUS WASTE, HAZARDOUS MATERIAL, HAZARDOUS SUBSTANCE, SOLVENT, OR OIL OR PETROLEUM PRODUCTS.

(5) BUYER'S RELIANCE ON BUYER'S EXAMINATIONS, INSPECTIONS, STUDIES AND ASSESSMENTS: BUYER ACKNOWLEDGES AND AGREES THAT, EXCEPT FOR SELLER'S REPRESENTATIONS AND SELLER'S WARRANTIES TO BE INCLUDED IN THE CLOSING DOCUMENTS AND SATISFACTION OF SELLER'S COVENANTS IN THIS CONTRACT, BUYER REPRESENTS, WARRANTS, AND AGREES THAT BUYER IS SOLELY RELYING ON BUYER'S OWN EXAMINATIONS, INSPECTIONS, STUDIES AND ASSESSMENTS IN MAKING THE DECISION TO PURCHASE AND CLOSE THE PURCHASE OF THE PROPERTY AND BUYER HAS NOT RELIED AND WILL NOT RELY ON, AND SELLER IS NOT LIABLE FOR OR BOUND BY, ANY EXPRESS OR IMPLIED WARRANTIES, GUARANTIES, STATEMENTS, REPRESENTATIONS, OR INFORMATION PERTAINING OR RELATING TO THE PROPERTY MADE OR FURNISHED BY SELLER, OR ANY PARTY ACTING OR PURPORTING TO ACT FOR SELLER, TO WHOMEVER MADE OR GIVEN, DIRECTLY OR INDIRECTLY, VERBALLY OR IN WRITING.

(6) REFLECTED IN SALES PRICE: BUYER ACKNOWLEDGES AND AGREES THE SALES PRICE REFLECTS THE SALE OF THE PROPERTY TO BUYER AS IS.

(7) NO INDEPENDENT INVESTIGATION OR VERIFICATION OF INFORMATION BY SELLER: BUYER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION MADE AVAILABLE TO BUYER OR PROVIDED OR TO BE PROVIDED BY OR ON BEHALF OF SELLER WITH RESPECT TO THE PROPERTY, INCLUDING THE PROPERTY INFORMATION, WAS OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND MAKES NO REPRESENTATIONS AS TO THE ACCURACY, TRUTHFULNESS OR COMPLETENESS OF SUCH INFORMATION. BUYER ACKNOWLEDGES AND AGREES THAT THE PROPERTY INFORMATION IS DELIVERED TO BUYER SOLELY AS AN ACCOMMODATION TO BUYER. SELLER HAS NOT MADE AND DOES NOT MAKE ANY WARRANTIES OR REPRESENTATIONS OF ANY KIND OR NATURE REGARDING THE TRUTH, ACCURACY OR COMPLETENESS OF THE INFORMATION SET OUT IN OR DISCLOSED BY THE PROPERTY INFORMATION. SELLER SHALL HAVE NO LIABILITY OR CULPABILITY OF ANY KIND OR NATURE AS A RESULT OF PROVIDING THE PROPERTY INFORMATION TO BUYER.

(8) SELLER NOT RESPONSIBLE FOR TENANT: IT IS UNDERSTOOD AND AGREED BY BUYER THAT SELLER IS NOT RESPONSIBLE OR LIABLE TO BUYER FOR THE ACTS OR OMISSIONS OF TENANT.

(9) BUYER REPRESENTED BY COUNSEL: BUYER ACKNOWLEDGES THAT: (A) THE DISCLAIMERS, RELEASES AND OTHER MATTERS SET OUT IN THIS PARAGRAPH 12D HAVE BEEN FULLY EXPLAINED TO BUYER BY BUYER'S COUNSEL; (B) BUYER FULLY UNDERSTANDS, ACCEPTS AND AGREES TO ALL OF SUCH DISCLAIMERS AND RELEASES; AND (C) BUYER HAS BEEN REPRESENTED BY COUNSEL IN CONNECTION WITH THE PREPARATION AND NEGOTIATION OF THIS CONTRACT.

(10) SOPHISTICATED AND KNOWLEDGEABLE BUYER: BUYER EXPRESSLY ACKNOWLEDGES AND AGREES THAT: (A) BUYER HAS INVESTIGATED OR SHALL HAVE THE OPPORTUNITY TO INVESTIGATE AND INSPECT THE PROPERTY OR WILL INVESTIGATE AND INSPECT THE PROPERTY DURING THE FEASIBILITY PERIOD; (B) BUYER IS FAMILIAR WITH THE PROPERTY OR WILL BECOME FAMILIAR WITH THE PROPERTY DURING THE FEASIBILITY PERIOD AND HAS MADE OR WILL MAKE BUYER'S OWN DETERMINATION AS TO ALL OF THE DISCLAIMED MATTERS (C) BUYER IS RELYING SOLELY ON THE SELLER'S WARRANTIES AND ITS OWN INVESTIGATION AND INSPECTION OF THE PROPERTY IN ACQUIRING THE PROPERTY; (D) BUYER IS A SOPHISTICATED BUYER OF REAL PROPERTY AND IS EXPERIENCED IN THE PURCHASE OF PROPERTIES SIMILAR TO THE PROPERTY; AND (E) BASED SOLELY UPON THE FOREGOING BUYER SHALL, BY THE END OF THE FEASIBILITY PERIOD, BE FULLY SATISFIED WITH THE CONDITION OF THE PROPERTY.

(11) SURVIVAL: THIS PARAGRAPH 12D (AS IS) SURVIVES CLOSING.

Buyer's agreement to accept the Property As Is does not preclude Buyer from inspecting the Property under Paragraph 7C (Inspections, Studies, or Assessments), or from terminating this contract during the feasibility period.

E. Seller's Representations: Seller makes the following representations to Buyer as to the extent of Seller's current actual knowledge as to the following Items as of the effective date of this contract ("**Seller's Representations**") and Seller makes no other representations to Buyer:

(1) Contracts: To the extent of Seller's current actual knowledge, the Property will be transferred to Buyer free and clear of any management, service or other contractual obligations other than (a) those disclosed to and approved by Buyer and (b) the Lease.

(2) Authority: To the extent of Seller's current actual knowledge, the execution by Seller of this contract and the consummation by Seller of the sale contemplated hereby have been duly authorized, and will not, at or after closing, result in a breach of any of the terms or provisions of, or constitute a default under any indenture, agreement, instrument or obligation to which Seller is a party or by which the Property or any portion thereof is bound.

(3) Condemnation: To the extent of Seller's current actual knowledge, neither all or any part of the Real Property is the subject of a condemnation proceeding.

(4) Litigation: To the extent of Seller's current actual knowledge, there is no litigation relating to the Property.

(5) Contamination: To the extent of Seller's current actual knowledge, Seller is not aware that it has caused contamination of the Real Property with Hazardous Materials during its ownership; and Tenant's Lease prohibits contaminating activities and no contamination by Tenant has been reported to Landlord/Seller. Attached hereto as **Exhibit G** (Phase I Environmental Assessment User Questionnaire) are Seller's good faith responses, based solely on Seller's current actual knowledge as of the effective date of this contract, to the Environmental Professional undertaking the Phase I pursuant to the ASTM Standard E-1527-13 of the Real Property, to the six questions in the User Questionnaire, ASTM Standard E1527-13, Appendix X.3; the Property Information provided pursuant to Paragraph 7D includes the "Helpful Documents" pursuant to ASTM Standard E-1527-13 responsive to a request, if made, by the Environmental Professional conducting a Phase I based on Seller's bona fide search of Seller's reasonably available records as of the effective date of this contract.

(6) Leases: To the extent of Seller's current actual knowledge, the Lease is the only lease encumbering the Real Property as of the effective date of this contract. To the extent of Seller's current actual knowledge, none of the Lease Events (as defined in Paragraph 8A (The Existing Lease and Future Leases)) exist as of the effective date of the contract.

(7) Brokers: To the extent of Seller's current actual knowledge, Seller has not contracted with a broker to pay a sales commission other than as set out in Paragraph 9A (Identification of Brokers) with respect to this contract.

F. Current Actual Knowledge of Seller. For all purposes under this contract, the term "**current actual knowledge**" of Seller shall mean the actual, present, knowledge (as opposed to constructive, implied or imputed knowledge) of John Chamblee (the "**Designated Employee**"), on and as of the effective date of this contract, without any specific or special investigation, diligence or inquiry of any kind or nature whatsoever and shall not be construed to impose upon the Designated Employee any duty to investigate the matter to which such knowledge, or the absence thereof, pertains.

G. ENVIRONMENTAL LIABILITY ASSUMPTION; RELEASE AND INDEMNITY. As a part and parcel of the consideration for Buyer's acquisition of the Property from Seller, Buyer shall, upon closing, execute and deliver to Seller the Environmental Liability Assumption, Release and Indemnity Agreement in the form attached as **Exhibit H** (Environmental Liability Assumption, Release and Indemnity).

H. RELEASE. BUYER, UPON CLOSING, SHALL BE DEEMED TO HAVE WAIVED, RELINQUISHED, RELEASED AND DISCHARGED SELLER (AND SELLER'S OFFICERS, DIRECTORS, MEMBERS, SHAREHOLDERS, EMPLOYEES AND AGENTS) FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION (INCLUDING CAUSES OF ACTION IN TORT OR STRICT LIABILITY AND CLAIMS FOR CONTRIBUTION OR INDEMNITY), LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES (INCLUDING ATTORNEYS' FEES AND COURT COSTS) OF ANY AND EVERY KIND OR CHARACTER, KNOWN OR UNKNOWN, WHICH BUYER MIGHT HAVE ASSERTED OR ALLEGED AGAINST SELLER (AND SELLER'S OFFICERS, DIRECTORS, MEMBERS, SHAREHOLDERS, EMPLOYEES AND AGENTS) AT ANY TIME BY REASON OF OR ARISING OUT OF OR RELATING TO ANY LATENT OR PATENT CONSTRUCTION DEFECTS OR ANY PHYSICAL CONDITION OF THE PROPERTY, VIOLATIONS OF ANY APPLICABLE LAWS (INCLUDING, WITHOUT LIMITATION, ANY ENVIRONMENTAL LAWS), AND ANY AND ALL OTHER ACTS, OMISSIONS, EVENTS, CIRCUMSTANCES OR MATTERS REGARDING THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE PRESENCE, GENERATION, TREATMENT OR DISPOSITION OF ANY HAZARDOUS MATERIALS ON, UNDER OR AT THE PROPERTY OR ANY PROPERTY NEAR THE PROPERTY. THE RELEASE IN THIS PARAGRAPH 12H SURVIVES CLOSING.

I. NO FRAUD IN THE INDUCEMENT:

(1) No Representations or Warranties or Duty to Make Disclosures Except as Set forth in Contract: EACH PARTY UNEQUIVOCALLY REPRESENTS, ACKNOWLEDGES AND STATES THAT NEITHER THE OTHER PARTY NOR ANY AGENT, EMPLOYEE, CONTRACTOR OR OTHER PERSON OR ENTITY OPERATING BY, THROUGH OR UNDER THE OTHER PARTY: (A) HAS MADE ANY WARRANTIES, REPRESENTATIONS, PROMISES OR STATEMENTS, EITHER EXPRESS OR IMPLIED, TO INDUCE SUCH PARTY TO ENTER INTO THIS CONTRACT, EXCEPT TO THE EXTENT THAT THE SAME ARE EXPRESSLY SET FORTH IN THIS CONTRACT; OR (B) HAS ANY DUTY TO MAKE ANY DISCLOSURES TO SUCH PARTY, EXCEPT TO THE EXTENT THAT THE SAME ARE EXPRESSLY SET FORTH IN THIS CONTRACT.

(2) Reliance Solely on Own Inspection, Studies and Judgment: EACH PARTY UNEQUIVOCALLY REPRESENTS, ACKNOWLEDGES AND STATES THAT IN ENTERING INTO THIS TRANSACTION AND EXECUTING AND DELIVERING THIS CONTRACT TO THE OTHER PARTY, SUCH PARTY IS: (A) NOT RELYING UPON ANY WARRANTIES, REPRESENTATIONS, PROMISES OR STATEMENTS, WHETHER EXPRESS OR IMPLIED, MADE BY THE OTHER PARTY OR ANY AGENT, EMPLOYEE, CONTRACTOR OR OTHER PERSON OR ENTITY OPERATING BY, THROUGH OR UNDER THE OTHER PARTY, EXCEPT TO THE EXTENT THAT THE SAME ARE EXPRESSLY SET FORTH IN THIS CONTRACT; AND (B) EXCEPT TO THE EXTENT OTHERWISE EXPRESSLY AND SPECIFICALLY SET FORTH IN THIS AGREEMENT, RELYING SOLELY ON ITS OWN INSPECTION, STUDIES AND ASSESSMENTS AND JUDGMENT.

(3) Releases and Waivers: EACH PARTY UNEQUIVOCALLY WAIVES, RELEASES, AND DISCLAIMS ANY RIGHT OR ABILITY TO SEEK TO REVOKE, RESCIND, VACATE, OR OTHERWISE AVOID THE OPERATION AND EFFECT OF THIS CONTRACT ON THE BASIS OF: (A) ANY ALLEGED FRAUDULENT INDUCEMENT, MISREPRESENTATION, OR MATERIAL OMISSION BY THE OTHER PARTY OR ANY AGENT, EMPLOYEE, CONTRACTOR OR OTHER PERSON OR ENTITY OPERATING BY, THROUGH OR UNDER THE OTHER PARTY; OR (B) MUTUAL OR UNILATERAL MISTAKE OF FACT OR LAW, OR NEWLY DISCOVERED INFORMATION.

13. SALES EXPENSES:

A. Seller's Expenses: Seller will pay for the following at or before closing:

(1) Lien Releases: releases of existing liens, other than those liens assumed by Buyer, including prepayment penalties and recording fees;

(2) Release of Loan Liability: release of Seller's loan liability, if applicable;

(3) Tax Statement: tax statements or certificates;

(4) Sale Closing Documents: preparation of the deed, bill of sale and assignment, assignment of leases;

(5) Escrow Fee: one-half of any escrow fee;

(6) Title Curative Recordation Fees: costs to record any documents to cure title objections that Seller must cure; and

(7) Other Seller Expenses: Seller's attorney's fees and other expenses that Seller will pay under other provisions of this contract.

B. Buyer's Expenses: Buyer will pay for the following at or before closing:

(1) Loan Costs: all loan expenses and fees; preparation fees of any deed of trust; recording fees for the deed and any deed of trust; premiums for flood and hazard insurance as may be required by Buyer's lender;

(2) Title Policy: The premium for the basic title policy and the cost of any endorsements or additional title insurance coverage requested by Buyer, including, without limitation, the deletion of any standard printed exceptions from the title policy and/or the deletion of the standard exception concerning shortages in area or discrepancies or conflicts in boundary lines, or any encroachments, or any overlapping improvements;

(3) Inspections, Studies, Assessments, and Survey: The cost of all of Buyer's inspections, studies, assessments and the survey; and any inspection fees charged by the title company to issue the title policy;

(4) Escrow Fee: one-half of any escrow fee; and

(6) Other Buyer Expenses: Buyer's attorney's fees and other expenses that Buyer will pay under other provisions of this contract.

14. PRORATIONS:

A. Prorations:

(1) Taxes, Rents and Expense Reimbursements from Tenants: taxes, rents, and any expense reimbursements from tenants will be prorated through the closing date.

(2) Basis for Tax Proration: If the amount of ad valorem taxes for the year in which the sale closes is not available on the closing date, taxes will be prorated on the basis of taxes assessed in the previous year. If the taxes for the year in which the sale closes vary from the amount prorated at closing, the parties will adjust the prorations when the tax statements for the year in which the sale closes become available. This Paragraph 14A(2) survives closing.

B. Rollback Taxes: If Seller's use or change in use of the Property before closing results in the assessment of additional taxes, penalties, or interest (assessments) for periods before closing, the assessments will be the obligation of Seller. If this sale or Buyer's use of the Property after closing results in additional assessments for periods before closing, the assessments will be the obligation of Buyer. This Paragraph 14B survives closing.

C. Rent and Security Deposits: At closing, Seller will tender to Buyer all security deposits and the following advance payments received by Seller for periods after closing: prepaid expenses, advance rental payments, and other advance payments paid by tenants. Rents prorated to one party but received by the other party will be remitted by the recipient to the party to whom it was prorated within 5 days after the rent is received. This Paragraph 14C survives closing.

D. CAM Charges and Additional Rents. All income and expenses arising out of the operation of the Property shall be prorated between Buyer and Seller in accordance with generally accepted accounting standards as of midnight on the date of closing, at which time Seller shall deliver possession of the Property to Buyer. Buyer and Seller shall jointly prepare an accounting of all income and expenses prior to the closing and the net amount due from either party to the other shall be paid at closing, to the extent then ascertainable. Income and expenses to be prorated between the parties hereunder shall include, without limitation, rents, percentage rents, common area maintenance charges ("**CAM**") operating and other triple net expenses, and all other charges of a similar nature, if any (collectively, "**Additional Rents**"), and any additional charges and expenses payable under the leases affecting the Property, all as and when actually collected (whether such collection occurs prior to, on or after the closing date), water, sewer and other utility charges and amounts payable under any contract that is assigned to Buyer at closing, all to be prorated as of midnight on the date of closing, on the basis of a 365-day year. There shall be no prorations for insurance premiums. Seller shall cancel all insurance coverage for the Property as of the date of closing and funding.

Except as expressly provided herein to the contrary, if any of the aforesaid proration's cannot be calculated accurately on the closing date, then the same shall be calculated as soon as reasonably practicable after the closing date. If any Tenant is required to pay Additional Rents and such Additional Rents are not finally adjusted between the Landlord and tenant under the applicable lease until after the end of the applicable lease year in which closing occurs, then such proration's shall be calculated as soon as reasonably practicable after such Additional Rents have been finally adjusted. Either party owing the other party a sum of money based on proration(s) calculated after the closing date shall upon such party providing reasonable detail and backup evidence to the other party as to the amount claimed to be owed under this Contract, shall unless disputed, promptly pay said sum to the other party, together with interest thereon at the rate of 10% per annum from the date the invoice is delivered to the date of payment, if payment is not made within 30 days after delivery of a bill therefore. At closing, CAM charges, proration's or other items that are not fully accounted for or that may change after closing will be set forth in a "**Closing Agreement**" to be entered into between the parties at closing.

15. DEFAULT:

~~A. If Buyer fails to comply with this contract, Buyer is in default and Seller, as Seller's sole remedy(ies), may terminate this contract and receive the earnest money, as liquidated damages for Buyer's failure except for any damages resulting from Buyer's inspections, studies or assessments in accordance with Paragraph 7C(4) which Seller may pursue, or~~
~~*(Check if applicable)*~~
~~☐ enforce specific performance, or seek such other relief as may be provided by law.~~

~~B. If, without fault, Seller is unable within the time allowed to deliver the estoppel certificates, survey or the commitment, Buyer may:~~
~~(1) terminate this contract and receive the earnest money, less any independent consideration under Paragraph 7B(1), as liquidated damages and as Buyer's sole remedy; or~~
~~(2) extend the time for performance up to 15 days and the closing will be extended as necessary.~~

~~C. Except as provided in Paragraph 15B, if Seller fails to comply with this contract, Seller is in default and Buyer may:~~
~~(1) terminate this contract and receive the earnest money, less any independent consideration under Paragraph 7B(1), as liquidated damages and as Buyer's sole remedy; or~~
~~(2) enforce specific performance, or seek such other relief as may be provided by law, or both.~~

A. Sole Remedies for Seller Default:

(1) Seller's Conveyance Obligation: In the event that Seller fails to convey the Property to Buyer ("**Seller's Conveyance Obligation**") for any reason other than Buyer's default or the permitted termination of this contract by Seller or Buyer as herein expressly provided, Buyer shall be entitled, as its sole remedy, either to:

(a) Terminate: terminate this contract by providing written notice thereof to Seller, in which event the entire earnest money, including the additional earnest money and the Extension Fees (if any) shall be returned immediately to Buyer by the title company, and the parties hereto shall have no further liabilities or obligations one unto the other under the contract; or

(b) Specific Performance: enforce specific performance of the obligation of Seller to execute the documents provided for in this contract to convey the Property to Buyer, it being understood and agreed that the remedy of specific performance is not available to enforce any other obligation of Seller hereunder. Buyer expressly waives any rights to seek damages in the event of Seller's default pursuant to this contract except as specifically provided in this Paragraph 15A. Buyer shall be deemed to have elected to terminate this contract under Paragraph 15A(1)(a), if Buyer fails to file suit for specific performance against Seller in Travis County, Texas on or before 30 days after the date upon which the closing was to have occurred. If, however, the equitable remedy of specific performance of the Seller's Conveyance Obligation is not available to Buyer as the result of Seller's conveyance of the Property, then Seller shall reimburse Buyer for reasonable out-of-pocket expenses incurred by Buyer with respect to the transaction contemplated in this contract inclusive of attorney's fees and costs of litigation up to but not exceeding the Cap on Damages Payable by Seller, but no other damage award or remedy.

(2) Other Defaults: Other than a default in Seller's Conveyance Obligation, which default and remedy is addressed in Paragraph 15A(1) (Seller's Conveyance Obligation), should Seller fail to perform any of its obligations pursuant to this contract, including a breach of Seller's Representations, except due to a default by Buyer, Buyer as its sole remedy, may seek to recover its actual damages only, subject to and limited by the provisions of Paragraphs 15A(2) (Other Defaults), 15A(3) (Cap on Damages Payable by Seller) and 15C (Limitation on Damages), and Buyer waives all other remedies.

If Buyer becomes aware either that any of Seller's Representations or any of Seller's Warranties to be included in the closing documents are untrue or that Seller has defaulted on any of Seller's covenants in this contract and the Seller does not cure the default within 10 business days of receipt of notice of the default given by Buyer to Seller containing a description of the specific nature of such default, then Buyer shall have the right to terminate this contract before closing and recover the earnest money including any additional earnest money deposited with the title company, the Extension Deposits (if any) deposited with the title company, and the Independent Consideration, by delivering notice of contract termination to Seller and the title company at any time before the closing.

Other than as provided for in Paragraph 15A(1) (Seller's Conveyance Obligation) and subject to and limited by the provisions of Paragraphs 15A(2) (Other Defaults), 15A(3) (Cap on Damages Payable by Seller) and 15C (Limitation on Damages), no claim for a default by Seller, including an untrue representation or warranty, shall be actionable against Seller (a) if the default in question results from or is based on a condition, state of facts or other matter which was actually known by Buyer prior to closing, (b) unless the valid claims for all defaults result in actual damages that collectively aggregate more than $_____,000, (c) unless written notice containing a description of the specific nature of such default shall have been given by Buyer to Seller within 30 days of Buyer's actual knowledge or such longer period if required by law and in any event prior to closing if Buyer has actual knowledge of the default prior to closing, and (d) unless a lawsuit shall have been filed by Buyer against Seller within two years and one day after the claim accrues.

(3) Cap on Damages Payable by Seller: Buyer agrees that the maximum amount of damages, including attorney's fees and costs awardable to Buyer under Paragraph 17 (Attorney's Fees) is capped and limited in the aggregate for all defaults by Seller not to exceed in the aggregate $____,000, and BUYER RELEASES AND WAIVES ANY CLAIM OR RIGHT TO COLLECT ABOVE THAT AMOUNT (the "**Cap on Damages Payable by Seller**"). Except for the Seller's Warranties to be contained in the closing documents, in no event shall Seller's aggregate liability to Buyer for default on its obligations to Buyer, including a breach of any representation or warranty of Seller, exceed in the aggregate the Cap on Damages Payable by Seller, except to the extent Seller has been found to have committed fraud by a court of competent jurisdiction.

B. Remedies for Buyer Default: In the event that Buyer shall fail to perform any of its obligations under this contract prior to Buyer closing the purchase of the Property, except due to a default by Seller and except as to Buyer's obligations to Seller that survive contract termination, and Buyer does not cure the default within 10 business days of receipt of notice of the default given by Seller to Buyer containing a description of the specific nature of such default, Seller's sole remedy shall be to terminate this contract and receive from the title company the earnest money including the additional earnest money, and the Extension Fees (if any) deposited with the title company. Except as to Buyer's obligations to Seller that survive contract termination, the earnest money including the additional earnest money, and the Extension Fees (if any) are agreed upon by and between the Seller and Buyer as liquidated damages due to the difficulty and inconvenience of ascertaining and measuring actual damages, and the uncertainty thereof, and no other damages, rights or remedies shall in any case be collectible, enforceable or available to the Seller against Buyer, and the Seller shall accept the earnest money, including the additional earnest money, and Extensions Fees (if any) as the Seller's total damages and relief, Seller hereby waiving any other rights or remedies to which it may otherwise be entitled, except as to Buyer's obligations to Seller that survive contract termination. As to the obligations of Buyer to Seller that survive contract termination, Buyer shall remain liable to Seller for a default by it on such obligations.

C. LIMITATION ON DAMAGES: NOTWITHSTANDING ANY PROVISION OF THIS CONTRACT OR IN THE DOCUMENTS TO BE EXECUTED AT CLOSING, INCLUDING THE DEED, BILL OF SALE AND ASSIGNMENT, AND THE ASSIGNMENT OF LEASES TO THE CONTRARY, OTHER THAN AS PROVIDED FOR UNDER PARAGRAPH 15 (DEFAULT), UNDER NO CIRCUMSTANCES WILL SELLER BE LIABLE FOR ANY ACTUAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, AND BUYER WAIVES AND RELEASES SELLER FOR ACTUAL, PUNITIVE AND CONSEQUENTIAL DAMAGES OTHER THAN FOR ACTUAL DAMAGES UNDER PARAGRAPH 15A (SOLE REMEDIES FOR SELLER DEFAULT) OR FOR A BREACH BY SELLER OF SELLER'S WARRANTIES TO BE INCLUDED IN THE CLOSING DOCUMENTS. THIS PARAGRAPH 15C SURVIVES CLOSING OR TERMINATION OF THE CONTRACT.

16. CASUALTY LOSS AND CONDEMNATION:

A. Casualty Loss: If any part of the Property is damaged or destroyed by fire or other casualty after the effective date, Seller ~~must~~ may restore the Property to its previous condition ~~as soon as reasonably possible and not later than~~ prior to the closing date. If, ~~without fault,~~ Seller does not do so ~~unable to do so~~, Buyer ~~may~~ shall elect either to:

(1) Terminate: terminate this contract by providing written notice to Seller and the entire earnest money, the additional earnest money and the Extension Fees (if any), less the Independent Consideration under Paragraph 7B(1) (Independent Consideration; Earnest Money Becoming Non-Refundable), will be refunded to Buyer; or

(2) Close: accept at closing: (i) the Property in its damaged condition and (ii) the sales price will not be reduced.

B. Condemnation: If before closing, condemnation proceedings are commenced against any part of the Property, Buyer ~~may~~ shall elect either to:

(1) Terminate: terminate this contract by providing written notice to Seller within 15 days after Buyer is advised of the condemnation proceedings and the entire earnest money, the additional earnest money and the Extension Fees (if any), less the Independent Consideration under Paragraph 7B(1) (Independent Consideration; Earnest Money Becoming Non-Refundable), will be refunded to Buyer; or

(2) Close: appear and defend the condemnation proceedings and any award will belong to Buyer and the sales price will not be reduced.

17. ATTORNEY'S FEES: If Buyer, Seller, ~~any broker,~~ or the title company is a prevailing party in any legal proceeding brought under or with relation to this contract or this transaction, such party is entitled to recover

from the non-prevailing parties all costs of such proceeding and reasonable attorney's fees, subject to the Cap on Damages Payable by Seller. This Paragraph 17 survives termination of this contract.

18. ESCROW:

A. Application of Earnest Money: At closing, the earnest money will be applied first to any cash down payment, then to Buyer's closing costs, and any excess will be refunded to Buyer. If no closing occurs, the title company may require payment of unpaid expenses incurred on behalf of the parties and a written release of liability of the title company from all parties.

B. Disposition of Earnest Money After Demand for it by a Party: If one party makes written demand for the earnest money, the title company will give notice of the demand by providing to the other party a copy of the demand. If the title company does not receive written objection to the demand from the other party within 15 days after the date the title company sent the demand to the other party, the title company may disburse the earnest money to the party making demand, reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and the title company may pay the same to the creditors.

C. Disposition of Independent Consideration: The title company will deduct ~~any~~ the Independent Consideration under Paragraph 7B(1) before disbursing any earnest money to Buyer and will pay the independent consideration to Seller.

D. Release of Title Company: If the title company complies with this Paragraph 18, each party hereby releases the title company from all claims related to the disbursal of the earnest money.

E. Notices Regarding Escrow Matters: Notices under this Paragraph 18 must be sent by certified mail, return receipt requested. Notices to the title company are effective upon receipt by the title company.

F. A Party's Refusal to Sign Release Acceptable to Title Company: Any party who wrongfully fails or refuses to sign a release acceptable to the title company within seven days after receipt of the request will be liable to the other party for (as limited and capped in Paragraph 15A(3) (Cap on Damages Payable by Seller) as to Seller): (i) damages; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.

G. 1031 Exchange: ☒ Seller ☐ Buyer intend(s) to complete this transaction as a part of an exchange of like-kind properties in accordance with Section 1031 of the Internal Revenue Code, as amended. All expenses in connection with the contemplated exchange will be paid by the exchanging party. The other party will not incur any expense or liability with respect to the exchange. The parties agree to reasonably cooperate ~~fully and~~ in good faith to arrange and consummate the exchange so as to comply to the maximum extent feasible with the provisions of Section 1031 of the Internal Revenue Code. The other provisions of this contract will not be affected in the event the contemplated exchange fails to occur.

19. MATERIAL FACTS: [Intentionally deleted.] "**As Is**" sale. ~~To the best of Seller's knowledge and belief: *(Check only one box.)*~~

~~☐ (A) Seller is not aware of any material defects to the Property except as stated in the attached Commercial Property Condition Statement (TAR-1408).~~

~~☒ (B) Except as otherwise provided in this contract, Seller is not aware of:~~
~~(1) any subsurface: structures, pits, waste, springs, or improvements;~~
~~(2) any pending or threatened litigation, condemnation, or assessment affecting the Property;~~
~~(3) any environmental hazards or conditions that materially affect the Property;~~
~~(4) whether the Property is or has been used for the storage or disposal of hazardous materials or toxic waste, a dump site or landfill, or any underground tanks or containers;~~

~~(5) whether radon, asbestos containing materials, urea formaldehyde foam insulation, lead based paint, toxic mold (to the extent that it adversely affects the health of ordinary occupants), or other pollutants or contaminants of any nature now exist or ever existed on the Property;~~
~~(6) any wetlands, as defined by federal or state law or regulation, on the Property;~~
~~(7) any threatened or endangered species or their habitat on the Property;~~
~~(8) any present or past infestation of wood destroying insects in the Property's improvements;~~
~~(9) any contemplated material changes to the Property or surrounding area that would materially and detrimentally affect the ordinary use of the Property;~~
~~(10) any material physical defects in the improvements on the Property; or~~
~~(11) any condition on the Property that violates any law or ordinance.~~

~~*(Describe any exceptions to (1) (11) in Paragraph 12 or an addendum.)*~~

20. NOTICES: All notices between the parties under this contract must be in writing and are effective when hand-delivered, mailed by certified mail return receipt requested, or sent by facsimile transmission to the parties addresses or facsimile numbers stated in Paragraph 1 (Parties). The parties will send copies of any notices to the broker representing the party to whom the notices are sent.

☒ A. Emails to Seller: Seller also consents to receive any notices by e-mail at Seller's e-mail address stated in Paragraph 1.

☒ B. Emails to Buyer: Buyer also consents to receive any notices by e-mail at Buyer's e-mail address stated in Paragraph 1.

C. Notice to Each Party's Attorney: Seller and Buyer identify the following as such party's attorney, notices sent to a party by the other party are to be sent to the attorney for the party to be notified in addition to the party being notified:

Buyer's Attorney is:	Seller's Attorney is:
_____	_____
_____	_____
_____	_____
_____	_____
Phone: _____	Phone: _____
Fax: _____	Fax: _____
E-mail: _____	E-mail: _____

21. DISPUTE RESOLUTION: The parties agree to negotiate in good faith in an effort to resolve any dispute related to this contract that may arise. If the dispute cannot be resolved by negotiation, the parties will submit the dispute to non-binding mediation before resorting to arbitration or litigation and will equally share the costs of a mutually acceptable mediator. This paragraph survives termination of this contract. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.

22. AGREEMENT OF THE PARTIES:

A. Binding Agreement: This contract is binding on the parties, their heirs, executors, representatives, successors, and permitted assigns. This contract is to be governed by and construed in accordance with the laws of the State of Texas. If any term or condition of this contract shall be held to be invalid or unenforceable, the remainder of this contract shall not be affected thereby.

B. Entire Agreement: This contract contains the entire agreement of the parties and may not be changed except in writing.

C. Counterparts: ~~If this contract is executed in a number of identical counterparts, each counterpart is an original and all counterparts, collectively, constitute one agreement.~~ This contract may be executed in one or more original, facsimile or electronic counterparts, each of which shall be taken to be an original, and all collectively shall be but one instrument. The parties agree that facsimile and electronic counterparts shall be acceptable for all purposes hereof.

D. Addenda and Exhibits: Addenda and exhibits which are part of this contract are: *(Check all that apply.)*

- ☒ (1) Property Description **Exhibit A** identified in Paragraph 2A (Additional Property);
- ☐ (2) ~~Commercial Contract Condominium Addendum (TAR-1930)~~;
- ☐ (3) ~~Commercial Contract Financing Addendum (TAR-1931)~~;
- ☐ (4) ~~Commercial Property Condition Statement (TAR-1408)~~;
- ☐ (5) ~~Commercial Contract Addendum for Special Provisions (TAR-1940)~~;
- ☐ (6) ~~Addendum for Seller's Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (TAR-1906)~~;
- ☐ (7) ~~Notice to Purchaser of Real Property in a Water District (MUD)~~;
- ☐ (8) ~~Addendum for Coastal Area Property (TAR-1915)~~;
- ☐ (9) ~~Addendum for Property Located Seaward of the Gulf Intracoastal Waterway (TAR-1916)~~;
- ☐ (10) ~~Information About Brokerage Services (TAR-2501)~~; and
- ☒ (11) **Exhibit B** - Form of Deed
  Exhibit C - Form of Bill of Sale
  Exhibit D - Form of Assignment of Lease
  Exhibit E - Form of Estoppel Certificate
  Exhibit F - List of Provided Property Information
  Exhibit G - Phase I Environmental Assessment User Questionnaire
  Exhibit H - Environmental Liability Assumption, Release and Indemnity
  Exhibit I - Environmental Information Mutual Confidentiality Agreement
  Exhibit J - Memorandum of Environmental Liability Assumption, Release and Indemnity.

(Note: Counsel for the Texas Association of REALTORS® (TAR) has determined that any of the foregoing addenda which are promulgated by the Texas Real Estate Commission (TREC) or published by TAR are appropriate for use with this form.)

E. Assignment: ~~Buyer ☐ may ☐ may not assign this contract. If Buyer assigns this contract, Buyer will be relieved of any future liability under this contract only if the assignee assumes, in writing, all of Buyer's obligations under this contract.~~ Buyer may not assign this contract without Seller's prior written consent, provided that Buyer may assign this contract at any time without Seller's prior consent to: (1) any wholly owned subsidiary or any parent entity of Buyer; (2) any affiliate or entity under common control with Buyer; or (3) any entity that acquires all or substantially all of the assets, stock, partnership interests or membership interests of Buyer by merger, consolidation, acquisition or other business reorganization. If Buyer assigns this contract, the deed, bill of sale and assignment, assignment of leases shall be modified to include (or a separate document shall be prepared for execution by the assignee and Seller at closing) the Paragraph 12D (As Is) acknowledgement by the assignee, including the waiver of consumer rights set out in Paragraph 22G (Waiver of Consumer Rights), the waiver of jury trial set out in Paragraph 22H (Waiver of Jury Trial) and the limitation on damages set out in Paragraph 15C (Limitation on Damages).

I. **F. Foreign Person Federal Tax Requirement**. If Seller is not a foreign person, as defined in the Federal Foreign Investment in Real Property Tax Act of 1980 and the 1984 Tax Reform Act as amended (the federal tax law), then at the closing Seller shall deliver to Buyer a certificate so stating in a form complying with the federal tax law. If Seller is a foreign person or if Seller fails to deliver the required certificate at the closing, then in either such event the funding to Seller at the closing shall be adjusted to the extent required to comply with the withholding provisions of the federal tax law; and although the amount withheld shall still be paid at the closing by Buyer, it shall be retained by a mutually acceptable escrow agent (the reasonable fees of which shall be paid by Seller at the closing) for delivery to the Internal Revenue Service together with the appropriate federal tax law forwarding forms, and with copies being

provided both to Seller and Buyer. The title company is hereby approved as a mutually acceptable escrow agent in the event that withholding is warranted in accordance with this paragraph.

G. WAIVER OF CONSUMER RIGHTS: BUYER ACKNOWLEDGES AND AGREES, ON ITS OWN BEHALF AND ON BEHALF OF ANY PERMITTED ASSIGNS AND SUCCESSORS OF BUYER HEREAFTER, THAT THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SUBCHAPTER E OF CHAPTER 17 OF THE TEXAS BUSINESS AND COMMERCE CODE (THE "**DTPA"**) IS NOT APPLICABLE TO THIS TRANSACTION. SPECIFICALLY, BUYER ACKNOWLEDGES THAT THE TRANSACTION CONTEMPLATED BY THIS CONTRACT CONSTITUTES A WRITTEN CONTRACT INVOLVING CONSIDERATION OF MORE THAN $100,000 WHICH IS NOT RELATED TO BUYER'S RESIDENCE, AND IS THEREFORE EXEMPT FROM THE DTPA AS STATED IN SECTION 17.49(F)(1) OF THE TEXAS BUSINESS AND COMMERCE CODE. ACCORDINGLY, BUYER'S RIGHTS AND REMEDIES WITH RESPECT TO THE TRANSACTION CONTEMPLATED UNDER THIS CONTRACT, AND WITH RESPECT TO ALL ACTS OR PRACTICES OF SELLER, PAST, PRESENT OR FUTURE, IN CONNECTION WITH SUCH TRANSACTION, SHALL BE GOVERNED BY LEGAL PRINCIPALS OTHER THAN THE DTPA.

H. WAIVER OF JURY TRIAL: EACH OF SELLER AND BUYER HEREBY WAIVE TRIAL BY JURY IN ANY ACTION ARISING OUT OF MATTERS RELATED TO THIS CONTRACT, WHICH WAIVER IS INFORMED AND VOLUNTARY.

I. Construction: The parties acknowledge that the parties and their counsel have reviewed and revised the contract and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of the contract or any exhibits or amendments hereto.

I. Waiver: Any failure by a party to insist or election by a party not to insist upon strict performance by the other Party of any of the terms of this contract will not be deemed to be a waiver of those terms or of any other term hereof, and such party will have the right at any time or times thereafter to insist upon strict performance of any and all of the terms hereof.

J. Applicable Law and Venue: The construction and validity of this contract will be governed by the laws of the State of Texas. Exclusive venue will be in a court of appropriate jurisdiction in Travis County, Texas.

K. Article and Section Headings: The headings contained in this contract are for convenience only and will in no way enlarge or limit the scope or meaning of the provisions.

L. Grammatical Construction: Wherever appropriate, the masculine gender will include the feminine or neuter, and the singular will include the plural, and vice versa.

M. No Recordation: Seller and Buyer hereby acknowledge that neither this contract nor any memorandum, affidavit or other instrument evidencing this contract or relating hereto (other than the closing documents contemplated hereunder) shall ever be recorded in the Official Public Records or other records of Travis County, or in any other public records.

N. EXCULPATION: Notwithstanding any provision in this contract to the contrary, it is agreed and understood that Buyer shall look solely to the assets of Seller in the event of any breach or default by Seller under this contract, and not to the assets of: (1) any person or entity which is a partner in Seller, if Seller is a partnership, or which otherwise owns or holds any ownership interest in Seller, directly or indirectly (each such partner or other holder or owner of any interest in Seller being referred to herein as a "**Subtier Owner**"); (2) any person or entity which is a partner in or otherwise owns or holds any ownership interest in any Subtier Owner, whether directly or indirectly; (3) any person or entity serving as an officer, director, employee or otherwise for or in Seller; (4) any person or entity serving as an officer, director, employee or otherwise for or in any Subtier Owner; or (5) _____ ("**Manager**"). This contract is executed by one or more persons (the "**Signatories**" whether one or more) of Seller solely in their capacities as representatives of the Seller or a Subtier Owner of Seller and not in their own individual capacities. Buyer hereby releases and relinquishes the Signatories from any and all personal liability for any matters or claims of any kind which arise under or in connection with or as a result of this contract. The foregoing release of liability shall be effective with respect to and shall apply to all claims against any partners of Seller if Seller is a

partnership) and any partners of any Subtier Owner (if such Subtier Owner is a partnership) regardless of whether such claims arise as a result of any liability which the Signatories may have as partners of the Seller or any Subtier Owner, or otherwise.

O. Survival: The following provisions of this contract survive closing: Paragraph 9D (Buyer Representation and Each Party's Commission Indemnity); Paragraph 12D (As Is); Paragraph 12H (Release); Paragraph 14A(2) (Basis for Tax Proration); Paragraph 14B (Roll Back Taxes); The following provisions of this contract survive termination of this contract: Paragraph 7C(4); Paragraph 17 (Attorney's Fees).

23. TIME: Time is of the essence in this contract. The parties require strict compliance with the times for performance. If the last day to perform under a provision of this contract falls on a Saturday, Sunday, or legal holiday, the time for performance is extended until the end of the next day which is not a Saturday, Sunday, or legal holiday. For purposes of this contract, the term "**business day**" or "**business days**" shall mean and refer to all calendar days, other than Saturdays, Sundays and days on which the U.S. Federal Reserve Bank of Dallas is closed.

24. EFFECTIVE DATE: The "**effective date**" of this contract for the purpose of performance of all obligations is the date the title company receipts this contract after all parties execute this contract.

25. ADDITIONAL NOTICES:

A. Abstract or Title Policy: Buyer should have an abstract covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a title policy.

B. Certain Districts: If the Property is situated in a utility or other statutorily created district providing water, sewer, drainage, or flood control facilities and services, Chapter 49, Texas Water Code, requires Seller to deliver and Buyer to sign the statutory notice relating to the tax rate, bonded indebtedness, or standby fees of the district before final execution of this contract.

C. Water Code Notice: Notice Required by §13.257, Water Code: "The real property, described below, that you are about to purchase may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the properties in the certificated area. If your property is located in a certificated area there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to your property. You are advised to determine if the property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to your property. The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or before the execution of a binding contract for the purchase of the real property described in the notice or at closing of purchase of the real property." The Real Property is described in Paragraph 2 (Property) of this contract.

D. Tidally Influenced Submerged Lands: If the Property adjoins or shares a common boundary with the tidally influenced submerged lands of the state, §33.135, Texas Natural Resources Code, requires a notice regarding coastal area property to be included as part of this contract.

E. Gulf Intracoastal Waterway: If the Property is located seaward of the Gulf Intracoastal Waterway, §61.025, Texas Natural Resources Code, requires a notice regarding the seaward location of the Property to be included as part of this contract.

F. ETJ: If the Property is located outside the limits of a municipality, the Property may now or later be included in the extra-territorial jurisdiction ("**ETJ**") of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and ETJ. To determine if the Property is located within a municipality's ETJ, Buyer should contact all municipalities located in the general proximity of the Property for further information.

G. Lead-Based Paint: If apartments or other residential units are on the Property and the units were built before 1978, federal law requires a lead-based paint and hazard disclosure statement to be made part of this contract.

H. Mold Remediation Certificates: Section 1958.154, Occupations Code requires Seller to provide Buyer a copy of any mold remediation certificate issued for the Property during the 5 years preceding the date the Seller sells the Property.

I. Review of Codes, Ordinances and Other Laws: Brokers are not qualified to perform property inspections, surveys, engineering studies, environmental assessments, or inspections to determine compliance with zoning, governmental regulations, or laws. Buyer should seek experts to perform such services. Buyer should review local building codes, ordinances and other applicable laws to determine their effect on the Property. Selection of experts, inspectors, and repairmen is the responsibility of Buyer and not the brokers. Brokers are not qualified to determine the credit worthiness of the parties.

J. Notice of Water Level Fluctuations: If the Property adjoins an impoundment of water, including a reservoir or lake, constructed and maintained under Chapter 11, Water Code, that has a storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level, Seller hereby notifies Buyer: "The water level of the impoundment of water adjoining the Property fluctuates for various reasons, including as a result of: (1) an entity lawfully exercising its right to use the water stored in the impoundment; or (2) drought or flood conditions."

~~**26. CONTRACT AS OFFER:** The execution of this contract by the first party constitutes an offer to buy or sell the Property. Unless the other party accepts the offer by 5:00 p.m., in the time zone in which the Property is located, on _____ the offer will lapse and become null and void.~~

READ THIS CONTRACT CAREFULLY. The brokers and agents make no representation or recommendation as to the legal sufficiency, legal effect, or tax consequences of this document or transaction. CONSULT your attorney BEFORE signing.

[*Signatures, Exhibits*]

Exhibit F to Contract – List of Provided Property Information

Provided Before Effective Date of Contract		
1.	Par. 7D(1)(b).	The Lease and Assignment and Assumption Agreement dated_____, 2017 executed by _____ and _____and consented to by _____.
2.	Par. 7D(1)(b).	Landlord's Lien Waiver executed by _____ Bank, _____and _____.
3.	Par. 7D(1)(b).	Site Investigation Report dated _____ prepared by _____.
4.	Par. 7D(1)(m).	Letter dated _____ to _____ as to water intrusion.
5.	Par. 7D(1)(m).	Microbiology Analytical Reports dated _____issued by _____.
6.	Par. 7D(1)(m).	Asbestos Inspection report dated _____ issued by _____and Invoice.
7.	Par. 7D(1)(m).	Letter dated _____ from _____ regarding Notification of Application to TCEQ Innocent Owner/Operator Program (IOP).
8.	Par. 7D(1)(m).	Environmental Site Assessment dated _____prepared for _____ issued by _____.
9.	Par. 7D.	Flood Hazard Determination dated _____.
10.	Par. 7D.	Letter dated _____ from _____ as to ADA Compliance.
11.	Par. 7D(1)(m).	Letter dated _____ from _____ regarding Tree Hazard Evaluation and Analysis and Photographs of Pecan Trees.
12.	Par. 7A(3).	Title Commitment dated _____, 2018 issued by Chicago Title Insurance Co.

To Be Provided After Effective Date of Contract		
13.	Par. 7D(1)(q).	Survey dated_____, 2001, prepared by _____, Registered Professional Surveyor No. 5267.
14.	Par. 7D(1)(a).	Current rent roll.
15.	Par. 7D(1)(h)	Declaration's page to Seller's fire, hazard, liability and other insurance policies that currently relate to the Property.
16.	Par. 7D(1)(k).	Copies of Seller's Quickbook reports for utilities and repairs incurred by Seller for the Property in the 24 months immediately preceding the effective date of this contract.
17.	Par. 7D(1)(n).	Real & personal property tax statements for the Property for the previous 2 calendar years.
18.	Par. 7D(1)(p).	Current tax assessment.

Exhibit G to Contract - Phase I Environmental Assessment User Questionnaire

Person Completing Questionnaire	Name: _____ Phone: Company: SEE ATTACHED Email:
Site Address	100 East Avenue, Austin, TX
Point of Contact for Access	Name: SEE ATTACHED Phone: Company: Email:
Access Restrictions or Special Site Requirements?	___No X Yes (If yes, please explain) **See Contract ¶ 7.C**
Confidentiality Requirements?	___No __X Yes(If yes, please explain) **See Contract ¶ 7.D &12.B**
Current Site Owner	Name: **SEE ATTACHED** Phone: Company: Email:
Current Site Operator	Name: _____ Phone: Company: Email:
Reasons for ESA (e.g. , financing, acquisition, lease, etc.)	Request by _____ (prospective purchaser)
Anticipated Future Site Use	
Relevant Documents? SEE ATTACHED	Please provide _____ copies of prior Phase I or II ESAs, Asbestos Surveys, Environmental Permits or Audit documents, Underground Storage Tank documents, Geotechnical Investigations, Site Surveys, Diagrams or Maps, or other relevant reports or documents.

ASTM User Questionnaire

In order to qualify for one of the Landowner Liability Protections ("**LLPs**") offered by the Small Business Relief arid Brownfields Revitalization Act of 2001 (the "**Brownfields Amendments**"), the user must respond to the following questions Failure to provide this information to the environmental professional may result in significant data gaps, which may limit our ability to identify recognized environmental conditions resulting in a determination that 'all appropriate inquiry' is not complete This form represents a type of interview and as such, the uses has an obligation to answer all questions in good faith, to the extent of their actual knowledge

Did a search of recorded land title records (or judicial records where appropriate) identify any environmental liens filed or recorded against the property under federal, tribal, state, or local law (40 CFR 312.25)? **SEE ATTACHED**

___ No___ Yes __Title search not completed (if yes, explain below and send Terracon a copy of the Chain of Title report.)

Did a search of recorded land title records (or judicial records where appropriate) identify any activity and use limitations (AULs), such as engineering controls, land use restrictions, or institutional controls that are in place at the property and/or have been filed or recorded against the property under federal, tribal, state, or local law (40 CFR 312.26)? **SEE ATTACHED**

___ No___ Yes ___Title search not completed (If yes, explain below and send Terracon a copy of the Chain of Title report.)

Do you have any specialized knowledge or experience related to the site or nearby properties? For example, are you involved in the same fine of business as the current or former occupants of the site or an adjoining property so that you would have specialized knowledge of the chemicals and processes used by this type of business (40 CFR 312-28)? **SEE ATTACHED**

___ No___ Yes (If yes, explain below) No, as to former occupants.

Do you have actual knowledge of a lower purchase price because contamination is known or believed to be present at the site (40 CFR 312.29)? **SEE ATTACHED**

___ No___ Yes Not applicable (If yes, explain below)

Are you aware of commonly known or reasonably ascertainable information about the site that would help the environmental professional to identify conditions indicative of releases or threatened releases (40 CFR 312.30)? **SEE ATTACHED**

___ No___ Yes (If yes, explain below)

Based on your knowledge and experience related to the site, are there any obvious indicators that point to the presence or likely presence of contamination at the site (40 CFR 312.31)? **SEE ATTACHED**

___ No___ Yes (If yes, explain below)

Comments or explanations: **SEE ATTACHED**

Attachment to Phase I Environmental Assessment User Questionnaire

PHASE I ENVIRONMENTAL ASSESSMENT USER QUESTIONNAIRE ATTACHMENT

_____'s responses to this Questionnaire are made in good faith and are made based on Seller's current actual knowledge as of the _____, 2018, effective date of the contract between _____ as Seller and _____ as Buyer for the sale to Buyer of the land described on Exhibit A to the Contract and the improvements thereto (called the **"effective date of the Contract"**).

Responses to specific questions:

Relevant documents? See **Exhibit F** to Contract, including items 3-10 provided to Buyer as of the effective date of the Contract.

1)-2) No search of recorded land title or judicial records has been undertaken by Seller.

3) No, as to site occupants prior to Seller's acquisition of the Property. Seller has knowledge of the terms of post-acquisition leases and activities permitted thereunder.

4) No.

5) No, except that if "commonly known or reasonably ascertainable information" includes "Relevant documents," "Relevant documents" have been provided.

6) No.

2. Environmental Liability Assumption, Release and Indemnity (Seller Oriented)

ENVIRONMENTAL LIABILITY ASSUMPTION, RELEASE AND INDEMNITY [683]

This Environmental Liability Assumption, Release and Indemnity (the "**Agreement**") is made by and between _____ ("**100 East Avenue Seller**"), _____ [*the party that signed the Sales Contract as Buyer*] ("**Buyer in the Contract**") and _____ [*the entity formed by Buyer in the Contract to acquire and hold title to the Property*] ("**Buyer's New SPE**") and is effective as of_____, 2018, the date of the closing of the sale of the Property from 100 East Avenue Seller to the Buyer's New SPE (the "**Effective Date**").

RECITALS

A. Property. 100 East Avenue Seller and the Buyer in the Contract entered into a Commercial Contract – Improved Property (the "**contract**") whereby the Buyer in the Contract contracted to purchase from the 100 East Avenue Seller the land described on **Exhibit A** hereto (the "**Land**") together with the improvements and rights and appurtenances thereto (the "**Property**") and thereafter the Buyer in the Contract assigned to the Buyer's New SPE and _____ [*a 1031 Qualified Intermediary for an investor that wishes to invest in owning an interest in the Property*] ("**Investor**") two undivided interests in the Buyer's right to purchase the Property pursuant to the contract, 25% and 75%, respectively. Contemporaneously with the closing of the sale to the Buyer's New SPE and the Qualified Intermediary as tenants-in-common, the Qualified Intermediary is reconveying the undivided interest conveyed to it on to Buyer's New SPE resulting in the Buyer's New SPE acquiring on the day of closing 100% of the Property. The parties hereto have agreed that the Qualified Intermediary not be required to sign this Agreement.

B. Closing of the Sale As Is. The contract provides for the Buyer and all assignees of Buyer to execute this Agreement at the closing of the sale of the Property **As Is** as set out in the contract, and without reliance upon any property information, statements, representations or warranties of the 100 East Avenue Seller, but in reliance upon the Buyer's and Buyer New SPE's own inspection, studies and assessments.

C. Environmental Reports. As a condition to the closing of the sale of the Property, Buyer in the Contract caused to be conducted by the environmental consulting firm _____, as its Project No. _____ prior to closing, at its expense, inspections, studies and assessments of the Property, and 100 East Avenue Seller has provided to Buyer in the Contract certain Property Information, including those described in the reports attached hereto as **Exhibit B** ("**Environmental Reports**").

NOW, THEREFORE for $10 and other good and valuable consideration, 100 East Avenue Seller, Buyer in the Contract and the Buyer's SPE agree as follows:

1. ENVIRONMENTAL LIABILITY ASSUMPTION, RELEASE and INDEMNITY. To the extent enforceable, Buyer in the Contract and the Buyer's SPE agree to the following (the "**Covenants**"):

a. ENVIRONMENTAL LIABILITY ASSUMPTION. BUYER IN THE CONTRACT AND BUYER'S SPE (WHICH ARE JOINTLY AND SEVERALLY REFERRED TO HEREIN AS "**BUYER**") EXPRESSLY AGREES AS FOLLOWS (THE "**ENVIRONMENTAL LIABILITY ASSUMPTION**"): (1) BUYER AGREES TO PERFORM AND SATISFY ALL REQUIREMENTS OF ENVIRONMENTAL LAW APPLICABLE TO THE PROPERTY, INCLUDING REMEDIATING THE PROPERTY AS TO ANY CONTAMINATION OF THE PROPERTY BY HAZARDOUS MATERIALS, INCLUDING CONTAMINATION OR PROSPECTIVE CONTAMINATION AS INDICATED BY THE ENVIRONMENTAL REPORTS, AND (2) BUYER ASSUMES ANY AND ALL ENVIRONMENTAL LIABILITY OF 100 EAST AVENUE SELLER, ITS PARTNERS AND THEIR PRINCIPALS, MANAGERS, TRUSTEES, OFFICERS, DIRECTORS, MEMBERS, SHAREHOLDERS, EMPLOYEES AND AGENTS FOR AND WITH RESPECT TO THE PROPERTY OR ARISING OUT OF THE PROPERTY, OR BOTH, WHETHER STATUTORY, CONTRACTUAL, STRICT LIABILITY OR TORTIOUS, AND WHETHER TO A GOVERNMENTAL AGENCY, A PRIVATE ENTITY OR OTHERWISE. IT IS THE INTENT OF THE 100 EAST AVENUE SELLER AND BUYER FOR BUYER TO UNDERTAKE ALL OF 100 EAST AVENUE SELLER'S RESPONSIBILITY FOR THE PERFORMANCE OF ALL REQUIREMENTS OF ENVIRONMENTAL LAW. BUYER DOES NOT RELEASE ANY PERSON OR PERSONS OTHER THAN 100 EAST AVENUE SELLER AND ITS PARTNERS AND THEIR

PRINCIPALS, MANAGERS, TRUSTEES, OFFICERS, DIRECTORS, MEMBERS, SHAREHOLDERS, EMPLOYEES AND AGENTS FROM THEIR LIABILITY FOR CONTAMINATION OF THE PROPERTY OR ANY OTHER PROPERTY.

b. ENVIRONMENTAL LIABILITY RELEASE. BUYER, AND ANYONE CLAIMING BY, THROUGH OR UNDER IT, INCLUDING BUT NOT LIMITED TO IT AS OWNER OF THE PROPERTY OR ANY OTHER PROPERTIES, HEREBY WAIVES, RELINQUISHES AND RELEASES ITS RIGHT TO RECOVER FROM AND FULLY AND IRREVOCABLY WAIVES AND RELEASES 100 EAST AVENUE SELLER AND ITS PARTNERS AND THEIR PRINCIPALS, MANAGERS, TRUSTEES, OFFICERS, AGENTS, DIRECTORS, MEMBERS, SHAREHOLDERS, EMPLOYEES, AGENTS AND _____ (*A PRINCIPAL IN 100 EAST AVENUE SELLER THAT HAS MANAGED THE PROPERTY AND THE SELLER ENTITY*) ("**MANAGER**") FROM THE FOLLOWING (THE "**ENVIRONMENTAL LIABILITY RELEASE**"): (1) ANY AND ALL CLAIMS, RESPONSIBILITY AND LIABILITY THAT ANY OF THEM MAY NOW HAVE OR HEREAFTER ACQUIRE AGAINST THE 100 EAST AVENUE SELLER FOR ANY CLAIMS, COSTS, EXPENSES, DAMAGES, LOSSES, OR LIABILITY ARISING FROM OR RELATED TO THE CONTAMINATION OF THE PROPERTY (INCLUDING WITHOUT LIMITATION THE PRESENCE IN THE SOIL, SOIL GAS, AIR, STRUCTURES, OR SURFACE OR SUBSURFACE WATERS OF MATERIALS OR SUBSTANCES THAT HAVE BEEN, ARE OR MAY IN THE FUTURE BE DETERMINED TO BE TOXIC, HAZARDOUS, OR SUBJECT TO REGULATION AND THAT MAY NEED TO BE SPECIALLY TREATED, HANDLED OR REMOVED FROM THE PROPERTY UNDER CURRENT OR FUTURE FEDERAL, STATE AND LOCAL LAWS REGULATIONS OR GUIDELINES), INCLUDING BY HAZARDOUS MATERIALS ("**ENVIRONMENTAL LIABILITY**"); AND (2) FOR CONTRIBUTION OR INDEMNITY WITH RESPECT TO THE CONDITION OF THE PROPERTY WHETHER ARISING UNDER ENVIRONMENTAL LAW, COMMON LAW OR OTHERWISE, EXCEPT TO THE EXTENT OF 100 EAST AVENUE SELLER'S LIABILITY, IF ANY, TO BUYER UNDER PARAGRAPH 15A(2) AND (3) OF THE CONTRACT (THE "**ENVIRONMENTAL LIABILITY CARVE OUT**"). THIS ENVIRONMENTAL LIABILITY RELEASE INCLUDES 100 EAST AVENUE SELLER'S NEGLIGENCE AND CLAIMS OF WHICH BUYER IS PRESENTLY AWARE OR UNAWARE OR WHICH BUYER DOES NOT PRESENTLY SUSPECT TO EXIST WHICH, IF KNOWN BY BUYER, WOULD MATERIALLY AFFECT BUYER'S WAIVER AND RELEASE OF 100 EAST AVENUE SELLER; AND INCLUDES THE FOLLOWING COVENANT: BUYER COVENANTS NOT TO SUE 100 EAST AVENUE SELLER FOR ENVIRONMENTAL LIABILITIES. THIS ENVIRONMENTAL LIABILITY RELEASE INCLUDES, AND BUYER AGREES ON BEHALF OF ITSELF AND ITS SUCCESSORS AND ASSIGNS NOT TO SUE 100 EAST AVENUE SELLER, ITS PARTNERS AND THEIR PRINCIPALS, MANAGERS, TRUSTEES, OFFICERS, DIRECTORS, MEMBERS, SHAREHOLDERS, EMPLOYEES, AGENTS AND MANAGER FOR ANY ENVIRONMENTAL LIABILITY.

c. ENVIRONMENTAL LIABILITY INDEMNITY. BUYER, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS 100 EAST AVENUE SELLER, ITS PARTNERS AND THEIR PRINCIPALS, MANAGERS, TRUSTEES, OFFICERS, DIRECTORS, MEMBERS, SHAREHOLDERS, EMPLOYEES, AGENTS AND MANAGER FROM AND AGAINST THE FOLLOWING (THE "**ENVIRONMENTAL LIABILITY INDEMNITY**"): ALL CLAIMS ARISING OUT OF ENVIRONMENTAL LIABILITY, INCLUDING WITHOUT LIMITATION (A) THE FAILURE, IN WHOLE OR IN PART, DIRECTLY OR INDIRECTLY, OF BUYER OR ITS SUCCESSORS, ASSIGNS, AGENTS OR CONTRACTORS (A "**BUYER-RELATED PERSON**") TO COMPLY WITH ENVIRONMENTAL LAW; OR (B) THE RELEASE OR DISTURBANCE OF HAZARDOUS MATERIALS; OR (C) ANY ALLEGATION OF IMPROPER MANAGEMENT, REMEDIATION OR DISPOSAL OF HAZARDOUS MATERIALS IN CONNECTION WITH 100 EAST AVENUE SELLER'S OR BUYER'S OPERATIONS, ACTIONS OR INACTIONS. THIS INDEMNITY IS INTENDED TO INDEMNIFY 100 EAST AVENUE SELLER FROM LIABILITY EVEN TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE SOLE, CONTRIBUTORY OR CONCURRENT NEGLIGENCE OF 100 EAST AVENUE SELLER OR BUYER OR A BUYER-RELATED PERSON OR STRICT LIABILITY, EXCEPT THE ENVIRONMENTAL LIABILITY CARVE OUT.

c. Definitions.

(1) Claims. "**Claims**" means any and all costs, expenses, damages, losses, liability, demand, action or cause of action, including court costs, attorneys' fees and consultants' fees.

(2) Environmental Law. "**Environmental Law**" means any federal, state or local law, statute, ordinance, rule, regulation or legal requirement in effect at the Effective Date pertaining to (a) the protection of health, safety, or the environment; (b) the conservation, management, protection, or use of natural resources and wildlife; (c) the protection or use of source water and groundwater; (d) the management, manufacture, possession, use, generation, transportation, treatment, storage, disposal, release, threatened release, abatement, removal, remediation, or handling of, or exposure to, any Hazardous Materials; or (e) pollution (including any release to air, land, surface water and groundwater), and includes without limitation the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, the Solid

Waste Disposal Act, as amended, 42 U.S.C. 6901 *et seq.*, the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.*, the Clean Air Act of 1966, as amended, 42 U.S.C. 7401 *et seq.*, Toxic Substances Control Act of 1976, 15 USC 2601 *et seq.*, the Hazardous Materials Transportation Act, 49 U.S.C. 5101, the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. 651 *et seq.*, the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. 11001 *et seq.*, the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300(f) *et seq.*, together with state counterparts, including without limitation the Texas Water Code including the Texas Water Code Subchapter I, Underground and Aboveground Storage Tanks, §§ 26.341 *et seq.*; the Texas Solid Waste Disposal Act, the Texas Health & Safety Code §§ 361.001 *et seq.*, and any comparable, implementing or successor law, and any amendment, rule, regulation, order or directive, issued thereunder.

(3) Hazardous Materials. "**Hazardous Materials**" means (a) any hazardous waste, hazardous substance, toxic pollutant, hazardous air pollutant or hazardous chemical (as any such terms may be defined under, or for the purpose of, any Environmental Law), (b) asbestos, (c) polychlorinated biphenyls, (d) petroleum or petroleum products, including without limitation contamination, fuel-related waste and materials from exploration and production of petroleum hydrocarbons and natural gas, (e) any substance the presence of which on the Property is prohibited under any Environmental Law or which requires or may require special handling or notification of or reporting under Environmental Law as to its generation use, handling, collection, treatment, storage, recycling, transportation, corrective action, remediation, removal, discharge or disposal.

2. Covenants Running with the Land. The Environmental Liability Assumption, the Environmental Liability Release and the Environmental Liability Indemnity are referred to herein as the Covenants. 100 East Avenue Seller reserves an easement unto itself, its successors and assigns, for reasonable access to the Property, to comply with the obligations of 100 East Avenue Seller under Environmental Law. The Covenants are appurtenant to and run with the land, and shall be binding and enforceable against Buyer, and all parties having any right, title or interest in the Property, now or hereafter, and their respective heirs, successors and assigns, each and all of which are hereby included within the term "Buyer" as used in this Agreement; and shall inure to the benefit of 100 East Avenue Seller, its successors and assigns. Buyer, on behalf of itself and its grantee's heirs, successors and assigns, agrees that the Covenants shall be incorporated into the deed by reference as covenants binding on the grantee, and obligating the grantee to include the Covenants as binding on its grantee, and the grantee's heirs, successors and assigns, and continuing as to each grantee thereafter to include in its deed to its grantee the Covenants as binding on it, and its heirs, successors and assigns. Notwithstanding the foregoing, any person who now or hereafter owns or acquires any right, title or interest in or to any portion of the Property shall be deemed to have consented and agreed to this Agreement and obligated for the payment and performance of the Covenants, whether or not any reference to this Agreement is contained in the instrument by which such person acquired any right, title or interest in the Property. If in order for the Covenants to be enforceable as covenants running with the land, enforcement is required by applicable law to be limited to a specified period of time or a reasonable period of time, enforcement of the Covenants is limited to 10 years from the effective date of this Agreement or such other period as is required by applicable law and in any event terminates 20 years from the effective date of this Agreement.

3. Assignment of Causes of Action. 100 East Avenue Seller assigns to Buyer any Claims has against persons other than 100 East Avenue Seller's officers, directors, members, shareholders, employees and agents concerning any contamination of the Property.

4. Miscellaneous.

a. Notices. All notices, demands and requests which may be given or which are required to be given by either party to the other, and any exercise of a right of termination provided by this Agreement, shall be in writing and shall be deemed effective when personally delivered to the address of the party to receive such notice set forth below or, whether actually received or not, upon actual delivery confirmation of facsimile transmission to a party's facsimile number listed below, or when deposited in any post office or mail receptacle regularly maintained by the United States government, certified or registered mail, return receipt requested, postage prepaid, addressed as set forth on the Signature Pages attached hereto and made a part hereof for all purposes, or such other place as 100 East Avenue Seller, or Buyer, respectively, may from time to time designate by written notice to the other. The attorney for a party has the authority to send and receive notices on behalf of such party.

b. **Entire Agreement.** This Agreement embodies the entire agreement between the parties relative to the subject matter hereof, and there are no oral or written agreements between the parties, nor any representations made by either party relative to the subject matter hereof, which are not expressly set forth herein. This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged into and superseded by this Agreement. The provisions of this Agreement may not be explained, supplemented, or qualified through evidence of trade usage or a prior course of dealings. In entering into this Agreement, the parties have not relied upon any statement, representation, or agreement of the other party except for those expressly contained in this Agreement. There is no condition precedent to the effectiveness of this agreement other than those expressly stated in this Agreement.

c. **Amendment.** This Agreement may be amended only by a written instrument executed by the party or parties to be bound thereby.

d. **Captions.** The captions and headings used in this Agreement are for convenience only and do not in any way limit, amplify or otherwise modify the provisions of this Agreement.

e. **Successors and Assigns.** This Agreement shall bind and inure to the benefit of 100 East Avenue Seller and Buyer and their respective heirs, successors and assigns.

g. **Invalid Provision.** If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws, such provision shall be fully severable; this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Agreement; and, the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance from this Agreement.

h. **Attorneys' Fees.** In the event it becomes necessary for 100 East Avenue Seller to file suit to enforce this Agreement or any provision contained herein, if it is the party prevailing in such suit, it shall be entitled to recover, in addition to all other remedies or damages as herein provided, reasonable attorneys' fees incurred in such suit.

i. **Multiple Counterparts.** This Agreement may be executed in a number of identical counterparts, each of which for all purposes is deemed an original, and all of which constitute collectively one agreement; but in making proof of this Agreement, it shall not be necessary to produce or account for more than one such counterpart. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page.

j. **Venue; Waiver of Jury Trial.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY ACTION OR OTHER LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT AND THE TRANSACTIONS IT CONTEMPLATES. THIS WAIVER APPLIES TO ANY ACTION OR OTHER LEGAL PROCEEDING, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE ("**PROCEEDING**"). EACH PARTY ACKNOWLEDGES THAT IT HAS RECEIVED THE ADVICE OF COMPETENT COUNSEL. ANY PROCEEDING ARISING OUT OF OR BASED ON THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY MAY BE INSTITUTED ONLY IN THE FEDERAL OR STATE COURTS WITHIN TRAVIS COUNTY, TEXAS. EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS AND WAIVES ANY OBJECTION IT MAY HAVE NOW OR HEREAFTER TO THE LAYING OF VENUE IN SUCH COURTS FOR ANY PROCEEDING. SERVICE OF PROCESS, SUMMONS, NOTICE OR OTHER DOCUMENT BY MAIL TO SUCH PARTY'S ADDRESS SET FORTH HEREIN SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY PROCEEDING BROUGHT IN ANY SUCH COURT.

k. **Construction.** The parties acknowledge that the parties and their counsel have reviewed and revised the Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of the Agreement or any exhibits or amendments hereto.

I. Waiver. Any failure by 100 East Avenue Seller to insist or election by 100 East Avenue Seller not to insist upon strict performance by Buyer of any of the terms of this Agreement will not be deemed to be a waiver of those terms or of any other term hereof, and such party will have the right at any time or times thereafter to insist upon strict performance of any and all of the terms hereof.

m. Applicable Law. The construction and validity of this Agreement will be governed by the laws of the State of Texas.

n. Article and Section Headings. The article and section headings contained in this Agreement are for convenience only and will in no way enlarge or limit the scope or meaning of the provisions.

o. Grammatical Construction. Wherever appropriate, the masculine gender will include the feminine or neuter, and the singular will include the plural, and vice versa.

p. Memorandum of Environmental Liability Assumption, Release and Indemnity Agreement. A Memorandum of Environmental Liability Assumption, Release and Indemnity Agreement is executed by the parties and is recorded in the public records. Each party to this Agreement, and its successors and assigns, may in its discretion make a copy of this Agreement available to other persons.

[*Balance of page left blank intentionally.*] [*Attached are signature pages.*]

Exhibit A to Environmental Liability Assumption, Release And Indemnity
Description of Land

Exhibit B to Environmental Liability Assumption, Release And Indemnity
Environmental Reports

100 East Avenue Seller Provided Before Effective Date of Contract	
1.	Site Investigation Report dated _____ prepared by _____.
2.	Letter dated _____ to _____ as to water intrusion.
3.	Microbiology Analytical Reports dated _____ issued by _____.
4.	Asbestos Inspection report dated _____ issued by _____ and Invoice.
5.	Letter dated _____ from _____ to _____ regarding Notification of Application to TCEQ Innocent Owner/Operator Program (IOP).
6.	Environmental Site Assessment dated _____, 2001 prepared for _____ issued by HBC Engineering, Inc. a division of Terracon.
7.	Flood Hazard Determination dated _____.
8.	Letter dated _____ from _____ as to ADA Compliance.
9.	Letter dated _____ from _____ regarding Tree Hazard Evaluation and Analysis and Photographs of Pecan Trees.
Buyer Obtained After Effective Date of Contract	
1.	Phase I Environmental Site Assessment dated _____ as Project No. _____ prepared _____ for _____.

3. Environmental Information Confidentiality Agreement (Adjoining Properties – Different Sellers)

ENVIRONMENTAL INFORMATION MUTUAL CONFIDENTIALITY AGREEMENT [684]

This Environmental Information Mutual Confidentiality Agreement is made effective as of _____, 2018, by and between _____ ("**100 East Avenue Seller**"), _____ ("**102 East Avenue Seller**") [collectively, "**Sellers**"] and _____ ("**Buyer**"), the Buyer of 100 East Avenue and 102 East Avenue.

INTRODUCTION

1. **Purpose.** This Environmental Information Mutual Confidentiality Agreement is entered into by the parties for the following purpose (the "**Purpose**"): Buyer has or desires to enter into contracts for the purchase of 100 East Avenue, Austin, Travis County, Texas ("**100 East Avenue**") and 102 East Avenue, Austin, Travis County, Texas ("**102 East Avenue**") and to close the purchase of these properties (collectively the "**Properties**"). In connection with Buyer's due diligence investigation of the Properties, Buyer has hired or will hire environmental professionals (*e.g.*, Terracon) ("**Environmental Professional**") to undertake environmental assessments of the Properties. The 100 East Avenue Seller has conditioned its entry into a sales contract to sell 100 East Avenue to Buyer on Buyer obtaining this Environmental Information Mutual Confidentiality Agreement signed by the Buyer and the 102 East Avenue Seller. The 100 East Avenue sales contract provides that the 100 East Avenue Seller will provide Buyer with existing environmental reports and related information in its files relating to 100 East Avenue and will cooperate with Buyer in Buyer's having its Environmental Professional to issue a Phase I conditioned on Buyer sharing with the 100 East Avenue Seller all environmental reports and related information obtained by Buyer in regards to 102 East Avenue. The 100 East Avenue Seller is willing for Buyer to share with the 102 East Avenue Seller the environmental information Buyer obtains as to 100 East Avenue under this circumstance.

2. **Confidential Environmental Information.** To achieve the Purpose, confidential and proprietary information regarding the environmental condition of 100 East Avenue, 102 East Avenue, the roadway of East Avenue and other properties exists and will be generated by the parties ("**Confidential Environmental Information**").

3. **Disclosure.** The parties agree that the disclosure by any of them of Confidential Environmental Information as to the other party's property must be made according to the terms of this Environmental Information Mutual Confidentiality Agreement.

Accordingly, we agree with each other as follows:

1. **Use of Confidential Environmental Information.** The party receiving Confidential Environmental Information as to property other than property owned by it ("**Recipient**") will make use of the Confidential Environmental Information as to the other party's property only for the Purpose and will not provide it to anyone else other than to those persons who have a valid business need to know it including employees, agents, attorneys, lenders, equity partners, affiliates, consultants including the Environmental Professional, members, partners, successors and assigns involved in the business discussions or who may have any occasion to view, handle, or obtain any of the Confidential Environmental Information, and Recipient shall notify each such person of the confidentiality requirements. Notwithstanding anything herein to the contrary, the 100 East Avenue Seller and the 102 East Avenue Seller are not prohibited from disclosing to and providing confidential and proprietary information as to the condition of its own property to third parties, such as buyers (e.g., the 100 East Avenue Seller may disclose to and provide to the Buyer or to buyers other than Buyer, or both, existing and future developed confidential and proprietary information regarding the environmental condition of 100 East Avenue, but not information obtained pursuant hereto as to 102 East Avenue, and *vice versa* as to the 102 East Avenue Seller as to 102 East Avenue).

2. **Term.** The obligations of confidentiality under this Environmental Information Mutual Confidentiality Agreement will survive for the following periods: (a) as to Buyer it terminates upon the closing of the purchase by Buyer of both Properties; and (b) as to the Sellers it terminates 2 years after the termination or closing of the sale of the Property owned by it to Buyer.

3. **Standard of Care.** Recipient will protect the disclosed Confidential Environmental Information by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized use, disclosure, dissemination or publication of the Confidential Environmental Information as Recipient uses to protect its own Confidential Environmental Information.

4. **Identification.** Recipient's obligation shall only extend to Confidential Environmental Information that is described in Paragraph 1 – Use of Confidential Environmental Information and that: (a) is marked as confidential at the time of disclosure; or (b) is unmarked (e.g., orally disclosed) but treated as confidential at the time of disclosure.

5. **Exclusions.** This Environmental Information Mutual Confidentiality Agreement imposes no obligation upon Recipient with respect to information that: (a) was rightfully in Recipient's possession before receipt from the disclosing party (the "**Disclosing Party**"); (b) is or becomes a matter of public knowledge through no fault of Recipient; (c) is rightfully received by Recipient from a third party without a duty of confidentiality; (d) is disclosed by Disclosing Party to a third party without duty of confidentiality on the third party; (e) is independently developed by Recipient; (f) is disclosed under requirement of law; or (g) is disclosed by Recipient with Disclosing Party's prior written approval.

6. **Rights.** No party acquires any intellectual property rights in property of the other under this Environmental Information Mutual Confidentiality Agreement.

7. **Return or Destruction.** Recipient will return to the Disclosing Party upon demand, or in the event either party ceases to be interested in pursuing the Purpose, all Confidential Environmental Information provided to Recipient, including all copies thereof which may have been made by or on behalf of Recipient, and Recipient shall destroy, or cause to be destroyed, all notes or memoranda or other stored information of any kind prepared by Recipient relating to the Confidential Environmental Information or negotiations generally.

8. **Representations and Warranties.** The parties acknowledge that, except as may be set forth in a definitive, written Environmental Information Mutual Confidentiality Agreement in respect of a transaction relating to the Purpose, neither a party nor any of its partners, members, directors, officers, employees, affiliates, attorneys, advisors, successor and assigns shall have been deemed to make, or shall be responsible for, any representations or warranties, express or implied, with respect to the accuracy or completeness of the Confidential Environmental Information supplied under this Environmental Information Mutual Confidentiality Agreement.

9. **Remedies.** Recipients acknowledge and agree that in the event of any breach of this Environmental Information Mutual Confidentiality Agreement, the Disclosing Party would be irreparably and immediately harmed and could not be made whole by monetary damages. It is accordingly agreed that Disclosing Party, in addition to any other remedy to which it may be entitled in law or equity, shall be entitled to an injunction or injunctions to prevent breaches of this Environmental Information Mutual Confidentiality Agreement, and to compel specific performance of this Environmental Information Mutual Confidentiality Agreement, without the need for proof of actual damages. Recipients also agree to reimburse the Disclosing Party for all costs and expenses, including attorneys' fees, incurred by or in enforcing its obligation hereunder.

10. **No Relationship.** This Environmental Information Mutual Confidentiality Agreement does not create any agency or partnership relationship.

11. **JURY TRIAL. ALL PARTIES HEREBY IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY LAW, ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER IN CONTRACT, STATUTE, TORT (SUCH AS NEGLIGENCE), OR OTHERWISE) RELATING TO THIS ENVIRONMENTAL INFORMATION MUTUAL CONFIDENTIALITY AGREEMENT.**

12. **Entire Agreement.** This Environmental Information Mutual Confidentiality Agreement, including any

exhibits attached to this Environmental Information Mutual Confidentiality Agreement, embodies the entire understanding between the parties pertaining to the subject matter hereof. Any additions or modifications to this Environmental Information Mutual Confidentiality Agreement must be made in writing and must be signed by both parties. Notwithstanding the foregoing or anything else set forth in this Environmental Information Mutual Confidentiality Agreement, this Environmental Information Mutual Confidentiality Agreement does not supersede or nullify the Mutual Confidentiality Agreement between the 100 East Avenue Seller and _____ as agent for _____ dated _____, 2018 regarding aspects of the sale of 100 East Avenue to _____ other than the Confidential Environmental Information.

13. **Jurisdiction.** This Environmental Information Mutual Confidentiality Agreement is made under, and shall be construed according to the substantive laws of the State of Texas, without regard to the conflict of laws provisions.

[*Signature pages follow.*]

4. Purchase and Sale Agreement (Buyer to Removes USTs)

PURCHASE AND SALE AGREEMENT [685]

This Purchase and Sale Agreement is made by and among _____ ("**Property Seller**"), _____ ("**USTs Seller**") (Property Seller and USTs Seller are collectively referred to herein as the "**Sellers**"), and the entity executing as Buyer, and/or its permitted assigns ("**Buyer**") and is effective as of the Effective Date established pursuant to Section 10.16.

RECITALS

A. Property. This Purchase and Sale Agreement concerns the Property and the USTs (as defined below). Currently located on the Property is a gasoline service station branded Chevron with an ancillary small convenience store, and car wash (the "**Service Station**"). Located on the Property are underground storage tanks and underground storage tank systems [both as defined in 30 TAC §§ 334.2(114) and (115)], including without limitation fuel dispensers, lines and piping, pumps, bins and barrels, and all other related systems and equipment (collectively, the "**USTs**"). The Property including the Service Station is leased under a Station Lease with a lease term expiring _____, 2018 (the "**Station Lease**"). The USTs are owned by the USTs Seller and are being sold to Buyer and are to assigned to Buyer at Closing by execution of the USTs Bill of Sale in the form attached hereto as **Exhibit 3**. The USTs Seller supplies gasoline to the Station Lease tenant under a Supply Contract (the "**Fuel Supply Contract**"). Tenant owns the candy, cigarettes, beer, wine and soft drink beverages and other items for sale in the convenience store, the car wash chemicals and the fuel in the USTs (collectively, the "**Inventory**") and the Inventory is not being sold to Buyer. Located on the Property are signs displaying the Chevron name and related advertising ("**trade names**"). The Sellers' right to display the trade names is not being sold to Buyer.

B. Construction of a Store. Buyer is purchasing the Property from Property Seller with the intent, but not the obligation, of construction of a ____ store on the land after demolition by Buyer of the Service Station and removal by it of the USTs.

C. Testing for Contamination. As a condition to the sale of the Property, Buyer is to cause to be conducted, at its expense, tests including those described on **Exhibit 1** to determine, to the extent reasonably practicable given the current use and condition of the Property, if the contents of the USTs have leaked or are leaking ("**Contamination**") and if there is Contamination, the extent of Contamination in the soil, groundwater or surface water.

D. Decommissioning the Service Station. Subject to the terms and conditions set forth in this Purchase and Sale Agreement, the parties intend to close the sale of the Property to Buyer after the expiration of the Station Lease. At Closing, the Property Seller is to convey the Property but not the USTs, to Buyer by executing the Deed attached as **Exhibit 2**. Prior to or at closing of the sale, Seller is to drain the gasoline, diesel and any other petroleum products from the USTs and remove the USTs from service in accordance with TCEQ Regulatory Guidance, Environmental Assistance Division, RG-4751, Revised September 2016, and after closing Buyer is to remove the USTs, properly dispose of the USTs, and complete the remediation of any Contamination in compliance with all laws and in accordance with the USTs Removal Agreement to be executed at Closing and set out in **Exhibit 4** ("**Decommissioning the Service Station**"). At Closing, Buyer is to execute the Escrow Agreement in the form attached as **Exhibit 5** and to escrow with the Title Company as the Escrow Agent 125% of the estimated costs to comply with its obligations under the USTs Removal Agreement.

E. Release and Indemnity. If Buyer closes the purchase of the Property, Property Seller, USTs Seller and Bill Broaddus (the "**Seller Parties**") are to be released and indemnified by Buyer for all claims or liabilities arising out of the condition of the Property, including any Contamination, or arising out of Decommissioning the Service Station in accordance with the USTs Removal Agreement.

F. Exhibits. Attached to this Purchase and Sale Agreement are the following Exhibits:

Exhibit 1 Testing Plan;

Exhibit 2 Deed;
Exhibit 3 Bill of Sale;
Exhibit 4 USTs Removal Agreement; and
Exhibit 5 Escrow Agreement.

NOW, THEREFORE for a good and valuable consideration, and in consideration of the mutual covenants and representations herein contained, Sellers and Buyer agree as follows:

1. PURCHASE AND SALE

1.1 Property. Subject to the terms and conditions of this Purchase and Sale Agreement, Seller hereby agrees to sell and convey to Buyer and Buyer hereby agrees to purchase from Property Seller the property located at 202 East Avenue, Austin, Travis County, Texas, and consisting of the following ("**Property**"):

a. Land. That certain tract of land ("**Land**") described as follows: _____.

b. Easements. All easements and rights of ingress or egress and any other similar rights, if any, appurtenant to the Land ("**Easements**");

c. Rights and Appurtenances. All rights and appurtenances pertaining to the foregoing, including, but not limited to, (1) any right, title and interest of Property Seller in and to adjacent streets, roadways, alleys or rights-of-way, (2) any sewer, water or other utility rights or capacity, (3) any oil, gas or other minerals in, on or under or that may be produced from the Land, and (4) any reversionary rights or rights by limitation or prescription ("**Rights and Appurtenances**"); and

d. Improvements. All improvements in and on the Land, if any ("**Improvements**"), but expressly excluding the USTs and the Inventory.

1.2 USTs. Subject to the terms and conditions of this Purchase and Agreement, USTs Seller hereby agrees to assign ownership of the USTs to Buyer at the closing of the sale of the Property to Buyer. In accordance with 30 Texas Administrative Code ("**T.A.C.**") § 334.9(4) the following notice is given to Buyer and is repeated in the USTs Bill of Sale:

USTs Seller, _____, Austin, Texas, notifies _____ that the underground storage tanks which are included in this sale are presumed to be regulated by the Texas Commission on Environmental Quality ("**TCEQ**") and may be subject to certain registration, compliance self-certification, construction notification, and other requirements found in Title 30 Texas Administrative Code, Chapter 334. The underground storage tanks include the following: Tank 1, 10,000 gallons, installed 1/1/1979: in use for gasoline; Tank 2, 10,000 gallons, installed 1/1/1979: in use for gasoline; Tank 3, 10,000 gallons, installed 1/1/1979: in use for gasoline; Tank 4, 10,000 gallons, installed 1/1/1979: in use for diesel. The tank material is Single Wall non-corrodible FRP. The TCEQ Designated Facility # is 0028634 and is known on TCEQ's records as Pinky's Pantry. The TCEQ Site Number is RN_____. The Petroleum Storage Tank Registration # is _____. The Owner/Operator # is _____. The TCEQ Customer # is CN _____.

2. PURCHASE PRICE

The purchase price ("**Purchase Price**") for the Property and the USTs shall be $_____,000, in collected funds, and shall be paid by Buyer to Sellers at the Closing (of this amount Sellers allocate $10,000 to the USTs).

3. EARNEST MONEY

3.1 Earnest Money. Within three business days after the receipt by the Title Company of a fully executed Purchase and Sale Agreement from Sellers and Buyer, Buyer shall deliver to Fidelity National Title Company ("**Title Company**") (see Title Company Receipt attached hereto for address and contact information) the

sum of $___0,000 ("**Earnest Money**"). The Earnest Money shall be deposited into an interest bearing account with a bank or thrift institution satisfactory to Buyer. If the sale of the Property is consummated pursuant to the terms of this Purchase and Sale Agreement, the Earnest Money and all interest accrued thereon shall be paid to Sellers and applied to the payment of the Purchase Price. The Earnest Money shall become non-refundable to Buyer (except in the event of Sellers' default of this Purchase and Sale Agreement or otherwise as specifically set forth in this Purchase and Sale Agreement) according to the following schedule:

Number of Days After Effective Date	Total Amount of Non-Refundable Earnest Money
120	$15,000
150	$30,000
181	$50,000

The termination of this Purchase and Sale Agreement under any right to do so granted herein will terminate all obligations of Property Seller to sell the Property and of Buyer to purchase the Property, but will not terminate the provisions of this Purchase and Sale Agreement relating to the Post Termination Obligations (as herein below defined) or the disposition of any Earnest Money, and all such provisions will expressly survive closing or any termination of this Purchase and Sale Agreement.

3.2 Independent Consideration. Notwithstanding any term or provision set forth in this Purchase and Sale Agreement to the contrary, if (a) this Purchase and Sale Agreement is terminated prior to Closing and (b) Buyer is entitled to a return of the Earnest Money as a result of such termination, Sellers shall receive $100 of the Earnest Money, which amount has been bargained for and agreed to as independent consideration for having entered into this Purchase and Sale Agreement and for having granted Buyer the exclusive right to purchase the Property as provided in this Purchase and Sale Agreement ("**Independent Consideration**"). Sellers acknowledge that Buyer has or will soon incur considerable expense in connection with this transaction, which may include, without limitation, investigating the Property, pursuing entitlements for the Property and taking other actions in connection with its prospective purchase of the Property, some of which may benefit the Property or Sellers and which may facilitate any future sale to others should Buyer elect not to proceed with the transaction contemplated by this Purchase and Sale Agreement.

4. CONDITIONS TO CLOSING

4.1 Title Commitment. The Title Company shall provide a Commitment for Owner's Policy of Title Insurance ("**Commitment**"), in the amount of the Purchase Price of the Property, issued by the Title Company and legible copies of any restrictive covenants, easements and other items listed as title exceptions therein ("**Title Documents**"). In the event the Land is out of a larger tract of land, the Commitment shall not be deemed received by Buyer until the description of the Land has been provided with the Survey (as hereinafter defined) and the Commitment has been issued, describing only the Land as so described.

4.2 Survey. Buyer may procure (at Buyer's expense) an ALTA/ACSM Land Title Survey of the Land, ("**Survey**"), prepared by a licensed surveyor, dated subsequent to the Effective Date, in the form acceptable to Buyer and the Title Company. In the event of any discrepancy in the description provided in this Purchase and Sale Agreement and the description provided with the Survey, the description provided with the Survey shall be used in the Deed in lieu of the description contained in this Purchase and Sale Agreement.

4.3 Property Information. Within 10 days of the Effective Date, Sellers (at their expense) shall provide to Buyer the following information ("**Property Information**"):

a. Property Contracts. A copy of all leases, contracts and maintenance agreements and any other agreements related to the ownership, operation, use or occupancy of the Property, the Improvements or any part thereof of which Sellers have current actual knowledge, but excluding agreements by the tenant and persons other than Sellers of which Sellers do not have a copy (provided, however, if an Owner is aware of any such agreements, Sellers shall provide Buyer with a list of such agreements) ("**Property Contracts**").

b. Tax Statements. Copies of property tax statements for the Property and the Improvements for the most recent two tax years.

c. Other Property Information. If in the possession of Sellers, copies of all title policies and reports, surveys, environmental and engineering reports, soils reports, easements, utility information, permits, licenses, certificates of occupancy, zoning letters, and other similar matters relating to the Property, the Improvements, or the Property Contracts.

Sellers make no representations or warranties as to the completeness or accuracy of such materials, other than that these materials are contained in Sellers' records. Such materials may not be current or represent the current status of the Property.

4.4 Objections. Buyer shall have until the expiration of the Contingency Date (as defined below) or the Extended Contingency Date, if applicable, ("**Objection Date**") within which to approve or disapprove the Commitment, Title Documents, Survey and Property Information, including the information reflected therein, such approvals or disapprovals to be within Buyer's sole discretion. If Buyer fails to disapprove any such item by written notice to Sellers within such period, Buyer shall be deemed to have accepted such item in its then current form. If Buyer disapproves any such item by written notice to Sellers during such period, Buyer may terminate this Purchase and Sale Agreement and receive a refund of the Earnest Money, unless Sellers cure such objection to the satisfaction of Buyer within 10 business days after receipt of Buyer's notice. All Schedule C exceptions, including any lien or encumbrance will be deemed objected to by Buyer and Sellers shall be obligated to cause the release of any such lien or encumbrance and to otherwise satisfy the obligations of Sellers under Schedule C at Closing. The title exceptions to be listed in Schedule B of the Commitment, if and when approved by Buyer or deemed to be approved pursuant to this Section are hereinafter called the "**Permitted Exceptions**".

4.5 Contingency Date.

a. Buyer's Inspection. The obligations of Buyer hereunder are conditioned upon Buyer having procured prior to the Contingency Date such inspections, studies, tests and reports related to toxic or hazardous wastes or substances, including asbestos containing materials on the Property and the Improvements; the condition of the Improvements; the condition of the soils of the Land, including core drilling tests; the feasibility of the Property and Improvements for Buyer's intended use; and such other matters as Buyer, in its sole and unimpaired discretion, may determine (collectively, the "**Buyer's Inspection**"). Buyer and its designated agents, employees and independent contractors shall have the right to enter upon the Property and the Improvements to facilitate Buyer's Inspection and to perform such inspections, studies, and tests as Buyer may deem fit, subject to the limitations and requirements set out in **Exhibit 1**. The number of tests (soil sampling) and locations to be done by Terracon are to be reasonably acceptable to USTs Seller and Property Seller. All of Buyer's Inspections must be conducted so as not to permanently damage the Property and be performed at Buyer's sole cost, risk, and expense. All costs and expenses related to Buyer's Inspection of the Property and any related studies will be paid by Buyer in full and when due. Prior to any entry upon the Land by Buyer or Buyer's agents or contractors, Buyer must secure, at Buyer's expense, the following policies of insurance, which must include coverage of the activities of Buyer and Buyer's agents and contractors on the Land: (a) commercial liability insurance, including direct contractual and contingent liability, with a minimum limit of $2,000,000 for bodily injury to, or death of, any person, or more than one person, on an occurrence basis, and $2,000,000 for property damage in any one or more accidents, with aggregate operations on an occurrence basis. These policies of insurance must be (a) issued on an occurrence basis, (b) maintained in effect at all times during which Buyer or Buyer's agents or contractors access the Property, and (c) name Sellers as additional insureds as to liability for "bodily injury" or "property damage" caused, in whole or in part by Buyer or Buyer's agents or contractors in the performance of ongoing operations or occurring after completed operations. Copies of certificates of insurance showing Sellers' designation as additional insureds must be delivered to Property Seller prior to any entry on the Land by Buyer or Buyer's agents or contractors.

b. INDEMNITY; POST TERMINATION OBLIGATIONS. BUYER AGREES TO INDEMNIFY AND HOLD SELLERS HARMLESS FROM THE COSTS AND EXPENSES OF BUYER'S INSPECTION. BUYER AGREES (A) NOT TO PERMIT ANY LIENS TO ATTACH TO THE PROPERTY BY REASON OF THE EXERCISE OF BUYER'S RIGHTS UNDER THIS PURCHASE AND SALE AGREEMENT; (B) TO INDEMNIFY AND HOLD SELLERS HARMLESS FROM AND AGAINST ANY AND ALL LIENS OR CLAIMS ARISING BY OR THROUGH BUYER, BUYER'S AGENTS, AND ANY CONTRACTORS, SUBCONTRACTORS, MATERIALMEN, CONSULTANTS OR LABORERS PERFORMING WORK, STUDIES OR TESTS FOR BUYER OR BUYER'S AGENTS OR CONTRACTORS AND FROM AND AGAINST ANY AND ALL CLAIMS FOR DAMAGES BY THIRD PARTIES ARISING OUT OF THE CONDUCT OF SUCH WORK, STUDIES AND TESTS AND/OR ANY OTHER ACTIVITIES OF

BUYER OR BUYER'S AGENTS OR CONTRACTORS UNDER THIS PURCHASE AND SALE AGREEMENT OR RELATED TO THE PROPERTY; AND (C) TO PAY AND/OR REIMBURSE SELLERS FOR ANY REASONABLE AND ACTUAL THIRD-PARTY EXPENSES (INCLUDING REASONABLE FEES AND DISBURSEMENTS OF ATTORNEYS AND OTHER PROFESSIONALS AND COURT COSTS) INCURRED BY SELLERS IN THE ENFORCEMENT OF SELLERS' RIGHTS UNDER THIS SECTION 4.5; PROVIDED, HOWEVER, SO LONG AS BUYER IS CONDUCTING BUYER'S INSPECTION AND SEEKING APPROVALS IN ACCORDANCE WITH THE TERMS OF THIS PURCHASE AND SALE AGREEMENT, BUYER SHALL NOT BE RESPONSIBLE FOR THE COST OF ANY ATTORNEYS, CONSULTANTS, OR ADVISERS HIRED BY A SELLER TO REVIEW ANY ASPECTS OF BUYER'S INSPECTION OR PURSUIT OF APPROVALS. BUYER'S OBLIGATIONS UNDER THIS SECTION 4.5(B) WILL SURVIVE THE CLOSING OR TERMINATION OF THIS PURCHASE AND SALE AGREEMENT AND WILL CONSTITUTE "**Post Termination Obligations**".

c. Contingency Date. On or before 180 days after the Effective Date ("**Contingency Date**" or the "**Contingency Period**"), Buyer may notify Sellers, in writing that Buyer's Inspection is not satisfactory to Buyer in its sole and unimpaired discretion, and may terminate this Purchase and Sale Agreement without penalty or expense. If Buyer shall terminate this Purchase and Sale Agreement, the Earnest Money shall be disbursed as set forth in Section 3.1 above. Buyer agrees that, unless required to do so by law or regulation, the results of Buyer's Inspection will be held confidential and not revealed by Buyer other than to its agents, representatives, employees, tenants, lenders or assigns, and shall be revealed to Sellers, including delivering to Sellers a copy of all non-privileged third party reports within 10 days of Buyer's receipt.

d. Extended Contingency Date. Buyer shall have the right to extend the Contingency Date for one additional period of 90 days ("**Extended Contingency Date**") by (a) providing written notice to Sellers and the Title Company of its intent to exercise this option to extend the Contingency Date on or before the Contingency Date, and (b) depositing with the Title Company the sum of $____,000 ("**Extension Deposit**"). The Extension Deposit shall be held by the Title Company and shall be treated as a portion of the Earnest Money for all purposes hereunder. On or before the Extended Contingency Date, Buyer may notify Sellers, in writing that Buyer's Inspection is not satisfactory to Buyer in its sole and unimpaired discretion, and may terminate this Purchase and Sale Agreement without penalty or expense; provided, however, the entire Deposit shall be non-refundable to Buyer after the Contingency Date, and shall be disbursed to Sellers if Buyer terminates the Agreement after the Contingency Date pursuant to the terms of this Purchase and Sale Agreement or does not close the purchase as required by this Purchase and Sale Agreement (except in the event of Sellers' default or otherwise as specifically set forth in this Purchase and Sale Agreement). The extension of the Contingency Date shall extend the Closing Date for a like period.

4.6 Property Contracts. In the event Buyer shall not elect to terminate this Purchase and Sale Agreement as provided above, then on or prior to Closing, Sellers (at their expense) shall terminate all Property Contracts, effective no later than the date of the Closing. Sellers shall be solely responsible, at their sole cost and expense for terminating all Property Contracts prior to or at Closing, and for providing Title Company and Buyer with written evidence of same, including but not limited to: (i) obtaining any termination agreements for any fuel supply or "branding" agreements relating to the operation of the gas station on the Property; and (ii) obtaining a waiver of any right of first refusal in favor of any franchisee pursuant to the Petroleum Marketing Practices Act (15 U.S.C. § 2801).

4.7 Approvals and Diligence.

a. Approvals. During the Contingency Period and thereafter to Closing, Buyer intends to seek the following approvals and confirmations ("**Approvals**"):

(1) Utilities. The availability of utilities of proper size and capacity at the Property, the soils and geotechnical conditions of the Property, and the environmental condition of the Property;

(2) Governmental Approval. The approval of necessary plans for building, signs, access, lot split, platting or consolidation plats and the site plan for the Property by required governmental authorities and any other third parties with approval rights (with same to be effective and binding on the Property after Closing); and

(3) Permits. The issuance of building and other necessary permits by required governmental authorities for Buyer's intended use for the Property.

b. Diligence.

(1) Approvals.

(a) Buyer's Efforts. Buyer agrees to make a good faith and diligent effort to pursue and obtain the Approvals and satisfy any condition attached thereto. Buyer shall furnish to Sellers, simultaneously with their submission, copies of all plans, applications and correspondence with governmental agencies with respect to the Property specified in such matter request. Buyer shall furnish Sellers with advance notice of all meetings with governmental agencies. Sellers (at no out of pocket expense to Sellers) will reasonably cooperate with Buyer in connection with Buyer's application for and pursuit and receipt of the Approvals, which cooperation will include, without limitation Seller's execution of authorizations, documents, affidavits, consents, applications, agreements and/or easements in favor of utility companies and governmental and quasi-governmental authorities (collectively, the "**Governmental Approval Documentation**"), for Buyer to obtain the Approvals as may be required by Buyer or the governmental agencies from which the Approvals are to be obtained; provided that Sellers will not be obligated to execute any Governmental Approval Documentation with respect to any Approvals which will bind the Property in the event Buyer does not close on the purchase of the Property ("**Excluded Approvals**").

(b) Buyer's Protective Actions. In the event that Sellers fail or refuse to execute any of such Governmental Approval Documentation (other than Excluded Approvals), and deliver same to Buyer within 10 days after Buyer requests such execution, then all deadlines and timelines described in this Purchase and Sale Agreement shall toll until the day on which Buyer receives the last of Sellers' executed Governmental Approval Documentation other than Excluded Approvals. In the event that Buyer has not received all of Sellers' executed Governmental Approval Documentation other than Excluded Approvals on or before 30 days after receipt of Buyer's request for same, then Sellers shall be deemed to have appointed Buyer as Sellers' attorney-in-fact, coupled with an interest to execute all the Governmental Approval Documentation on behalf of Sellers other than Excluded Approvals.

(2) Testing. Within 90 days of the Effective Date of this Purchase and Sale Agreement, Buyer shall undertake and use its good faith efforts to complete the tests in accordance with the Testing Plan set out in **Exhibit 1**. If the tests indicate that there exists Contamination on the Property, Buyer shall engage Terracon to use its good faith efforts to determine the extent of Contamination and to develop an estimate of the likely cost of remediation, which estimated amount shall be placed into an Escrow Account at closing pursuant to the USTs Removal Agreement.

4.8 Utility Lines. Sellers agree to reasonably cooperate with Buyer (at no out of pocket expense to Sellers) with respect to Buyer obtaining prior to Closing permits (other than Excluded Approvals) for adequately sized utility lines (water, sanitary sewer, gas, electric, storm sewer, *etc.*) to serve the Property. Sellers agree to reasonably cooperate with Buyer's efforts to obtain the approval of the utility lines (other than Excluded Approvals).

4.9 Buyer's Post Termination Obligations. If this Purchase and Sale Agreement is terminated for any reason, then Buyer agrees to: (a) promptly restore and repair any damage to the Property if it was damaged or its condition changed in any material respect as the result of inspections, tests or other activities of Buyer or Buyer's agents or contractors; (b) promptly remove all liens against the Property that may have arisen due to the activities of Buyer or any of Buyer's agents or contractors; and (c) reimburse Sellers for all third party expenses, costs and liabilities of any kind or nature (including reasonable attorneys' fees and court costs) incurred by Sellers in connection with Sellers' enforcement or performance of any of Buyer's obligations under this Section. The obligations and agreements of Buyer under this Section as well as any other obligations of Buyer under this Purchase and Sale Agreement that survive Closing or termination of this Purchase and Sale Agreement are collectively referred to in this Purchase and Sale Agreement as the "**Post Termination Obligations**".

5. REPRESENTATIONS, WARRANTIES AND COVENANTS

5.1 Representations and Warranties. Sellers represent and warrant to Buyer as follows and except for the warranties of title contained in the Deed, the representations and warranties herein below and elsewhere contained in this Purchase and Sale Agreement or the instruments executed in connection herewith, the sale of the Property and the USTs is "**AS IS, WHERE IS, AND WITH ALL FAULTS**" as set forth in Section 5.2:

a. Power and Authority. Each of the Sellers has the right, power and authority to enter into this Purchase and Sale Agreement and to perform this Purchase and Sale Agreement.

b. Performance of Contracts to Closing. Each of the Sellers has or shall fully perform and observe all requirements of all contracts affecting the Property and the USTs and binding on it, including the Permitted Exceptions.

c. No Agreements Surviving Closing other than Specified Surviving Agreements. Other than this Purchase and Sale Agreement and the Permitted Exceptions ("**Specified Surviving Agreements**"), there are no Property Contracts (all of which shall be terminated prior to Closing), or other agreements or instruments which will be in force or effect on the Closing Date that grant to any person whomsoever or any entity whatsoever, any right, title, interest or benefit in or to all or any part of the Property or any right relating to the use, operation, management, maintenance or repair of all or any part of the Property.

d. No Resulting Conflict, Breach by Sellers and No Required Consents. The execution of this Purchase and Sale Agreement, the consummation of the transactions herein contemplated and the performance and observance of the obligations of Sellers hereunder and under any and all other agreements and instruments herein mentioned to which either of Sellers is a party (1) will not conflict with or result in the breach of any law or regulation, order, writ, injunction or decree of any court or governmental instrumentality ("**Governmental Requirements**") or of any agreement or instrument to which either Seller is now a party or to which it is subject ("**Property Contracts**"), or constitute a default thereunder, and (2) does not require a Seller to obtain any consents or approvals from, or the taking of any other actions with respect to any third parties.

e. Property Information from Sellers' Records. The Property Information provided or to be provided by Sellers to Buyer are documents taken from Sellers' records.

f. Title. The Property Seller has good and indefeasible title to the Property and the USTs Seller has good title to the USTs, each contracted to be sold by it under this Purchase and Sale Agreement, free and clear of all liens and encumbrances except those exceptions the particular Seller is obligated to cause to be released at or prior to Closing or are Permitted Exceptions.

g. No Lawsuits or Administrative Actions. There are not any lawsuits or administrative actions pending or threatened against the Property, the Improvements, or to the business conducted thereon nor against a Seller which if decided adversely to such Seller would have any effect upon the Property or the USTs.

h. Contamination. Sellers do not have current actual knowledge that the Property has Contamination. The phrase "**current actual knowledge**" shall mean and refer to the current actual knowledge of Bill Broaddus, but without undertaking any special inquiry or investigation and not constructive or imputed knowledge of Sellers or Bill Broaddus, and not what Sellers or Bill Broaddus should have known. Buyer agrees that Sellers and Bill Broaddus are not under a duty of inquiry or investigation in order to make such representations and warranties and have no liability to Buyer for failing to discover whether a condition as to which a representation or warranty as to knowledge is made is true or exists, even if there means to know are at hand or could be discovered upon inquiry. A representation or warranty of "current actual knowledge" is not an express or implied representation or warranty that the condition does exist or does not exist, but is only a representation and warranty as to the current actual knowledge of Bill Broaddus.

5.2. Condition of the Property.

a. **As Is**. SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED, AND ANY REPRESENTATIONS AND WARRANTIES IN THIS PURCHASE AND SALE AGREEMENT, THE PROPERTY AND THE USTS ARE SOLD BY THE RESPECTIVE SELLER AND ACCEPTED BY BUYER IN ITS PRESENT CONDITION, AS IS, WHERE IS AND WITH ALL FAULTS, AND WITH ANY AND ALL LATENT AND PATENT DEFECTS. SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED, THE USTS BILL OF SALE AND ANY REPRESENTATIONS AND WARRANTIES IN THIS PURCHASE AND SALE AGREEMENT, THERE IS NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, BY SELLERS OR SCOTT W. (BILL) BROADDUS, JR. (COLLECTIVELY THE "**SELLER PARTIES**" AND EACH A "**SELLER PARTY**") THAT EITHER THE PROPERTY AND THE USTS HAS A PARTICULAR FINANCIAL VALUE, IS FIT FOR A PARTICULAR PURPOSE, OR AS TO THE CONDITION, HABITABILITY, SUITABILITY, OR MERCHANTABILITY OF THE PROPERTY OR THE USTS. SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED AND ANY REPRESENTATIONS AND WARRANTIES IN THIS PURCHASE AND SALE AGREEMENT, BUYER HAS RELIED SOLELY UPON BUYER'S OWN INVESTIGATION OF THE PROPERTY AND THE USTS AND NOT UPON ANY REPRESENTATION, STATEMENT OR ASSURANCE BY ANY SELLER PARTY. THE PURCHASE PRICE REFLECTS THE SALE OF THE PROPERTY AND THE USTS "AS IS" AND WITH THESE DISCLAIMERS. SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED AND ANY REPRESENTATIONS AND WARRANTIES IN THIS PURCHASE AND SALE AGREEMENT, THE SELLER PARTIES HEREBY SPECIFICALLY DISCLAIM ANY WARRANTY, GUARANTY, OR REPRESENTATION, ORAL OR WRITTEN, EXPRESSED OR IMPLIED, PAST, PRESENT OR FUTURE, OF, AS TO, OR CONCERNING, AND BUYER ACKNOWLEDGES THAT BUYER IS NOT RELYING ON ANY REPRESENTATION, STATEMENT OR ASSURANCE BY ANY SELLER PARTY AS TO:

(1) THE NATURE AND CONDITION OF THE PROPERTY AND THE USTS, INCLUDING BUT NOT BY WAY OF LIMITATION, THE WATER, SOIL, SUBSURFACE, AND GEOLOGY, AND THE SUITABILITY THEREOF FOR ANY AND ALL ACTIVITIES AND USES WHICH BUYER MAY ELECT TO CONDUCT THEREON;

(2) THE MANNER, CONSTRUCTION, CONDITION, STATE OF REPAIR OR LACK OF REPAIR OF ANY IMPROVEMENTS LOCATED THEREON OR THE ADEQUACY OF PARKING OR ACCESS;

(3) THE COMPLIANCE OF THE PROPERTY AND THE USTS WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY FEDERAL, STATE OR LOCAL GOVERNMENTAL OR QUASI-GOVERNMENTAL BODY (INCLUDING WITHOUT LIMITATION, BUILDING PERMITS, ZONING, ENVIRONMENTAL LAW, AND THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *ET SEQ.* (EXCEPT SELLERS REPRESENT THAT THEY DO NOT HAVE CURRENT ACTUAL KNOWLEDGE THAT THE PROPERTY HAS CONTAMINATION);

(4) THE VALUE OF THE PROPERTY AND THE USTS;

(5) THE INCOME OR EXPENSES OF THE PROPERTY OR ITS PROFITABILITY;

(6) EXCEPT FOR THE SPECIAL WARRANTY OF TITLE EXPRESSLY SET FORTH IN THE DEED, THE NATURE OR EXTENT OF TITLE TO THE PROPERTY AND THE USTS;

(7) THE ENVIRONMENTAL CONDITION OF THE PROPERTY, INCLUDING BUT NOT LIMITED TO, THE PRESENCE OR ABSENCE OF ANY HAZARDOUS MATERIALS ON, IN, UNDER OR ADJACENT TO THE PROPERTY (EXCEPT FOR FUEL FOR THE USTS; AND SELLERS REPRESENT THAT THEY DO NOT HAVE CURRENT ACTUAL KNOWLEDGE THAT THE PROPERTY HAS CONTAMINATION);

(8) THE CONTENT, COMPLETENESS OR ACCURACY OF THE PROPERTY INFORMATION OR OTHER DUE DILIGENCE MATERIALS PROVIDED BUYER;

(9) THE CONFORMITY OF ANY IMPROVEMENTS TO ANY PLANS OR SPECIFICATIONS FOR THE PROPERTY, INCLUDING ANY PLANS AND SPECIFICATIONS THAT MAY HAVE BEEN OR MAY BE PROVIDED TO BUYER;

(10) THE CONFORMITY OF THE PROPERTY TO PAST, CURRENT OR FUTURE APPLICABLE ZONING OR BUILDING REQUIREMENTS;

(11) DEFICIENCY OF ANY DRAINAGE;

(12) THE EXISTENCE OF VESTED LAND USE, ZONING OR BUILDING ENTITLEMENTS AFFECTING THE PROPERTY; OR

(13) WITH RESPECT TO ANY OTHER MATTER.

BUYER FURTHER ACKNOWLEDGES AND AGREES THAT, HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY AND THE USTS AND REVIEW INFORMATION AND DOCUMENTATION AFFECTING THE PROPERTY, BUYER IS RELYING SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND THE USTS AND REVIEW OF SUCH INFORMATION AND DOCUMENTATION, AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER PARTIES, SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED AND ANY REPRESENTATIONS AND WARRANTIES IN THIS PURCHASE AND SALE AGREEMENT.

BUYER FURTHER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION MADE AVAILABLE TO BUYER OR PROVIDED OR TO BE PROVIDED BY OR ON BEHALF OF SELLER PARTIES WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER PARTIES HAVE NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND MAKE NO REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION.

BUYER AGREES TO FULLY AND IRREVOCABLY RELEASE SELLER PARTIES FROM ANY AND ALL CLAIMS THAT BUYER MAY NOW HAVE OR HEREAFTER ACQUIRE AGAINST SELLER PARTIES FOR ANY COSTS, LOSS, LIABILITY, DAMAGE, EXPENSE, DEMAND, ACTION OR CAUSE OF ACTION ARISING FROM SUCH INFORMATION OR DOCUMENTATION.

SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED AND ANY REPRESENTATIONS AND WARRANTIES IN THIS PURCHASE AND SALE AGREEMENT, SELLER PARTIES ARE NOT LIABLE OR BOUND IN ANY MANNER BY ANY ORAL OR WRITTEN STATEMENTS, REPRESENTATIONS OR INFORMATION PERTAINING TO THE PROPERTY, THE USTS, OR THE OPERATION THEREOF, FURNISHED BY ANY REAL ESTATE BROKER, AGENT, EMPLOYEE, SERVANT, TENANT OR OTHER PERSON.

SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED AND ANY REPRESENTATIONS AND WARRANTIES IN THIS PURCHASE AND SALE AGREEMENT, BUYER FURTHER ACKNOWLEDGES AND AGREES THAT TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE SALE OF THE PROPERTY AND THE USTS AS PROVIDED FOR HEREIN IS MADE ON AN "**AS IS**" CONDITION AND BASIS, WITH ALL FAULTS, AND THAT SELLERS HAVE NO OBLIGATIONS TO MAKE REPAIRS, REPLACEMENTS OR IMPROVEMENTS. BUYER AGREES THAT THE PROVISIONS OF THIS SECTION SURVIVE CLOSING AND ARE TO BE SET FORTH IN THE DEED AND THE USTS BILL OF SALE.

b. Environmental Matters.

(1) Hazardous Materials. "**Hazardous Materials**" means (a) any hazardous waste, hazardous substance, toxic pollutant, hazardous air pollutant or hazardous chemical (as any such terms may be defined under, or for the purpose of, any Environmental Law), (b) asbestos, (c) polychlorinated biphenyls, (d) petroleum or petroleum products, including without limitation Contamination, fuel-related waste and materials from exploration and production of petroleum hydrocarbons and natural gas, and (e) any substance the presence of which on the Property is prohibited under any Environmental Law or which requires or may require special handling or notification of or reporting under Environmental Law as to its generation use, handling, collection, treatment, storage, recycling, transportation, corrective action, remediation, removal, discharge or disposal.

(2) Environmental Law. "**Environmental Law**" means any federal, state or local law, statute, ordinance, rule, regulation or legal requirement in effect at the Effective Date and/or the Closing Date pertaining to (a) the protection of health, safety, or the environment; (b) the conservation, management, protection, or use of natural resources and wildlife; (c) the protection or use of source water and groundwater; (d) the management, manufacture, possession, use, generation, transportation, treatment, storage, disposal, release, threatened release, abatement, removal, remediation, or handling of, or exposure to, any Hazardous Material; or (e) pollution (including any release to air, land, surface water and groundwater), and includes without limitation the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 *et seq.*, the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.*, Clean Air Act of 1966, as amended, 42 U.S.C. 7401 *et seq.*, Toxic Substances Control Act of 1976, as amended, 15 U.S.C. 2601 *et seq.*, the Hazardous Materials Transportation Act, 49 USC App.

1801, Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. 651 *et seq.*, the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, the Emergency Planning and Community Right-To-Know Act of 1986, 42 USC App. 11001 *et seq.*, the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300(f) *et seq.*, together with state counterparts, including without limitation the Texas Water Code, including Texas Water Code Subchapter I, Underground and Aboveground Storage Tanks; the Texas Solid Waste Disposal Act, Tex. Health & Safety Code §§ 361.001 *et seq*., and any similar, implementing or successor law, and any amendment, rule, regulation, order or directive, issued thereunder.

(3) RELEASE OF SELLER PARTIES. BUYER ACKNOWLEDGES AND AGREES THAT BUYER IS RESPONSIBLE FOR CONDUCTING ITS OWN INSPECTIONS AND INVESTIGATIONS OF THE PROPERTY AND THE PROPERTY'S COMPLIANCE WITH ANY ENVIRONMENTAL LAW, AND THAT THE PROPERTY AND THE USTS WILL BE CONVEYED TO BUYER IN THE CONDITION SET FORTH IN THIS SECTION 5.2. SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED, BUYER'S OBLIGATIONS UNDER THE USTS REMOVAL AGREEMENT, AND ANY REPRESENTATIONS AND WARRANTIES IN THIS PURCHASE AND SALE AGREEMENT, BUYER AND ANYONE CLAIMING BY, THROUGH OR UNDER BUYER, INCLUDING BUT NOT LIMITED TO AS OWNER OF THE PROPERTY, THE USTS OR OTHER PROPERTY, HEREBY WAIVES ITS RIGHT TO RECOVER FROM AND FULLY AND IRREVOCABLY RELEASES SELLER PARTIES FROM ANY AND ALL CLAIMS, RESPONSIBILITY AND LIABILITY THAT IT MAY NOW HAVE OR HEREAFTER ACQUIRE AGAINST ANY OF THE SELLER PARTIES, AS BUYER OF THE PROPERTY AND THE USTS AND AS BUYER OF ANY OTHER PROPERTY, FOR ANY (A) CLAIMS, COSTS, EXPENSES, DAMAGES, LOSSES, LIABILITY ARISING FROM OR RELATED TO THE CONDITION, VALUATION, SALABILITY, UTILITY OR SUITABILITY FOR ANY PURPOSE OF THE PROPERTY AND THE USTS (INCLUDING WITHOUT LIMITATION ANY CONSTRUCTION DEFECTS, ERRORS, OMISSIONS, OR OTHER CONDITIONS, LATENT OR OTHERWISE, AND THE PRESENCE IN THE SOIL, SOIL GAS, AIR, STRUCTURES, OR SURFACE OR SUBSURFACE WATERS OF MATERIALS OR SUBSTANCES THAT HAVE BEEN OR MAY IN THE FUTURE BE DETERMINED TO BE TOXIC, HAZARDOUS, OR SUBJECT TO REGULATION AND THAT MAY NEED TO BE SPECIALLY TREATED, HANDLED OR REMOVED FROM THE PROPERTY UNDER CURRENT OR FUTURE FEDERAL, STATE AND LOCAL LAWS REGULATIONS OR GUIDELINES), INCLUDING HAZARDOUS MATERIALS AND (B) FOR CONTRIBUTION OR INDEMNITY WITH RESPECT TO THE CONDITION OF THE PROPERTY AND THE USTS WHETHER ARISING UNDER ENVIRONMENTAL LAW, COMMON LAW OR OTHERWISE. THIS RELEASE INCLUDES PROPERTY SELLER'S AND USTS SELLER'S NEGLIGENCE AND CLAIMS OF WHICH BUYER IS PRESENTLY UNAWARE OR WHICH BUYER DOES NOT PRESENTLY SUSPECT TO EXIST WHICH, IF KNOWN BY BUYER, WOULD MATERIALLY AFFECT BUYER'S RELEASE OF SELLER PARTIES. THE PROVISIONS OF THIS SECTION 5.2 SHALL SURVIVE CLOSING OF THE SALE.

6. CLOSING

6.1 Closing. The Closing ("**Closing**") shall be held at the office of the Title Company, 30 days following the expiration of the Contingency Date, as may be extended ("**Closing Date**") but not on or before _____, 2018, or such earlier date after _____, 2018, as Buyer may elect by providing 10 days advance, written notice to Sellers.

6.2 Sellers' Obligations at Closing. At Closing, Sellers shall deliver to Buyer the following, each of which must be satisfactory in form and substance to Buyer and must reveal no material adverse change in the information previously furnished to Buyer by Sellers:

a. Deed. Property Seller shall deliver a Special Warranty Deed ("**Deed**") executed by the Property Seller in the form attached hereto as **Exhibit 2**, subject to no exceptions other than the Permitted Exceptions.

b. Bill of Sale. USTs Seller shall deliver the USTs Bill of Sale executed by the USTs Seller in the form attached as **Exhibit 3**. USTs Seller shall deliver to TCEQ documentation assigning ownership of the USTs to Buyer.

c. Title Policy. Property Seller shall cause the Title Company to issue an Owner's Title Policy in Texas standard form (the "**Owner's Policy**"), naming Buyer as insured, in the amount of the Purchase Price, insuring that Buyer owns good and indefeasible fee simple title to the Real Property, subject only to the Permitted Exceptions, and the survey exception shall at Buyer's election and expense be amended to read, "any

shortages in area" subject to the Permitted Exceptions including matters based on the Title Company's inspection of the Property and review of the Survey.

d. **Owner's Affidavits.** Sellers shall respectively execute and deliver to the Title Company a standard Title Company form Owner's Affidavit or lien waiver satisfactory for the purpose of removing the mechanics lien exception, gap exception, parties-in-possession exception, unrecorded easements exceptions, and any other customarily-removed standard exceptions from the Owner's Policy, but subject to the Permitted Exceptions including matters based on the Title Company's inspection of the Property and review of the Survey.

e. **Foreign Person.** Sellers shall respectively execute and deliver to the Title Company an affidavit of Sellers certifying that the respective Seller is not a "foreign person", as defined in the federal Foreign Investment in Real Property Tax Act of 1980, and the 1984 Tax Reform Act, as amended.

f. **Evidence of Authority.** Sellers shall respectively deliver to the Title Company a copy of such consents, court orders and other matters required by the Title Company or Buyer to evidence the authority and the power of the respective Seller to execute this Purchase and Sale Agreement, convey the respective Owner's interest in the Property to Buyer in accordance with this Purchase and Sale Agreement, and to execute the Closing Documents executed by the Owner in connection with the Closing.

g. **Terminations.** If not sooner provided, evidence of the termination or expiration of all Property Contracts, including the Station Lease and the Fuel Supply Contract. If a Seller or any affiliate of a Seller is in possession of the Property or the USTs, such Seller and any such affiliate shall remove all personal property not a part of the Property or not part of the USTs, and shall quit the Property.

h. **USTs Removal Agreement.** Sellers and Buyer shall execute and deliver to the each other the USTs Removal Agreement in the form attached as **Exhibit 3**.

i. **Escrow Agreement.** Sellers, Buyers and the Title Company as Escrow Agent shall execute the Escrow Agreement attached as **Exhibit 4**.

j. **Other Matters.** Sellers shall deliver such other matters as may be required of them herein.

6.3 **Buyer's Obligation at Closing.** At Closing, Buyer shall deliver to Sellers the following:

a. **Purchase Price.** The Purchase Price, reduced by any Earnest Money paid to Sellers, if Buyer shall elect to apply the Earnest Money to the Purchase Price, by cashier's check or wire transfer of available funds.

b. **Evidence of Authority.** Buyer shall deliver to the Title Company a copy of such consents, court orders and other matters required by the Title Company or Sellers to evidence the authority and the power of Buyer to enter into this Purchase and Sale Agreement and to execute the Closing Documents executed by Buyer in connection with the Closing.

c. **USTs Removal Agreement.** Sellers and Buyer shall execute and deliver to the each other the USTs Removal Agreement in the form attached as **Exhibit 4**.

d. **Escrow Agreement.** Sellers, Buyer and the Title Company as Escrow Agent shall execute the Escrow Agreement attached as **Exhibit 5**. Buyer shall deposit with the Escrow Agent at closing or thereafter as determined 125% of the Estimates of the Cost of the Work as provided in the USTs Removal Agreement.

e. **UST Registration, Financial Assurance and Insurance.** Buyer shall deliver to Sellers proof of registration of the USTs in Buyer’s name with TCEQ, and the financial assurance required by TCEQ, the certificates of insurance and endorsements evidencing maintenance of the insurance required by TCEQ and the USTs Removal Agreement.

f. **Other Releases.** If an affiliate of Buyer or an affiliate of ____Health Corporation purchases property within a quarter mile of the Property, such purchaser shall execute a release of the Seller Parties conforming to the substance of Section 5a of the USTs Removal Agreement.

g. **Other Matters.** Buyer shall deliver such other matters as may be required of it herein.

6.4 **Proration.** Ad valorem and personal property taxes, rental, utilities, and all other sums customarily prorated in closing of similar properties in the County where the Property is located shall be prorated as of 12 midnight on the Closing Date. If the taxes for the current year cannot be ascertained, those of the previous year shall be used, giving due allowance for the maximum discount allowable by law. If taxes are prorated using the prior year's tax, Buyer and Sellers agree that there will be no re-proration of taxes after Closing.

6.5 **Possession.** Possession of the Property and the USTs shall be delivered to Buyer at Closing, subject to the Permitted Exceptions.

6.6 **Closing Costs.**

a. **Sellers.** Except as otherwise expressly provided herein, Sellers shall pay, on the Closing Date, all brokers' fees, one-half of any escrow fees, all recording costs for any title curative document, and the legal fees of Sellers' counsel in negotiating, preparing and closing this transaction.

b. **Buyer.** Buyer shall pay, on the Closing Date, all recording costs for the Deed, any title insurance premium, one-half of any escrow fees and other customary charges of the Title Company and the legal fees of Buyer's counsel in negotiating, preparing and closing this transaction.

7. RISK OF LOSS

7.1 **Condemnation.** If, prior to the Closing, action is initiated or threatened to take any of the Property by eminent domain proceedings or by deed in lieu thereof, Buyer may either (a) terminate this Purchase and Sale Agreement, or (b) consummate the Closing, in which event the award of the condemning authority shall be assigned to Buyer at the Closing.

7.2 **Casualty.** Sellers shall have and shall continue to have all risks and liability for damage to or injury occurring to the Property by fire, storm, accident, or any other casualty or cause, until the Closing has been consummated. Sellers shall maintain fire and extended coverage insurance with a replacement cost endorsement for the Property, up to and including the Closing Date. If the Property, or any part thereof, suffers any damage prior to the Closing from fire, storm or any other casualty or cause, Buyer may either (a) terminate this Purchase and Sale Agreement or (b) consummate the Closing, in which event the proceeds of any insurance covering such damage shall be assigned to Buyer at the Closing.

8. DEFAULT

8.1 **Breach by an Owner.** If a Seller fails to perform any of the covenants and agreements set forth in this Purchase and Sale Agreement on its part to be performed within the time or times specified herein, or if said Seller's representations and warranties contained herein are not true, correct or complete, and said Seller does not cure such failure within 10 days after said Seller's receipt of written notice from Buyer specifying the nature of Owner's alleged failure, Sellers shall be in default under this Purchase and Sale Agreement; provided, however, if such failure reasonably cannot be cured within said 10 day period but Sellers commence the curative action within the 10 day period and pursue same in a reasonable and diligent manner, Sellers shall have up to 90 days from receipt of said written notice from Buyer to cure such default. The foregoing notice and cure period shall not be applicable to Sellers' failure to be able to close as required hereunder. In the event of default by a Seller under this Purchase and Sale Agreement that is not cured within the applicable notice and cure period, (a) Buyer may terminate this Purchase and Sale Agreement and thereupon shall be entitled to the immediate return of the Earnest Money, together with all accrued interest thereon, or (b) Buyer may enforce specific performance of this Purchase and Sale Agreement; provided, however, that in the event a Seller's actions make it impossible for Buyer to obtain the remedy

of specific performance, or if an Owner's representations and warranties contained herein are not true, correct or complete, Buyer shall have the right to seek and obtain from Sellers actual damages incurred by Buyer due to a Seller's default under this Purchase and Sale Agreement, but not to exceed $250,000. The notice and cure rights of Seller set forth in this Section 8.1 shall not be applicable to any failure of Seller to timely perform its obligation to close within the time specified in Section 6.1.

8.2 Breach by Buyer. If Buyer fails to perform any of the covenants and agreements set forth in this Purchase and Sale Agreement on its part to be performed within the time or times specified herein, and Buyer does not cure such failure within 10 days after Buyer's receipt of written notice from Sellers specifying the nature of Buyer's alleged failure, Buyer shall be in default under this Purchase and Sale Agreement; provided, however, if such failure reasonably cannot be cured within said 10 day period but Buyer commences the curative action within the 10 day period and pursues same in a reasonable and diligent manner, Buyer shall have up to 90 days from receipt of said written notice from Sellers to cure such default. The foregoing notice and cure period shall not be applicable to Buyer's failure to close as required hereunder. In the event of a default by Buyer under this Purchase and Sale Agreement, in addition to enforcement of Buyer's Post Termination Obligations, Sellers shall be entitled to the Earnest Money, together with all interest accrued thereon, and all Extension Deposits as liquidated damages (and not as a penalty) and as Sellers' sole remedy and relief hereunder. Sellers and Buyer have made this provision for liquidated damages because it would be difficult to calculate, on the date hereof, the amount of actual damages for such breach, and that these sums represent reasonable compensation to Sellers.

9. OPERATION OF THE PROPERTY

9.1 Maintenance. Sellers shall keep and maintain the Property in the same manner and with the same services provided by the said Seller prior to the Effective Date for the term of this Purchase and Sale Agreement.

9.2 Leases and Service Contracts. Prior to the Closing, without the prior written consent of Buyer, Sellers (a) shall not enter into any Property Contracts affecting the Property, the USTs or any part thereof that are not terminated as of Closing, (b) shall not enter into any amendments or modifications of any Property Contracts that are not terminated as of Closing, and (c) shall provide evidence of the termination of all Property Contracts as provided above.

9.3 Other Matters. To the extent Sellers have current actual knowledge, Sellers shall provide to Buyer notice of any litigation, arbitration, administrative hearing or other event which concerns the Property or the USTs, arising or threatened after the Effective Date, and copies of any information which occurs after the Effective Date which causes any representation or warranty of a Seller not to be true and correct as of the Closing Date.

10. MISCELLANEOUS

10.1 Notices. All notices, demands and requests which may be given or which are required to be given by either party to the other, and any exercise of a right of termination provided by this Purchase and Sale Agreement, shall be in writing and shall be deemed effective when personally delivered to the address of the party to receive such notice set forth below or, whether actually received or not, upon actual delivery confirmation of facsimile transmission to a party's facsimile number listed below, or when deposited in any post office or mail receptacle regularly maintained by the United States Government, certified or registered mail, return receipt requested, postage prepaid, addressed as set forth on the Signature Pages attached hereto and made a part hereof for all purposes, or when deposited with a nationally recognized overnight courier service (*e.g.*, FedEx) for next business day delivery, delivery charges prepaid, addressed as set forth on the Signature Pages attached hereto and made a part hereof for all purposes or such other place as Sellers or Buyer, respectively, may from time to time designate by written notice to the other. In the event there is no facsimile number listed in this section for the delivery of notices to Sellers, but any party to whom copies of notices to Sellers are to be delivered does have a listed or published facsimile number (other than Closing Agent and Escrow Agent), then any notices timely delivered by Buyer to such third party's facsimile number shall be deemed timely to have been delivered to Sellers. The attorney for a party has the authority to send and receive notices on behalf of such party.

10.2 Real Estate Commissions. Neither Sellers nor Buyer has contacted any real estate broker, finder or similar person in connection with the transaction contemplated hereby. To the actual knowledge of Sellers and

Buyer, no real estate commissions or fees have been paid or are due and owing to any person or entity in connection with this transaction. It is agreed that no commission is payable to _____ or any related company. Sellers and Buyer each hereby agree to indemnify and hold harmless the other from and against any and all claims for real estate commissions, fees or similar charges with respect to this transaction, arising by, through or under the indemnifying party and each further agrees to indemnify and hold harmless the other from any loss or damage resulting from an inaccuracy in the representations contained in this Section. The following disclosure is provided in accordance with applicable law. Buyer should have an abstract covering the Property examined by an attorney of Buyer's selection or Buyer should be furnished with or obtain a title policy.

10.3 Entire Agreement. This Purchase and Sale Agreement embodies the entire agreement between the parties relative to the subject matter hereof, and there are no oral or written agreements between the parties, nor any representations made by either party relative to the subject matter hereof, which are not expressly set forth herein.

10.4 Survival. The representations and warranties contained herein, and the rights and obligations set forth in Section 6.5 and elsewhere specified herein as surviving the Closing shall survive the Closing of this transaction and shall not be merged into the Deed to be delivered at Closing.

10.5 Amendment. This Purchase and Sale Agreement may be amended only by a written instrument executed by the party or parties to be bound thereby.

10.6. Captions. The captions and headings used in this Purchase and Sale Agreement are for convenience only and do not in any way limit, amplify or otherwise modify the provisions of this Purchase and Sale Agreement.

10.7 Time of Essence. Time is of the essence of this Purchase and Sale Agreement. However, if the final date of any period which is set out in any provision of this Purchase and Sale Agreement falls on a Saturday, Sunday or legal holiday under the law of the United States or the State of Texas, in such event, the time of such period shall be extended to the next day which is not a Saturday, Sunday or legal holiday.

10.8 Governing Law. This Purchase and Sale Agreement shall be governed by the laws of the State of Texas and the laws of the United States pertaining to transactions in Texas, and shall be performable in Travis County, Texas.

10.9 Successors and Assigns. This Purchase and Sale Agreement shall bind and inure to the benefit of Sellers and Buyer and their respective successors and assigns.

10.10 Assignment. This Purchase and Sale Agreement may not be assigned, transferred, pledged, or hypothecated by Buyer without the prior written consent of Sellers, except that Buyer shall have the right, at any time upon notice to Sellers, to assign this Purchase and Sale Agreement and its rights hereunder to ___ Pharmacy, Inc. The Escrow Agreement is to be executed by the Grantee under the Deed and the Buyer under the USTs Bill of Sale.

10.11 Invalid Provision. If any provision of this Purchase and Sale Agreement is held to be illegal, invalid or unenforceable under present or future laws, such provision shall be fully severable; this Purchase and Sale Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Purchase and Sale Agreement; and, the remaining provisions of this Purchase and Sale Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance from this Purchase and Sale Agreement.

10.12 Attorneys' Fees. In the event it becomes necessary for either party hereto to file suit to enforce this Purchase and Sale Agreement or any provision contained herein, the party prevailing in such suit shall be entitled to recover, in addition to all other remedies or damages as herein provided, reasonable attorneys' fees incurred in such suit.

10.13 Confidentiality. Sellers agree to keep all information relating to the negotiations of this Purchase and Sale Agreement and Buyer, or any assignee of Buyer, whether such information is in any way proprietary, strategic or otherwise in strict confidence, and Sellers shall guard its accessibility to others within its control, or subject to its direction. Sellers agree not to divulge to persons other than the attorney, accountant, or involved officers, directors, employees, agents, representatives and if appropriate, family members, on a need to know only basis, any of the terms and conditions or any matters related to the negotiations, this Purchase and Sale Agreement and Buyer nor any assignee of Buyer.

10.14 Cooperation. The parties shall cooperate with one another, execute such additional documents as are necessary and reasonable to consummate the transaction set forth herein, any assemblage, the determination of the feasibility of the Property, for Buyer's intended use, and take such other necessary and reasonable actions as may be required to facilitate the Closing and assist Buyer.

10.15 Multiple Counterparts. This Purchase and Sale Agreement may be executed in a number of identical counterparts, each of which for all purposes is deemed an original, and all of which constitute collectively one agreement; but in making proof of this Purchase and Sale Agreement, it shall not be necessary to produce or account for more than one such counterpart. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page.

10.16 Effective Date. Upon receipt of such executed Agreement, the Title Company is directed to acknowledge the receipt of same in the place provided and deliver an original to Sellers and to Buyer. The Title Company shall date the Agreement effective as of the later of: (a) the date the Agreement was executed by the last of Sellers or Buyer, or (b) the date Sellers delivered the fully-executed Agreement to Buyer ("**Effective Date**"). The Title Company shall give notice to Sellers of receipt of the Earnest Money promptly upon its receipt of such Earnest Money. If Buyer fails to timely deliver the Earnest Money, Sellers shall have the right, as its sole and exclusive remedy, to terminate this Purchase and Sale Agreement by delivering written notice to Buyer, but if Buyer completes the delivery of the Earnest Money within two business days after receipt of the termination notice from Sellers, then this Purchase and Sale Agreement shall remain in full force and effect. Buyer and Sellers agree that the Title Company will hold and dispose of the Earnest Money in accordance with the terms of this Purchase and Sale Agreement.

10.17. Exhibits. Any exhibits attached to this Purchase and Sale Agreement are incorporated into this Purchase and Sale Agreement and made a part hereof.

10.18 Notice to Sellers and Buyer. If the Property is situated in a utility or statutorily created district providing water, sewer, drainage or flood control facilities and services, or if the Property is located in a certificated service area of a utility service provider, or a Texas Agricultural Development District, Texas law requires Sellers to deliver and Buyer to sign statutory notices relating thereto. Accordingly, in such event, the parties agree to execute notices in the form required by applicable law, contemporaneously with the Closing.

10.19 Notice Regarding Annexation. If the Property is located outside the limits of a municipality, the Property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the Property is located within a municipality's extraterritorial jurisdiction, contact all municipalities located in the general proximity of the Property for further information.

10.20 No Construction Against Drafting Party. Sellers and Buyer acknowledge that each of them and their respective counsel have had an opportunity to review this Purchase and Sale Agreement and that this Purchase and Sale Agreement will not be construed for or against either party merely because such party prepared or drafted this Purchase and Sale Agreement or any particular provision thereof.

10.21 Damages. Notwithstanding anything set forth in this Purchase and Sale Agreement to the contrary, neither party is liable to the other for any special, indirect, punitive, or consequential damages.

10.22 Merger/Prior Agreements. This Purchase and Sale Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Purchase and Sale Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Purchase and Sale Agreement are expressly merged into and superseded by this Purchase and Sale Agreement. The provisions of this Purchase and Sale Agreement may not be explained, supplemented, or qualified through evidence of trade usage or a prior course of dealings. In entering into this Purchase and Sale Agreement, the parties have not relied upon any statement, representation, or agreement of the other party except for those expressly contained in this Purchase and Sale Agreement. There is no condition precedent to the effectiveness of this Purchase and Sale Agreement other than those expressly stated in this Purchase and Sale Agreement.

10.23 Waiver of Jury Trial; Venue. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY ACTION OR OTHER LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS PURCHASE AND SALE AGREEMENT AND THE TRANSACTIONS IT CONTEMPLATES. THIS WAIVER APPLIES TO ANY ACTION OR OTHER LEGAL PROCEEDING, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE ("**PROCEEDING**"). EACH PARTY ACKNOWLEDGES THAT IT HAS RECEIVED THE ADVICE OF COMPETENT COUNSEL. ANY PROCEEDING ARISING OUT OF OR BASED ON THIS PURCHASE AND SALE AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY MAY BE INSTITUTED ONLY IN THE FEDERAL OR STATE COURTS WITHIN TRAVIS COUNTY, TEXAS. EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS AND WAIVES ANY OBJECTION IT MAY HAVE NOW OR HEREAFTER TO THE LAYING OF VENUE IN SUCH COURTS FOR ANY PROCEEDING. SERVICE OF PROCESS, SUMMONS, NOTICE OR OTHER DOCUMENT BY MAIL TO SUCH PARTY'S ADDRESS SET FORTH HEREIN SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY PROCEEDING BROUGHT IN ANY SUCH COURT.

10.24 No Third Party Beneficiaries. Nothing in this Purchase and Sale Agreement, express or implied, is intended to confer any rights or remedies under or by reason of this Purchase and Sale Agreement on any persons other than the parties to it, nor is anything in this Purchase and Sale Agreement intended to relieve or discharge the obligation or liability of any third person to any party to this Purchase and Sale Agreement.

10.25 Incorporation of Recitals. The Recitals are incorporated herein by reference as if set forth herein verbatim.

EXECUTED on the dates set forth below.

[*The balance of this page is intentionally left blank.*
Signatures appears on the Signature Pages attached hereto and made a part hereof.]

EXHIBIT 1 PURCHASE AND SALE AGREEMENT

Testing Plan

- Environmental Site Assessment (Phase I)
- Limited Site Assessment (Phase II)
- Geotechnical Engineering Report
- Pre-Demolition Asbestos Survey and Hazardous Building Materials Assessment

EXHIBIT 2 PURCHASE AND SALE AGREEMENT

SPECIAL WARRANTY DEED

THE STATE OF TEXAS §
§ KNOW ALL PERSONS BY THESE PRESENTS:
COUNTY OF TRAVIS §

_____ ("**Grantor**"), for a full valuable consideration in hand paid by _____ ("**Grantee**"), the receipt and sufficiency of which are hereby acknowledged, has GRANTED, SOLD AND CONVEYED and, by these presents, does GRANT, SELL AND CONVEY unto Grantee, the following described real property (the "**Land**") (other than the USTs, as defined in that certain Purchase and Sale Agreement, between Grantor, as Property Seller, and _____ as Buyer, as the USTs are sold and assigned by _____ to _____by a separate USTs Bill of Sale), together with: (i) all improvements on the Land and (ii) all of Grantor's right, title and interest in and to any appurtenances, rights, privileges, warranties, and easements benefiting, belonging, or pertaining thereto (including all development rights and water and wastewater utility capacity related thereto) (collectively, the "**Property**"):

_____.

TO HAVE AND TO HOLD the Property unto Grantee, and Grantee's successors and assigns, forever; and Grantor hereby binds itself and its successors and assigns to WARRANT AND FOREVER DEFEND all and singular the Property unto Grantee and Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof, by, through, or under Grantor, but not otherwise; provided, however, that this conveyance is made by Grantor and accepted by Grantee subject to all of the title exceptions listed on **Exhibit A** attached hereto and incorporated herein by reference (the "**Permitted Exceptions**"); and the liens securing taxes and assessments for the current and all subsequent years. Taxes for the current year having been prorated, the payment thereof is hereby assumed by Grantee.

SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THIS DEED, AND ANY REPRESENTATIONS AND WARRANTIES IN THE PURCHASE AND SALE AGREEMENT, THE PROPERTY IS SOLD BY GRANTOR AND ACCEPTED BY THE GRANTEE IN ITS PRESENT CONDITION, AS IS, WHERE IS AND WITH ALL FAULTS, AND WITH ANY AND ALL LATENT AND PATENT DEFECTS. THERE IS NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, BY GRANTOR THAT THE PROPERTY HAS A PARTICULAR FINANCIAL VALUE, IS FIT FOR A PARTICULAR PURPOSE, OR AS TO THE CONDITION, HABITABILITY, SUITABILITY, OR MERCHANTABILITY OF THE PROPERTY. SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED AND ANY REPRESENTATIONS AND WARRANTIES IN THE PURCHASE AND SALE AGREEMENT, GRANTEE HAS RELIED SOLELY UPON GRANTEE'S OWN INVESTIGATION OF THE PROPERTY AND NOT UPON ANY REPRESENTATION, STATEMENT OR ASSURANCE BY GRANTOR. SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THIS DEED, AND ANY REPRESENTATIONS AND WARRANTIES IN THE PURCHASE AND SALE AGREEMENT, THE PURCHASE PRICE REFLECTS THE SALE OF THE PROPERTY "AS IS" AND WITH THESE DISCLAIMERS. SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THE DEED AND ANY REPRESENTATIONS AND WARRANTIES IN THE PURCHASE AND SALE AGREEMENT, GRANTOR HEREBY SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY, OR REPRESENTATION, ORAL OR WRITTEN, EXPRESSED OR IMPLIED, PAST, PRESENT OR FUTURE, OF, AS TO, OR CONCERNING, AND GRANTEE ACKNOWLEDGES THAT GRANTEE IS NOT RELYING ON ANY REPRESENTATION, STATEMENT OR ASSURANCE BY GRANTOR AS TO: (1) THE NATURE AND CONDITION OF THE PROPERTY, INCLUDING BUT NOT BY WAY OF LIMITATION, THE WATER, SOIL, SUBSURFACE, AND GEOLOGY, AND THE SUITABILITY THEREOF AND OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH GRANTEE MAY ELECT TO CONDUCT THEREON; (2) THE MANNER, CONSTRUCTION, CONDITION, STATE OF REPAIR OR LACK OF REPAIR OF ANY IMPROVEMENTS LOCATED THEREON OR THE ADEQUACY OF PARKING OR ACCESS; (3) THE COMPLIANCE OF THE PROPERTY WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY FEDERAL, STATE OR LOCAL GOVERNMENTAL OR QUASI-GOVERNMENTAL BODY (INCLUDING WITHOUT LIMITATION, BUILDING PERMITS, ZONING, ENVIRONMENTAL LAW (DEFINED IN THE PURCHASE AND SALE AGREEMENT), AND THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *ET SEQ.*; (4) THE VALUE OF THE PROPERTY; (5) THE INCOME OR EXPENSES OF THE PROPERTY OR ITS PROFITABILITY; (6) EXCEPT FOR THE SPECIAL WARRANTY OF TITLE EXPRESSLY SET FORTH IN THIS DEED, THE NATURE OR EXTENT OF TITLE TO THE PROPERTY; (7) THE ENVIRONMENTAL CONDITION OF THE PROPERTY, INCLUDING BUT NOT LIMITED TO, THE PRESENCE OR ABSENCE OF ANY HAZARDOUS MATERIALS ON, IN, UNDER OR ADJACENT TO THE PROPERTY; (8) THE CONTENT, COMPLETENESS OR ACCURACY OF THE PROPERTY

INFORMATION OR OTHER DUE DILIGENCE MATERIALS PROVIDED GRANTEE; (9) THE CONFORMITY OF ANY IMPROVEMENTS TO ANY PLANS OR SPECIFICATIONS FOR THE PROPERTY, INCLUDING ANY PLANS AND SPECIFICATIONS THAT MAY HAVE BEEN OR MAY BE PROVIDED TO GRANTEE; (10) THE CONFORMITY OF THE PROPERTY TO PAST, CURRENT OR FUTURE APPLICABLE ZONING OR BUILDING REQUIREMENTS; (11) DEFICIENCY OF ANY DRAINAGE; (12) THE EXISTENCE OF VESTED LAND USE, ZONING OR BUILDING ENTITLEMENTS AFFECTING THE PROPERTY; OR (13) WITH RESPECT TO ANY OTHER MATTER. FOR THE PURPOSES OF THIS DEED, "**HAZARDOUS MATERIALS**" MEANS (A) ANY HAZARDOUS WASTE, HAZARDOUS SUBSTANCE, TOXIC SUBSTANCE OR POLLUTANT, HAZARDOUS AIR POLLUTANT OR HAZARDOUS CHEMICAL (AS ANY SUCH TERMS MAY BE DEFINED UNDER, OR FOR THE PURPOSE OF, ANY ENVIRONMENTAL LAW), (B) ASBESTOS, (C) POLYCHLORINATED BIPHENYLS, (D) PETROLEUM OR PETROLEUM PRODUCTS, INCLUDING WITHOUT LIMITATION CONTAMINATION, IF ANY, FUEL-RELATED WASTE AND MATERIALS FROM EXPLORATION AND PRODUCTION OF PETROLEUM HYDROCARBONS AND NATURAL GAS, AND (E) ANY SUBSTANCE THE PRESENCE OF WHICH ON THE PROPERTY IS PROHIBITED UNDER ANY ENVIRONMENTAL LAW OR WHICH REQUIRES OR MAY REQUIRE SPECIAL HANDLING OR NOTIFICATION OF OR REPORTING UNDER ENVIRONMENTAL LAW AS TO ITS GENERATION, USE, HANDLING, COLLECTION, TREATMENT, STORAGE, RECYCLING, TRANSPORTATION, CORRECTIVE ACTION, REMEDIATION REMOVAL, DISCHARGE OR DISPOSAL. GRANTEE AGREES THAT THE PROVISIONS OF THIS PARAGRAPH SURVIVE DELIVERY OF THIS DEED.

DATED effective as of the _____ day of _____, 2018.

[*To be executed and acknowledged by Seller and Buyer*]
[*Exhibit A (Permitted Exceptions) to be attached at Closing*]

EXHIBIT 3 TO PURCHASE AND SALE AGREEMENT

USTs BILL OF SALE

THE STATE OF TEXAS §
§ KNOW ALL PERSONS BY THESE PRESENTS:
COUNTY OF TRAVIS §

THAT, _____ ("**USTs Seller**"), for and in consideration of the sum of $10.00 to USTs Seller in hand paid by _____ ("**Buyer**"), the receipt and sufficiency of which is hereby acknowledged, has BARGAINED, SOLD, ASSIGNED, AND DELIVERED, and by these presents does BARGAIN, SELL, ASSIGN, AND DELIVER, unto Buyer, all of USTs Seller's right, title and interest in and to all underground storage tanks and underground storage tank systems [both as defined in 30 T.A.C. §334.2(114) and (115)], including without limitation fuel dispensers, lines and piping, and all other related systems and equipment ("**USTs**") located on or about the real property more particularly described as follows (the "**Property**"):

_____.

USTs Seller, 202 East Avenue, Austin, Texas, notifies Buyer, _____, that the underground storage tanks which are included in this sale are presumed to be regulated by the Texas Commission on Environmental Quality ("**TCEQ**") and may be subject to certain registration, compliance self-certification, construction notification, and other requirements found in Title 30 Texas Administrative Code, Chapter 334. The underground storage tanks include the following: Tank 1, 10,000 gallons, installed 1/1/1979: in use for gasoline; Tank 2, 10,000 gallons, installed 1/1/1979: in use for gasoline; Tank 3, 10,000 gallons, installed 1/1/1979: in use for gasoline; Tank 4, 10,000 gallons, installed 1/1/1979: in use for diesel. The tank material is Single Wall non-corrodible FRP. The TCEQ Designated Facility # is _____ and is known on TCEQ's records as Broaddus Chevron Lion Mart and as Pinky's Pantry. The TCEQ Site Number is RN _____. The Petroleum Storage Tank Registration # is ____. The Owner/Operator # is _____. The TCEQ Customer # is _____.

USTs Seller does hereby bind itself and its successors and assigns, to forever Warrant and Defend the title to the Personal Property unto the said Buyer, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof, by, through, or under USTs Seller, but not otherwise.

The USTs are conveyed by USTs Seller, and accepted by Buyer, in the condition set forth in that certain Purchase and Sale Agreement by and among Broaddus Properties, Ltd. ("**Seller**"), USTs Seller and _____. This USTs Seller Bill of Sale may be executed in identical counterparts, all of which, when taken together, will constitute one and the same instrument.

SUBJECT ONLY TO THE SPECIAL WARRANTIES OF TITLE CONTAINED IN THIS BILL OF SALE, THE USTS ARE SOLD BY USTS SELLER AND ACCEPTED BY BUYER IN ITS PRESENT CONDITION, AS IS, WHERE IS AND WITH ALL FAULTS, AND WITH ANY AND ALL LATENT AND PATENT DEFECTS. THERE IS NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, BY USTS SELLER THAT THE USTS HAVE A PARTICULAR FINANCIAL VALUE, IS FIT FOR A PARTICULAR PURPOSE, OR AS TO THE CONDITION, HABITABILITY, SUITABILITY, OR MERCHANTABILITY OF THE PROPERTY. BUYER HAS RELIED SOLELY UPON BUYER'S OWN INVESTIGATION OF THE PROPERTY AND NOT UPON ANY REPRESENTATION, STATEMENT OR ASSURANCE BY USTS SELLER, _____. THE PURCHASE PRICE REFLECTS THE SALE OF THE USTS "**AS IS**" AND WITH THESE DISCLAIMERS. USTS SELLER AND _____HEREBY SPECIFICALLY DISCLAIM ANY WARRANTY, GUARANTY, OR REPRESENTATION, ORAL OR WRITTEN, EXPRESSED OR IMPLIED, PAST, PRESENT OR FUTURE, OF, AS TO, OR CONCERNING, AND BUYER ACKNOWLEDGES THAT BUYER IS NOT RELYING ON ANY REPRESENTATION, STATEMENT OR ASSURANCE BY UST SELLER, _____AS TO: (1) THE NATURE AND CONDITION OF THE USTS OR THE PROPERTY, INCLUDING BUT NOT BY WAY OF LIMITATION, THE WATER, SOIL, SUBSURFACE, AND GEOLOGY, AND THE SUITABILITY THEREOF AND OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH BUYER MAY ELECT TO CONDUCT THEREON; (2) THE MANNER, CONSTRUCTION, CONDITION, STATE OF REPAIR OR LACK OF REPAIR OF ANY IMPROVEMENTS LOCATED THEREON OR THE ADEQUACY OF PARKING OR ACCESS; (3) THE COMPLIANCE OF THE PROPERTY WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY FEDERAL, STATE OR LOCAL GOVERNMENTAL OR QUASI-GOVERNMENTAL BODY (INCLUDING WITHOUT LIMITATION, BUILDING PERMITS, ZONING, ENVIRONMENTAL LAWS, AND THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *ET SEQ.*; (4) THE VALUE OF THE PERSONAL PROPERTY; (5) THE INCOME OR EXPENSES OF THE PROPERTY OR ITS PROFITABILITY; (6) EXCEPT FOR THE SPECIAL WARRANTY OF TITLE EXPRESSLY SET FORTH IN THIS USTS BILL OF SALE, THE NATURE OR EXTENT OF TITLE TO THE PERSONAL PROPERTY; AND (7) THE ENVIRONMENTAL CONDITION OF THE REAL PROPERTY OR THE USTS, INCLUDING BUT NOT LIMITED TO, THE PRESENCE OR ABSENCE OF ANY HAZARDOUS MATERIALS ON, IN, UNDER OR ADJACENT TO THE REAL PROPERTY OR THE PERSONAL PROPERTY; (8) THE CONTENT, COMPLETENESS OR ACCURACY OF THE PROPERTY INFORMATION OR OTHER DUE DILIGENCE MATERIALS PROVIDED BUYER; (9) THE CONFORMITY OF ANY IMPROVEMENTS TO ANY PLANS OR SPECIFICATIONS FOR THE PROPERTY, INCLUDING ANY PLANS AND SPECIFICATIONS THAT MAY HAVE BEEN OR MAY BE PROVIDED TO BUYER; (10) THE CONFORMITY OF THE PROPERTY TO PAST, CURRENT OR FUTURE APPLICABLE ZONING OR BUILDING REQUIREMENTS; (11) DEFICIENCY OF ANY DRAINAGE; (12) THE EXISTENCE OF VESTED LAND USE, ZONING OR BUILDING ENTITLEMENTS AFFECTING THE PROPERTY; OR (13) WITH RESPECT TO ANY OTHER MATTER. FOR THE PURPOSES OF THIS DEED, "**HAZARDOUS MATERIALS**" MEANS (A) ANY HAZARDOUS WASTE, HAZARDOUS SUBSTANCE, TOXIC POLLUTANT, HAZARDOUS AIR POLLUTANT OR HAZARDOUS CHEMICAL (AS ANY SUCH TERMS MAY BE DEFINED UNDER, OR FOR THE PURPOSE OF, ANY ENVIRONMENTAL LAW), (B) ASBESTOS, (C) POLYCHLORINATED BIPHENYLS, (D) PETROLEUM OR PETROLEUM PRODUCTS, INCLUDING WITHOUT LIMITATION CONTAMINATION, FUEL-RELATED WASTE AND MATERIALS FROM EXPLORATION AND PRODUCTION OF PETROLEUM HYDROCARBONS AND NATURAL GAS, AND (E) ANY SUBSTANCE THE PRESENCE OF WHICH ON THE PROPERTY IS PROHIBITED UNDER ANY ENVIRONMENTAL LAW OR WHICH REQUIRES OR MAY REQUIRE SPECIAL HANDLING OR NOTIFICATION OF OR REPORTING UNDER ENVIRONMENTAL LAW AS TO ITS GENERATION, USE, HANDLING, COLLECTION, TREATMENT, STORAGE, RECYCLING, TRANSPORTATION, CORRECTIVE ACTION, REMEDIATION REMOVAL, DISCHARGE OR DISPOSAL. BUYER AGREES THAT THE PROVISIONS OF THIS PARAGRAPH SURVIVE DELIVERY OF THIS BILL OF SALE.

DATED effective as of the _____ day of _____, 2018.

[*To be executed by USTs Seller and Buyer*]

EXHIBIT 4 TO PURCHASE AND SALE AGREEMENT

USTs REMOVAL AGREEMENT (**See Form attached to this Article at next numbered Form**)

EXHIBIT 5 TO PURCHASE AND SALE AGREEMENT

ESCROW AGREEMENT

This Escrow Agreement is entered into as of _____ ___, 2018 ("**Effective Date**"), by and among **Fidelity National Title Insurance Company** ("**Escrow Agent**"), _____ ("**Property Seller**"), _____ ("**USTs Seller**") Property Seller and USTs Seller collectively, "**Sellers**"], and _____ ("**Buyer**").

RECITALS

A. Property. Sellers and _____ entered into a Purchase and Sale Agreement whereby _____, as Buyer, contracted to purchase from Property Seller the following described land together with the improvements and rights and appurtenances thereto (the "**Property**"):

_____.

B. USTs. Additionally, pursuant to the Purchase and Sale Agreement, Buyer contracted to purchase from USTs Seller and take ownership, and agreed to remove after closing of the sale, the underground storage tanks and underground storage tank systems [both as defined in 30 Texas Administrative Code §§ 334.2(114) and (115)], including without limitation fuel dispensers, lines and piping, pumps, bins and barrels, and all other related systems and equipment located on the Property (collectively, the "**USTs**"), which are owned by USTs Seller. Terms used herein shall have the meaning assigned to them in the Purchase and Sale Agreement unless otherwise defined herein.

D. USTs Removal Agreement. The Purchase and Sale Agreement provides in Recital D that, after the close of the sale of the Property, Buyer shall perform certain USTs and environmental removal and remediation in accordance with a USTs Removal Agreement to be delivered by the parties at closing, and Buyer is to pay certain funds in order to fund the cost of such USTs removal and remediation.

E. Escrow Funds. In order to guarantee the rights and obligations of all the parties hereto, Property Seller, USTs Seller and Buyer have agreed to enter into this Escrow Agreement, and Buyer has agreed to place in escrow with Escrow Agent funds ("**Escrow Funds**") to be held by Escrow Agent pursuant to the terms and conditions of this Escrow Agreement.

F. Escrow Agreement. Escrow Agent has agreed to hold and disburse the Escrow Funds pursuant to the terms and conditions of this Escrow Agreement.

NOW THEREFORE, in consideration of the mutual covenants contained herein, and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Recitals. The above recitals are true and correct and are hereby incorporated into and made a part hereof.

2. Escrow Funds.

a. Delivery of Escrow Funds. The parties hereby agree that $_____ as Escrow Funds have been delivered to Escrow Agent. Escrow Agent hereby accepts the delivery in escrow of the Escrow Funds and agrees to hold in escrow and deliver such Escrow Funds in accordance with the terms and provisions of this Escrow Agreement. Escrow Agent further agrees to observe and perform all of the duties, responsibilities and functions to which it is subject under the provisions of this Escrow Agreement. Additional deposits may be made by Buyer with the Escrow Agent pursuant to the USTs Removal Agreement.

b. Escrow Account. Escrow Agent shall cause the Escrow Funds, together with any interest, dividends or other income hereafter generated therefrom, to be deposited in one or more interest-bearing demand deposit accounts with a federally insured financial institution. All interest, dividends and other income hereafter generated from the Escrow Funds shall be disbursed and paid to Buyer upon the final disbursement of the Escrow Funds. Each of Sellers and Buyer acknowledge that it is aware the Federal Deposit Insurance Corporation ("**FDIC**") coverages apply to a maximum amount of $250,000.00 per depositor (as may be modified by the FDIC

from time to time). Further, Sellers and Buyer agree that it does not and will not hold Escrow Agent liable for any loss occurring which arises from bank failure or error, insolvency or suspension, or a situation or event which falls under the FDIC coverages.

c. Release of Escrow Funds. Upon delivery by Buyer to the Escrow Agent of a written request (a "**Draw Request**"), Escrow Agent is to disburse from the Escrow Funds an amount (the "**Requested Amount**") to Buyer within 5 days after the date on which Escrow Agent sends a copy of such Draw Request to Sellers unless Escrow Agent receives written notice from a Seller disputing Buyer's entitlement to the Requested Amount. In the event a party disputes any Draw Request, any party may seek a court determination as to entitlement to the Requested Amount.

3. Role of Escrow Agent.

a. Depository. Escrow Agent is acting solely in the role of a depository hereunder and Escrow Agent shall have no liability for the holding, investment, disbursement or application of any monies by Escrow Agent hereunder other than to follow the specific instructions provided for pursuant to this Escrow Agreement.

b. Reliance on the Authority of Persons and Authorization of Documents. Escrow Agent shall not be responsible or liable in any manner whatsoever for the sufficiency, correctness, genuineness or validity of the subject matter of the escrow hereby established, or any portion thereof, or for the form or execution thereof, or for the identity or authority of any person executing or depositing the same. Escrow Agent is hereby authorized to rely upon, and shall be protected in acting upon, any written notice, statement, waiver, consent, certificate, affidavit, receipt, authorization, power of attorney or other instrument or document which Escrow Agent in good faith believes to be genuine and what it purports to be.

c. Not an Interpreter of Intention of Parties or Purpose of Escrow. In accepting any monies delivered to Escrow Agent hereunder, it is agreed and understood that Escrow Agent will not be called upon to construe any contract, instrument or document deposited herewith or submitted hereunder, but only to follow the specific instructions provided for pursuant to this Escrow Agreement.

d. Reliance on its Legal Counsel. Escrow Agent may consult with its legal counsel in the event of any dispute or question as to the construction of any terms or provisions of this Escrow Agreement or its duties hereunder, and it shall incur no liability and shall be fully protected in acting in accordance with the opinion and instructions of such counsel.

e. Disagreements Between the Parties. In the event of any disagreement between any of the parties to this Escrow Agreement, or between them or either or any of them and any other person or party, resulting in adverse or conflicting claims or demands being made in connection with the subject matter of this escrow, or in the event that Escrow Agent, in good faith, is in doubt as to what action it should take hereunder, Escrow Agent may, in its sole discretion, refuse to comply with any claims or demands made upon it, or refuse to take any other action hereunder, so long as such disagreement continues or such doubt exists, and in such event Escrow Agent shall not be or become liable in any way or to any person or party for its failure or refusal to act, and Escrow Agent shall be entitled to continue to so refrain from acting until (1) the rights of all interested parties shall have been fully and finally adjudicated by a court of competent jurisdiction or (2) all differences shall have been adjusted and all doubt resolved by Escrow Agreement among all of the interested parties and Escrow Agent shall have been notified thereof in writing signed by all such parties. Notwithstanding the foregoing, in the event Escrow Agent shall be in doubt as to what action it should take hereunder at any time during the term of this Escrow Agreement, Escrow Agent shall have the right, in its sole and absolute discretion, to file an interpleader action in the District Court of Travis County, Texas, and interplead all monies held by it into the registry of said court, and in such event all costs, expenses and attorneys' fees incurred by Escrow Agent in filing such interpleader action shall be paid from the monies so interpleaded. The rights of Escrow Agent under this Section 3.e are cumulative with all other rights which Escrow Agent may have under this Escrow Agreement or at law, in equity or otherwise.

f. Written Instructions. Notwithstanding any provision contained in this Escrow Agreement which could be construed to the contrary, prior to the disbursement of the Escrow Funds, or any portion

thereof, to any party hereunder, Escrow Agent may require specific written instructions signed by Property Seller, USTs Seller, or Buyer, or any or all of them, authorizing and directing that such disbursement be made.

4. Resignation of Escrow Agent. Escrow Agent, or any successor to Escrow Agent, may at any time resign by giving written notice to such effect to Property Seller, USTs Seller, and Buyer, whereupon Escrow Agent, or such successor, shall be relieved and discharged from the obligations and duties imposed upon Escrow Agent under this Escrow Agreement on the first to occur of (a) the appointment of a successor Escrow Agent or (b) the expiration of 30 calendar days after the giving of such written notice of resignation. In the event of any resignation as aforesaid, a successor Escrow Agent, which shall be a title company or state or national bank with trust powers, shall be appointed by Property Seller, USTs Seller, and Buyer. Any successor Escrow Agent shall deliver to Property Seller, USTs Seller, and Buyer and the resigning Escrow Agent a written instrument accepting its appointment under this Escrow Agreement, whereupon it shall then succeed to all the rights, privileges, duties, liabilities and immunities of the predecessor Escrow Agent under this Escrow Agreement and, concurrently with the execution of such acceptance, all monies held by the resigning Escrow Agent hereunder shall be delivered by it to the successor Escrow Agent.

5. Term. This Escrow Agreement shall terminate on the earlier to occur of (a) the delivery to Escrow Agent of an instrument in writing executed by Property Seller, USTs Seller, and Buyer advising Escrow Agent of the termination of this Escrow Agreement, including specific written instructions signed by Property Seller, USTs Seller, or Buyer for the disbursement of any monies remaining in the hands of Escrow Agent, or (b) the disbursement or interpleader of the balance of the Escrow Fund in accordance with the terms and provisions of this Escrow Agreement.

6. Limitations of Escrow Agent's Liability.

a. RELEASE. ESCROW AGENT SHALL NOT INCUR ANY LIABILITY WITH RESPECT TO (1) ANY ACTION TAKEN OR OMITTED TO BE TAKEN IN GOOD FAITH UPON ADVICE OF COUNSEL GIVEN WITH RESPECT TO ANY QUESTIONS RELATING TO DUTIES AND RESPONSIBILITIES, OR (2) TO ANY ACTION TAKEN OR OMITTED TO BE TAKEN IN RELIANCE UPON ANY DOCUMENTS, INCLUDING ANY WRITTEN NOTICE OF INSTRUCTION PROVIDED FOR IN THIS ESCROW AGREEMENT, NOT ONLY AS TO ITS EXECUTION AND THE VALIDITY AND EFFECTIVENESS OF ITS PROVISIONS, BUT ALSO TO THE TRUTH AND ACCURACY OF ANY INFORMATION CONTAINED THEREIN, WHICH ESCROW AGENT SHALL IN GOOD FAITH BELIEVE TO BE GENUINE, TO BE SIGNED OR PRESENTED BY A PROPER PERSON OR PERSONS AND TO CONFORM WITH THE PROVISIONS OF THIS ESCROW AGREEMENT. THE PARTIES HERETO COVENANT AND AGREE THAT IN PERFORMING ANY OF ITS DUTIES UNDER THIS ESCROW AGREEMENT, ESCROW AGENT SHALL NOT BE LIABLE FOR ANY LOSS, COSTS OR DAMAGE WHICH IT MAY INCUR IN THE CAPACITY OF ESCROW AGENT, **EXCEPT FOR** ANY LOSS, COSTS OR DAMAGE ARISING OUT IF ITS **DEFAULT OR GROSS NEGLIGENCE**.

b. INDEMNITY. BUYER, PROPERTY SELLER AND USTS SELLER SHALL INDEMNIFY ESCROW AGENT AND HOLD ESCROW AGENT HARMLESS FROM ALL DAMAGE, COSTS, CLAIMS AND EXPENSES ARISING FROM PERFORMANCE OF ITS DUTIES AS ESCROW AGENT INCLUDING REASONABLE ATTORNEY'S FEES, **EXCEPT FOR** THOSE DAMAGES, COSTS, CLAIMS AND EXPENSES RESULTING FROM THE **GROSS NEGLIGENCE OR WILLFUL MISCONDUCT** OF ESCROW AGENT.

7. Escrow Fee. Escrow Agent will be entitled to a fee in the amount of $_____ [*$200?*] for performing its duties hereunder. The parties hereto agreed that the fee will be paid 50% by Property Seller and USTs Seller and 50% by Buyer upon execution of this Escrow Agreement.

8. Notices. All notices, requests, disbursements (except wire transfers, which shall be deemed to have been duly given after confirmation of receipt given by the recipient bank as directed in the wiring instructions) or other communications shall be in writing and shall be deemed to have been duly given on receipt if hand delivered, sent by private overnight courier service, or sent certified mail, return receipt requested, with all post charges prepaid, and addressed to the following address for each party or to such further address as any such party may designate by written notice given pursuant to this paragraph:

Escrow Agent: _____

Sellers: _____

Buyer: _____

9. Miscellaneous.

a. Entire Agreement. This Escrow Agreement constitutes the entire Escrow Agreement between the parties with respect to the subject matter hereof.

b. Amendment. This Escrow Agreement and may not be modified or amended except pursuant to a written instrument executed by all parties.

c. Captions. The captions and headings used in this Agreement are for convenience only and do not in any way limit, amplify or otherwise modify the provisions of this Agreement.

d. Governing Law. THE LAWS OF THE STATE OF TEXAS SHALL GOVERN THE VALIDITY, CONSTRUCTION, ENFORCEMENT AND INTERPRETATION OF THIS ESCROW AGREEMENT. ANY LEGAL ACTION INSTITUTED IN CONNECTION HEREWITH SHALL BE MAINTAINED ONLY IN TRAVIS COUNTY, TEXAS. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY ACTION OR OTHER LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS ESCROW AGREEMENT AND THE TRANSACTIONS IT CONTEMPLATES. THIS WAIVER APPLIES TO ANY ACTION OR OTHER LEGAL PROCEEDING, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE ("**PROCEEDING**"). EACH PARTY ACKNOWLEDGES THAT IT HAS RECEIVED THE ADVICE OF COMPETENT COUNSEL. ANY PROCEEDING ARISING OUT OF OR BASED ON THIS ESCROW AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY MAY BE INSTITUTED ONLY IN THE FEDERAL OR STATE COURTS WITHIN TRAVIS COUNTY, TEXAS. EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS AND WAIVES ANY OBJECTION IT MAY HAVE NOW OR HEREAFTER TO THE LAYING OF VENUE IN SUCH COURTS FOR ANY PROCEEDING. SERVICE OF PROCESS, SUMMONS, NOTICE OR OTHER DOCUMENT BY MAIL TO SUCH PARTY'S ADDRESS SET FORTH HEREIN SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY PROCEEDING BROUGHT IN ANY SUCH COURT.

e. Attorneys' Fees. In the event it becomes necessary for either party hereto to file suit to enforce this Escrow Agreement or any provision contained herein, the party prevailing in such suit shall be entitled to recover, in addition to all other remedies or damages as herein provided, reasonable attorneys' fees incurred in such suit.

f. Parties Bound. This Escrow Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, personal representatives, successors and assigns.

g. Time of Essence. Time is of the essence in this Escrow Agreement.

h. Counterparts. This Escrow Agreement may be executed in any number of counterparts, each of which shall constitute an original, but all together one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Escrow Agreement as of the day and year first above written.

[*Balance of page left blank. Signature Pages and Exhibit follows.*]

5. USTs Removal Agreement

D. USTs REMOVAL AGREEMENT [686]

This USTs Removal Agreement is made by and among _____ ("**Property Seller**"), _____ ("**USTs Seller**") [collectively ""**Sellers**"], and _____ ("**Buyer**") and is effective as of _____, 2018 (the "**Effective Date**").

RECITALS

E. Property. Property Seller, USTs Seller and Buyer entered into a Purchase and Sale Agreement whereby _____ as Buyer contracted to purchase from Property Seller the following described land together with the improvements and rights and appurtenances thereto (the "**Property**"):

_____

F. Buyer. Additionally, pursuant to the Purchase and Sale Agreement, Buyer contracted to purchase from USTs Seller and take ownership, and agreed to remove after closing of the sale of the Property, the underground storage tanks and underground storage tank systems [both as defined in 30 Texas Administrative Code ("**T.A.C.**") §§ 334.2(114) and (115)], including without limitation fuel dispensers, lines, piping, pumps, bins and barrels, and all other related systems and equipment located on the Property (collectively, the "**USTs**"), which are owned by USTs Seller. Currently located on the Property is a gasoline service station branded Chevron with the USTs, an ancillary small convenience store, and car wash (the "**Service Station**"). The Property including the Service Station was leased under a Station Lease that has terminated. The USTs Seller supplied gasoline to the tenant under a Fuel Supply Contract, which has terminated.

G. Closing of the Sale. The Purchase and Sale Agreement provides for USTs Seller, Property Seller, and Buyer to enter into this USTs Removal Agreement at the closing of the sale of the Property to Buyer ("**Closing**") to provide for and cause the removal of the USTs after closing, subject to the provisions hereof.

H. Construction of a (Drug) Store. Buyer is purchasing the Property from Property Seller with the intent, but not the obligation, of construction of a _____ store on the Property after demolition by Buyer of the Service Station.

I. Testing for Contamination. As a condition to the closing of the sale of the Property, _____ caused to be conducted by the environmental consulting firm Terracon Consultants, Inc. ("**Terracon**") prior to closing, at its expense, tests including those described in the reports referenced in **Exhibit B** ("**Testing Reports**") to determine if the contents of the USTs have leaked or are leaking ("**Contamination**").

J. Decommissioning the Service Station. Pursuant to the Purchase and Sale Agreement, Buyer, Property Seller and USTs Seller enter into this USTs Removal Agreement to set out (1) Buyer's agreement to cause the removal of the USTs, properly dispose of the USTs, delineate the extent of any Contamination, and complete the remediation of any Contamination indicated in the Testing Reports or discovered in the removal of the USTs in compliance with all laws ("**Decommissioning the Service Station**"), (2) Buyer's agreement to pay the costs of Decommissioning the Service Station ("**Costs"**), and (3) Buyer's release and indemnification of Property Seller, USTs Seller and Bill Broaddus (the "**Seller Parties**") for all claims or liabilities arising out of the condition of the Property and the USTs, including any Contamination, or arising out of Decommissioning the Service Station.

K. Escrow Agreement. Pursuant to the Purchase and Sale Agreement and this USTs Removal Agreement, Property Seller, USTs Seller and Buyer entered into an Escrow Agreement with Fidelity National Title Insurance Company ("**Escrow Agent**") in accordance with which Buyer is to deposit with Escrow Agent monies to be disbursed pursuant hereto ("**Escrow Funds**").

NOW, THEREFORE for a valuable consideration, and in consideration of the mutual covenants and representations herein contained, Property Seller, USTs Seller, and Buyer agree as follows:

1. **Decommissioning the Service Station.** Provided Seller has removed the USTs from service in accordance with TCEQ Regulatory Guidance, Environmental Assistance Division, RG-4751, Revised September 2016 as required in the Purchase and Sale Agreement, Buyer agrees to cause Decommissioning of the Station as soon as reasonably possible as follows (the "**Work**"):

a. **Tank Removal and Corrective Actions.** The following ("**Tank Removal and Corrective Actions**"):

(1) **Tank Removal.** Removal of the USTs and any related petroleum based products from the Property ("**Tank Removal**").

(2) **Soil and Gas Corrective Actions.** Performance of required corrective actions for any soil or soil gas contamination in excess of current Texas Commission on Environmental Quality ("**TCEQ**") action levels relating thereto ("**Soil and Soil Gas Corrective Actions**").

(3) **Corrective Actions.** Provision of corrective actions deemed necessary by TCEQ related to any petroleum contamination documented above current TCEQ action levels in that certain Phase I Environmental Site Assessment Report prepared by Terracon for Buyer, that certain Limited Site Investigation Report prepared by Terracon for Buyer, and that certain Supplemental Site Investigation Report prepared by Terracon for Buyer to the satisfaction of TCEQ ("**Groundwater Corrective Actions**"; collectively with Soil and Soil Gas Corrective Actions, the "**Corrective Actions**").

(4) **Documentation of Tank Removal and Corrective Actions.** Documentation of the Tank Removal and Corrective Actions in accordance with TCEQ requirements (submission of a Release Determination Report inclusive of TCEQ Form 0621 and amended UST Registration Form 0724).

(5) **No Further Action Letter and Other Documentation.** Procurement of a "no further action" letter, LPST Case Closure Letter, or other similar documentation from TCEQ confirming that the USTs have been properly removed from the Property and any applicable soil, soil gas or groundwater contamination has been appropriately addressed with regards to the environment in accordance with applicable law (the "**Documentation**").

b. **Backfill and Certification.** The following ("**Backfill and Certification**"):

(1) **Backfill.** Backfill in accordance with the Geotechnical Engineering Report prepared by Terracon ("**Backfill**").

(2) **Certification.** Delivery to Sellers certification from a geotechnical engineer that the Backfill has been completed in accordance with the terms of this USTs Removal Agreement.

c. **Facilitative Work.** Buyer is to commence the Tank Removal promptly after the closing date, diligently complete the Tank Removal process, and deliver to Sellers a tank closure report certified by Terracon. Thereafter, Buyer is to diligently pursue the applicable Documentation (for example, but not by way of limitation, whether contamination was discovered) and are to promptly deliver to Sellers copies of any additional reports or communications received from Buyer's environmental consultant or from TCEQ (the "**Facilitative Work**").

2. **Contractors.** Sellers are to be provided the opportunity to approve the contractors to be employed to undertake the Work and the contracts with the contractors, which approval shall not be unreasonably withheld.

3. **Costs of the Work.** Buyer is to provide Sellers with detailed estimates ("**Estimates**") of the specific costs for the Tank Removal and Corrective Actions, the Backfill and Certification and the Facilitative Work for Sellers' review and approval prior to Closing. Buyer is to deposit with the Escrow Agent 125% of the Estimates within five business days of its receipt and approval of the amount of the Estimates. Upon Sellers' and Escrow Agent's receipt of the Documentation for the actual work performed, together with written documentation (*e.g.*,

invoices) evidencing the cost of the Work ("**Supporting Invoices**"), provided that Sellers do not object to any of the costs or information contained therein, within five business days after delivery of same, Escrow Agent shall release such portion of the Escrow Funds to Buyer or Buyer's environmental consultants and contractors as is necessary to pay the Supporting Invoices or reimburse Buyer therefor ("**Costs**"), and return any remaining Escrow Funds to Buyer. In the event that the Costs exceed the amount previously deposited with the Escrow Agent, Buyer shall replenish the Escrow Funds with an amount reasonably estimated by the parties to be required to complete the Work.

4. Bonds and Insurance. Buyer agrees to maintain or cause to be maintained the following bonds and insurance until completion of the Decommissioning of the Service Station (the "**Bonds and Insurance**"):

a. Bonds. The financial assurance required by Environmental Law for the ownership of out-of-service USTs, in the form of insurance and risk retention group coverage, letter of credit, or surety bond meeting, in each case, regulatory requirements under 30 Texas Administrative Code Chapter 37, Subchapter I, Financial Assurance for Petroleum Underground Storage Tank Systems, with Seller Parties to be additional insureds on the insurance policies, until issuance by TCEQ of its agreement that Decommissioning the Service Station has been completed, including obtaining and delivering to USTs Seller an unqualified Clean Closure Letter issued by TCEQ if Contamination is discovered on the Property pursuant to the tests or during the performance of the Work, provided, however, that Seller and Buyer acknowledge and agree that (i) as of the Closing Date the USTs have been temporarily removed from service by Seller in accordance with paragraph 1 hereof such that each UST is an "empty system" under 30 Texas Administrative Code 334.54(d); (ii) accordingly, no such financial assurance is required of Buyer under 30 Texas Administrative Code 334.54(d) and 30 Administrative Code 334.54(d) while each UST remains "temporarily removed from service" and an "empty system" in compliance with 30 Texas Administrative Code 334.54(d); and (iii) from the Closing Date until Tank Removal, Buyer shall comply with the requirements for temporary removal of service set forth in 30 Texas Administrative Code 334.54 (including without limitation, that Buyer shall keep vent lines open and functioning; keep all other piping, pumps, manways, tank access points and ancillary equipment capped, plugged, locked and secured to prevent unauthorized access, tampering or vandalism; maintain corrosion protection; comply with applicable fee, registration and recordkeeping requirements; and if a release is suspected or confirmed, Buyer shall comply with all release reporting requirements); and

b. Insurance. Liability insurance complying with the Insurance Specifications set out in **Exhibit A**, with Seller Parties to be additional insureds.

5. RELEASE and INDEMNITY.

a. RELEASE. BUYER, AND ANYONE CLAIMING BY, THROUGH OR UNDER IT, INCLUDING BUT NOT LIMITED TO IT AS OWNER OF THE PROPERTY OR ANY OTHER PROPERTIES, HEREBY WAIVES ITS RIGHT TO RECOVER FROM AND FULLY AND IRREVOCABLY RELEASES SELLER PARTIES FROM (1) ANY AND ALL CLAIMS, RESPONSIBILITY AND LIABILITY THAT ANY OF THEM MAY NOW HAVE OR HEREAFTER ACQUIRE AGAINST ANY OF THE SELLER PARTIES FOR ANY CLAIMS, COSTS, EXPENSES, DAMAGES, LOSSES, OR LIABILITY ARISING FROM OR RELATED TO THE CONTAMINATION (INCLUDING WITHOUT LIMITATION THE PRESENCE IN THE SOIL, SOIL GAS, AIR, STRUCTURES, OR SURFACE OR SUBSURFACE WATERS OF MATERIALS OR SUBSTANCES THAT HAVE BEEN OR MAY IN THE FUTURE BE DETERMINED TO BE TOXIC, HAZARDOUS, OR SUBJECT TO REGULATION AND THAT MAY NEED TO BE SPECIALLY TREATED, HANDLED OR REMOVED FROM THE PROPERTY UNDER CURRENT OR FUTURE FEDERAL, STATE AND LOCAL LAWS REGULATIONS OR GUIDELINES), INCLUDING HAZARDOUS MATERIALS AND (2) FOR CONTRIBUTION OR INDEMNITY WITH RESPECT TO THE CONDITION OF THE PROPERTY WHETHER ARISING UNDER ENVIRONMENTAL LAW, COMMON LAW OR OTHERWISE. THIS RELEASE INCLUDES SELLER AND USTS SELLER'S NEGLIGENCE AND CLAIMS OF WHICH BUYER IS PRESENTLY UNAWARE OR WHICH BUYER DOES NOT PRESENTLY SUSPECT TO EXIST WHICH, IF KNOWN BY BUYER, WOULD MATERIALLY AFFECT BUYER'S RELEASE OF SELLER PARTIES.

b. INDEMNITY. BUYER, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE SELLER PARTIES FROM AND AGAINST ALL CLAIMS ARISING OUT OF THE CONTAMINATION OR CONDITION OF THE PROPERTY OR DECOMMISSIONING THE SERVICE STATION, ANY OR ALL OF THE FOREGOING, INCLUDING WITHOUT LIMITATION (A) THE FAILURE, IN WHOLE OR IN PART, DIRECTLY OR INDIRECTLY, OF A BUYER-RELATED PERSON TO COMPLY WITH ENVIRONMENTAL LAW; OR (B) THE RELEASE OR DISTURBANCE OF HAZARDOUS MATERIALS; OR (C) ANY ALLEGATION OF IMPROPER MANAGEMENT,

REMEDIATION OR DISPOSAL OF HAZARDOUS MATERIALS IN CONNECTION WITH THIS USTs REMOVAL AGREEMENT. THIS INDEMNITY IS INTENDED TO INDEMNIFY SELLER PARTIES FROM LIABILITY EVEN TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE SOLE, CONTRIBUTORY OR CONCURRENT NEGLIGENCE OF A SELLER PARTY OR A BUYER-RELATED PERSON OR STRICT LIABILITY.

c. Definitions.

(1) Claims. "**Claims**" means any and all costs, expenses, damages, losses, liability, demand, action or cause of action, including court costs, attorneys' fees and consultants' fees.

(2) Environmental Law. "**Environmental Law**" means any federal, state or local law, statute, ordinance, rule, regulation or legal requirement in effect at the Effective Date pertaining to (a) the protection of health, safety, or the environment; (b) the conservation, management, protection, or use of natural resources and wildlife; (c) the protection or use of source water and groundwater; (d) the management, manufacture, possession, use, generation, transportation, treatment, storage, disposal, release, threatened release, abatement, removal, remediation, or handling of, or exposure to, any Hazardous Materials; or (e) pollution (including any release to air, land, surface water and groundwater), and includes without limitation the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 *et seq.*, the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.*, the Clean Air Act of 1966, as amended, 42 U.S.C. 7401 *et seq.*, Toxic Substances Control Act of 1976, 15 USC 2601 *et seq.*, the Hazardous Materials Transportation Act, 49 U.S.C. 5101, the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. 651 *et seq.*, the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. 11001 *et seq.*, the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300(f) *et seq.*, together with state counterparts, including without limitation the Texas Water Code including the Texas Water Code Subchapter I, Underground and Aboveground Storage Tanks, §§ 26.341 *et seq.*; the Texas Solid Waste Disposal Act, the Texas Health & Safety Code §§ 361.001 *et seq.*, and any comparable, implementing or successor law, and any amendment, rule, regulation, order or directive, issued thereunder.

(3) Hazardous Materials. "**Hazardous Materials**" means (a) any hazardous waste, hazardous substance, toxic pollutant, hazardous air pollutant or hazardous chemical (as any such terms may be defined under, or for the purpose of, any Environmental Law), (b) asbestos, (c) polychlorinated biphenyls, (d) petroleum or petroleum products, including without limitation Contamination, fuel-related waste and materials from exploration and production of petroleum hydrocarbons and natural gas, (e) any substance the presence of which on the Property is prohibited under any Environmental Law or which requires or may require special handling or notification of or reporting under Environmental Law as to its generation use, handling, collection, treatment, storage, recycling, transportation, corrective action, remediation, removal, discharge or disposal.

(4) Seller Parties. "**Seller Parties**" means Broaddus Properties, Ltd., Broaddus Enterprises, Inc., and Bill Broadus, their heirs, successors and assigns.

6. MISCELLANEOUS.

a. Notices. All notices, demands and requests which may be given or which are required to be given by either party to the other, and any exercise of a right of termination provided by this USTs Removal Agreement, shall be in writing and shall be deemed effective when personally delivered to the address of the party to receive such notice set forth below or, whether actually received or not, upon actual delivery confirmation of facsimile transmission to a party's facsimile number listed below, or when deposited in any post office or mail receptacle regularly maintained by the United States government, certified or registered mail, return receipt requested, postage prepaid, addressed as set forth on the Signature Pages attached hereto and made a part hereof for all purposes, or when deposited with a nationally recognized overnight courier service (e.g., FedEx) for next business day delivery, delivery charges prepaid, addressed as set forth on the Signature Pages attached hereto and made a part hereof for all purposes or such other place as Property Seller, UST Seller, or Buyer, respectively, may from time to time designate by written notice to the other. The attorney for a party has the authority to send and receive notices on behalf of such party.

b. **Entire Agreement.** This USTs Removal Agreement embodies the entire agreement between the parties relative to the subject matter hereof, and there are no oral or written agreements between the parties, nor any representations made by either party relative to the subject matter hereof, which are not expressly set forth herein.

c. **Amendment.** This USTs Removal Agreement may be amended only by a written instrument executed by the party or parties to be bound thereby.

d. **Captions.** The captions and headings used in this Agreement are for convenience only and do not in any way limit, amplify or otherwise modify the provisions of this Agreement.

e. **Time of Essence.** Time is of the essence of this USTs Removal Agreement. However, if the final date of any period which is set out in any provision of this USTs Removal Agreement falls on a Saturday, Sunday or legal holiday under the law of the United States or the State of Texas, in such event, the time of such period shall be extended to the next day which is not a Saturday, Sunday or legal holiday.

f. **Successors and Assigns.** This USTs Removal Agreement shall bind and inure to the benefit of Seller Parties and Buyer and their respective heirs, successors and assigns.

g. **Assignment.** This USTs Removal Agreement may not be assigned, transferred, pledged, or hypothecated by Buyer without the prior written consent of Sellers.

h. **Invalid Provision.** If any provision of this USTs Removal Agreement is held to be illegal, invalid or unenforceable under present or future laws, such provision shall be fully severable; this USTs Removal Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this USTs Removal Agreement; and, the remaining provisions of this USTs Removal Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance from this USTs Removal Agreement.

i. **Attorneys' Fees.** In the event it becomes necessary for either party hereto to file suit to enforce this USTs Removal Agreement or any provision contained herein, the party prevailing in such suit shall be entitled to recover, in addition to all other remedies or damages as herein provided, reasonable attorneys' fees incurred in such suit.

j. **Confidentiality.** Property Seller, USTs Seller, and Buyer agree to keep all information relating to the negotiations of this USTs Removal Agreement, the Work and each other, or any assignee of Buyer, whether such information is in any way proprietary, strategic or otherwise in strict confidence, and Property Seller, USTs Seller, Buyer shall guard its accessibility to others within its control, or subject to its direction, except to the extent required to complete the Work and Decommissioning the Service Station. Property Seller, USTs Seller, and Buyer agree not to divulge to persons other than governmental authorities, attorney, accountant, lender, tenants or involved officers, directors, employees, agents, representatives, consultants, and if appropriate, family members, on a need to know only basis, any of the terms and conditions or any matters related to the negotiations, this USTs Removal Agreement, the Work and each other.

k. **Cooperation.** The parties shall cooperate with one another, execute such additional documents as are necessary and reasonable to consummate the transaction set forth herein.

l. **Multiple Counterparts.** This USTs Removal Agreement may be executed in a number of identical counterparts, each of which for all purposes is deemed an original, and all of which constitute collectively one agreement; but in making proof of this USTs Removal Agreement, it shall not be necessary to produce or account for more than one such counterpart. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page.

m. **Damages.** Notwithstanding anything set forth in this USTs Removal Agreement to the contrary, neither party is liable to the other for any special, indirect, punitive, or consequential damages, except to the extent insured by insurance maintained by a party.

n. **Merger.** This USTs Removal Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this USTs Removal Agreement are expressly merged into and superseded by this agreement. The provisions of this USTs Removal Agreement may not be explained, supplemented, or qualified through evidence of trade usage or a prior course of dealings. In entering into this agreement, the parties have not relied upon any statement, representation, or agreement of the other party except for those expressly contained in this agreement. There is no condition precedent to the effectiveness of this agreement other than those expressly stated in this USTs Removal Agreement.

o. **Waiver of Jury Trial.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY ACTION OR OTHER LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS USTs REMOVAL AGREEMENT AND THE TRANSACTIONS IT CONTEMPLATES. THIS WAIVER APPLIES TO ANY ACTION OR OTHER LEGAL PROCEEDING, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE ("**PROCEEDING**"). EACH PARTY ACKNOWLEDGES THAT IT HAS RECEIVED THE ADVICE OF COMPETENT COUNSEL. ANY PROCEEDING ARISING OUT OF OR BASED ON THIS USTs REMOVAL AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY MAY BE INSTITUTED ONLY IN THE FEDERAL OR STATE COURTS WITHIN TRAVIS COUNTY, TEXAS. EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS AND WAIVES ANY OBJECTION IT MAY HAVE NOW OR HEREAFTER TO THE LAYING OF VENUE IN SUCH COURTS FOR ANY PROCEEDING. SERVICE OF PROCESS, SUMMONS, NOTICE OR OTHER DOCUMENT BY MAIL TO SUCH PARTY'S ADDRESS SET FORTH HEREIN SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY PROCEEDING BROUGHT IN ANY SUCH COURT.

p. **No Third Party Beneficiaries.** Nothing in this USTs Removal Agreement, express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to it, nor is anything in this USTs Removal Agreement intended to relieve or discharge the obligation or liability of any third person to any party to this USTs Removal Agreement.

[*Follows signatures and Exhibits.*]

EXHIBIT A TO USTs REMOVAL AGREEMENT

INSURANCE SPECIFICATIONS

These "**Insurance Specifications**" are incorporated into the USTs Removal Agreement executed by _____ ("**Property Seller**") and _____ ("**USTs Seller**") (which entities together with Bill Broaddus are referred to as the "**Seller Parties**") and _____ ("**Buyer**"). In the event of conflict between any of the following Insurance Specifications with any provision in the USTs Removal Agreement, these Insurance Specifications control, amend and supplement the conflicting provision. The USTs Removal Agreement provides for the removal of underground storage tanks and underground storage tank systems, including without limitation fuel dispensers, lines and piping, and all other related systems and equipment (collectively, the "**USTs**") from the service station located at 202 East Avenue, Austin, Texas (the "**Property**").

1. Specifications, Coverages, Limits & Other Requirements.

No.	Specifications	Coverages, Limits & Other Requirements
LIABILITY INSURANCE		
1.	**Commercial General Liability.** _____ is to maintain commercial general liability insurance ("**CGL**") and, if necessary, a commercial umbrella/excess insurance policy (see **Spec. 2** below), issued on an Occurrence Basis meeting at least the following specifications, but only to the extent permitted by law. _____ may allocate the minimum limits between primary and	

<table>
<tr><th>No.</th><th>Specifications</th><th>Coverages, Limits & Other Requirements</th></tr>
<tr><td></td><td colspan="2">umbrella/excess policies.</td></tr>
<tr><td>1.1</td><td>Minimum Limits</td><td>The minimum limits of coverage are not to be less than the following amounts (which amounts may be satisfied by primary and umbrella or excess policies – see Spec. 2 below):<table><tr><td>$1,000,000</td><td>Per Occurrence</td></tr><tr><td>$2,000,000</td><td>General Aggregate.</td></tr><tr><td>$2,000,000</td><td>Products/Completed Operations Aggregate</td></tr><tr><td>$1,000,000</td><td>Personal and Advertising Injury Limit.</td></tr></table></td></tr>
<tr><td>1.2</td><td>Form</td><td>This insurance is to be issued on an ISO CG 00 01, or other commercially reasonable form, and shall cover liability arising from premises, ongoing and completed operations, hire of contractors (independent contractors coverage).</td></tr>
<tr><td>1.3</td><td>Additional Insureds</td><td>This insurance is to be endorsed to insure _____, _____ and _____ as additional insureds.</td></tr>
<tr><td>1.4</td><td>Primary</td><td>This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to the USTs Removal Agreement that all insurance required herein shall be primary to and shall seek no contribution from any other insurance (primary, umbrella, contingent or excess) maintained by _____, with Buyer’s insurance being excess, secondary and non-contributing.</td></tr>
<tr><td>1.5</td><td>Waiver of Subrogation</td><td>This insurance is to include a waiver of subrogation by insurer as to _____.</td></tr>
<tr><td>1.6</td><td>Notice</td><td>This insurance is to contain a provision for 30 days’ prior written notice by insurance carrier to Buyer required for cancellation or material change.</td></tr>
<tr><td>1.7</td><td>Certificate of Insurance</td><td>A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Buyer to Sellers as Certificate Holders at the following address:

202 East Avenue
Austin, TX
Attention: _____</td></tr>
<tr><td>2.</td><td colspan="2"><u>Umbrella or Excess Policy</u>. If any of the required coverages are to be maintained by and through an umbrella or excess policy, they are to be by a policy issued on an Occurrence Basis meeting at least the following specifications.</td></tr>
<tr><td>2.1</td><td>Scope</td><td>This insurance shall be excess over and be no less broad than all coverages described above. The policy limits for the primary and excess policy may be allocated between the primary and excess/umbrella as selected by the named insured. It shall be excess over and be no less broad than all coverages and conditions described herein, including but not limited to the required additional insured status, designated construction project(s) and/or location(s) general aggregate, wavier of subrogation, notice of cancellation, and prohibited exclusions or limitations, and will be primary to and not seek contribution from any other insurance (primary, umbrella, contingent or excess) maintained by _____. The specification above of minimum limits does not limit the limits of coverage to be available to the additional insureds. If the insurance has limits greater than the above limits, the amount of coverage available to the insured is increased to the limits of insured’s insurance, including limits under any excess policies.</td></tr>
<tr><td>2.2</td><td>Limit of Liability</td><td>The policy limits required herein may be provided by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein.</td></tr>
</table>

No.	Specifications	Coverages, Limits & Other Requirements
2.3	**Concurrency**	Such coverage shall have the same inception date as the commercial general liability and employer's liability coverages.
2.4	**Primary**	This insurance shall be primary and non-contributing liability coverage. It is the specific intent of the parties to the USTs Removal Agreement that all insurance held by _____shall be excess, secondary and non-contributory.
2.5	**Drop-Down Coverage**	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits
2.6	**Defense Costs**	This insurance is to include a duty to defend any insured.
2.7	**Additional Insureds**	This insurance is to cover _____ as additional insureds.
2.8	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to _____required for cancellation or material change.
2.9	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to _____.
3.	**Contractor's Insurance.** Contractors employed to perform Work pursuant to the USTs Removal Agreement are to purchase and maintain insurance meeting or exceeding the following specifications:	
3.1	**CGL**	Buyer shall use its good faith efforts to require each contractor employed to perform Work to purchase and maintain CGL insurance meeting the specifications as set in **Specs. 1** and **2** above.
3.1.1	**Additional Insureds**	The CGL insurance is to be endorsed with an additional insured endorsement listing _____ as additional insureds.
3.1.2	**Waiver of Subrogation**	The CGL insurance is to be endorsed to include a waiver of subrogation by insurer as to _____.
3.2	**Contractor's Pollution Liability/Professional Errors and Omissions Insurance**	Contractor shall obtain Contractor's Pollution Liability/Professional Errors and Omissions Liability Insurance coverage, with limits of not less than $2,000,000 per occurrence/aggregate, naming _____ as additional insureds.
3.3	**Evidence of Insurance**	Buyer shall provide to Sellers certificates of insurance as to each contractor performing work pursuant to the USTs Removal Agreement prior to the contractor's entry on the Property certified to Sellers as Certificate Holders at the following address: 202 East Avenue Austin, TX Attention: Mr. _____

2. General Insurance Requirements.

All policies must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or *Standard & Poor Insurance Solvency Review* A-, or better, and admitted to engage in the business of insurance in the State in which the Work is performed. If the forms of policies, endorsements, certificates, or evidence of insurance required by these Insurance Specifications are superseded or discontinued, Seller Parties will have the right to require other equivalent forms. Any policy or endorsement form other than a

form specified in this Exhibit must be approved in advance by Seller Parties. "**Limits**" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Buyer maintains greater limits, then these specifications shall not limit the amount of recovery available to Seller Parties and the limits specified above as the minimum limits are increased to the greater limits.

EXHIBIT B TO USTs REMOVAL AGREEMENT

TESTING REPORTS

1. Limited Subsurface Investigation – Proposed ___ # _____, 202 East Avenue, Austin, Travis County, Texas _____, 2018 Terracon Project No. _____.

2. Phase I Environmental Site Assessment – _____ # _____, 202 East Avenue, Austin, Travis County, Texas _____, 2018 Terracon Project No. _____.

III. INSURANCE INDUSTRY FORMS

A. Standard Forms

1. Liability Insurance Forms

ISO CG DS 01 10 01 Commercial General Liability Declarations
ISO CG 00 01 04 13 Commercial General Liability Coverage Form
ISO CG 02 05 12 04 Texas Changes - Amendment of Cancellation Provisions or Coverage Change
ISO CG 04 37 04 13 Electronic Data Liability
ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition
ISO CG 20 10 04 13 Additional Insured - Owners, Lessees or Contractors - Scheduled Person Or Organization
ISO CG 20 11 04 13 Additional Insured – Managers Or Lessors Of Premises
ISO CG 20 24 04 13 Additional Insured – Owners or Other Interests From Whom Land Has Been Leased
ISO CG 20 26 04 13 Additional Insured - Designated Person or Organization
ISO CG 20 33 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement With You
ISO CG 20 37 04 13 Additional Insured – Owners, Lessees Or Contractors – Completed Operations
ISO CG 20 38 04 13 Additional Insured – Owners, Lessees Or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement
ISO CG 21 39 10 93 Contractual Liability Limitation
ISO CG 21 42 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations)
ISO CG 21 43 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations Excepted)
ISO CG 21 44 07 98 Limitation of Coverage To Designated Premises Or Project
ISO CG 22 34 04 13 Exclusion – Construction Management Errors and Omissions
ISO CG 22 43 04 13 Exclusion – Engineers, Architects or Surveyors Professional Liability
ISO CG 22 70 04 13 Real Estate Property Managed
ISO CG 22 79 04 13 Exclusion – Contractors – Professional Liability
ISO CG 22 94 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf
ISO CG 22 95 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations
ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others to Us
ISO CG 24 26 04 13 Amendment of Insured Contract Definition
ISO CG 25 04 05 09 Designated Location(s) General Aggregate Limit

2. Property Insurance Forms

ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page
ISO IL 00 17 11 98 Common Policy Conditions
ISO CP 00 10 10 12 Building and Personal Property Coverage Form
ISO CP 00 30 10 12 Business Income (And Extra Expense) Coverage Form
ISO CP 00 90 07 88 Commercial Property Conditions
ISO CP 04 05 10 12 Ordinance or Law Coverage
ISO CP 04 15 10 12 Debris Removal Additional Insurance
ISO CP 10 30 09 17 Causes of Loss – Special Form
ISO CP 12 18 06 07 Loss Payable Provisions
ISO CP 14 01 09 17 Scheduled Building Property Tenant's Policy
ISO CP 14 02 09 17 Unscheduled Building Property Tenant's Policy
ISO CP 12 19 16 07 Additional Insured Building Owner
ISO CP 00 60 06 95 Leasehold Interest Coverage Form

3. Certificates

ACORD 25 (2014/01) Certificate of Liability Insurance

ACORD 28 (2014/01) Evidence of Commercial Property Insurance
ACORD 75 (2013/09) Insurance Binder

B. Manuscript Liability Endorsements

COMMERCIAL GENERAL LIABILITY DECLARATIONS

COMPANY NAME AREA	**PRODUCER NAME AREA**

NAMED INSURED: _____

MAILING ADDRESS: _____

_____

POLICY PERIOD: FROM _____ TO _____ AT 12:01 A.M. TIME AT YOUR MAILING ADDRESS SHOWN ABOVE

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE		
EACH OCCURRENCE LIMIT	$ _____	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	$ _____	Any one premises
MEDICAL EXPENSE LIMIT	$ _____	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	$ _____	Any one person or organization
GENERAL AGGREGATE LIMIT	$ _____	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	$ _____	

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE:[687] _____

(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:[688]

☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ TRUST

☐ LIMITED LIABILITY COMPANY ☐ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY)

BUSINESS DESCRIPTION: _____

ALL PREMISES YOU OWN, RENT OR OCCUPY [689]	
LOCATION NUMBER	ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY

CLASSIFICATION AND PREMIUM							
LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/ Ops	Prod/Comp Ops	Prem/ Ops	Prod/Comp Ops
			$	$	$	$	$

STATE TAX OR OTHER (if applicable) $ _____

TOTAL PREMIUM (SUBJECT TO AUDIT) $ _____

PREMIUM SHOWN IS PAYABLE:

AT INCEPTION $ _____

AT EACH ANNIVERSARY $ _____

(IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)

AUDIT PERIOD (IF APPLICABLE)	☐ ANNUALLY	☐ SEMI-ANNUALLY	☐ QUARTERLY	☐ MONTHLY

ENDORSEMENTS
ENDORSEMENTS ATTACHED TO THIS POLICY: [690]

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned:	By:
(Date)	(Authorized Representative)

NOTE

OFFICERS' FACSIMILE SIGNATURES MAY BE INSERTED HERE, ON THE POLICY COVER OR ELSEWHERE AT THE COMPANY'S OPTION.

CG DS 01 10 01

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

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

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** - Who Is An Insured.

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

SECTION I - COVERAGES

COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. 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. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any

insured listed under Paragraph **1.** of Section **II** - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability [691]

"Bodily injury" or "property damage" for which the insured is 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:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "**insured contract**", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract" and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability [692]

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

(a) The supervision, hiring, employment, training or monitoring of others by that insured; or

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph **(1), (2)** or **(3)** above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is

not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws [693]

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution [694]

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire"

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants" or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or

(b) The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;[695]

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

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part[696] of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations,[697] if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.[698]

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** - Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work"

and were never occupied, rented or held for rental by you.

Paragraphs **(3), (4), (5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".[699]

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

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

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.[700]

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work" or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product"

(2) "Your work" or

(3) "Impaired property"

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data[701]

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Recording And Distribution Of Material Or Information In Violation Of Law[702]

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting,

communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** - Limits Of Insurance.

COVERAGE B - PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B.**

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods - Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description

of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14. a., b.** and **c.** of "personal and advertising injury" under the Definitions section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-related

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants" or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

COVERAGE C - MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations; provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, X-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers' Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage **A.**

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit"

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit"

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit" and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** - Coverage **A** - Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees

and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II - WHO IS AN INSURED [703]

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph **(1)(a)** or **(b)** above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by;

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by;

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

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.

SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage **C**;

b. Damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" and

c. Damages under Coverage **B**.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to Paragraph **2.** above, the Personal And Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to Paragraph **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

a. Damages under Coverage **A**; and

b. Medical expenses under Coverage **C**

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to Paragraph **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

7. Subject to Paragraph **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and 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) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit"

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit" and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance [704]

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 Paragraph **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 Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work"

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or

watercraft to the extent not subject to Exclusion **g.** of Section **I** - Coverage **A** - Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.[705]

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". 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.

(3) 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:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) 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 of 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.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds[706]

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

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us[707]

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

will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew [708]

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

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

SECTION V - DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

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

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or

c. All other parts of the world if the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph a. above;

(2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with

permission of the owner is not an "insured contract";

b. A sidetrack agreement;

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

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

e. An elevator maintenance agreement;

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

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

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

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

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

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

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

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto"

b. While it is in or on an aircraft, watercraft or "auto" or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning,

geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.[709]

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement" or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product" and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability,

performance or use of "your work" and

(2) The providing of or failure to provide warnings or instructions.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 02 05 12 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TEXAS CHANGES – AMENDMENT OF CANCELLATION PROVISIONS OR COVERAGE CHANGE [710]

This endorsement modifies insurance provided under the following:

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

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

SCHEDULE

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 04 37 04 13

ELECTRONIC DATA LIABILITY[711]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Loss Of Electronic Data Limit: $
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Exclusion **2.p.** of **Coverage A – Bodily Injury And Property Damage Liability** in **Section I – Coverages** is replaced by the following:

2. Exclusions

This insurance does not apply to:

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate "electronic data" that does not result from physical injury to tangible property.

However, this exclusion does not apply to liability for damages because of "bodily injury".

B. The following paragraph is added to **Section III – Limits Of Insurance:**

Subject to **5.** above, the Loss of Electronic Data Limit shown in the Schedule above is the most we will pay under Coverage **A** for "property damage" because of all loss of "electronic data" arising out of any one "occurrence".

C. The following definition is added to the **Definitions** section:
"Electronic data" means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

D. For the purposes of the coverage provided by this endorsement, the definition of "property damage" in the **Definitions** section is replaced by the following:

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it; or

c. Loss of, loss of use of, damage to, corruption of, inability to access, or inability to properly manipulate "electronic data", resulting from physical injury to tangible property. All such loss of "electronic data" shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, "electronic data" is not tangible property.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 01 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION [712]

This endorsement modifies insurance provided under the following:

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

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

Primary And Noncontributory Insurance

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

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

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION [713]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

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

1. Your acts or omissions;[714] or

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

in the performance of your ongoing operations[715] for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law;[716] and

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

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

This insurance does not apply to "bodily injury" or "property damage" occurring after:

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

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

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

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

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

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

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**
CG 20 11 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES [717]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designation of Premises (Part Leased to You): [718] **[*insert suite no., street address and other descriptive information as to what is the "premises" and add the following: and the appurtenant use of the "Common Areas" as defined in the Lease between _____ as Tenant and _____, as Landlord*]**
Name of Person or Organization (Additional Insured): [*insert name of additional insureds: (a) _____, and its successors and assigns (the owner/landlord), and its directors and employees, (b) _____, (property manager), and (c) _____ (owner's lender)*].
Additional Premium: $
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II - Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use [719] of that part of the premises leased to you[720] and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

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

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

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

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

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

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

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 24 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS OR OTHER INTERESTS FROM WHOM LAND HAS BEEN LEASED [721]

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

SCHEDULE

Name Of Person(s) Or Organization(s)	Designation of Premises (Part Leased to You) [722]
[*insert name of additional insureds*: *(a) _____ (the primary additional insured), and its successors and assigns, and its members and employees and (b) _____ (the designated primary additional insured's lender.)*]	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the land leased to you[723] and shown in the Schedule.
However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law;[724] and

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

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

This insurance does not apply to:

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(s) or organization(s) shown in the Schedule.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits of Insurance**:
If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 26 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION [725]

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

SCHEDULE

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

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions [726] or the acts or omissions of those acting on your behalf:

1. In the performance of your ongoing operations; [727] or

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

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; [728] and

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

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

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

1. Required by the contract or agreement; or

2. Available under the applicable Limits of insurance shown in the Declarations;

whichever is less.

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 33 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU [729]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in 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 for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or [730]

2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured:

1. Only applies to the extent permitted by law;[731] and

2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

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

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

This insurance does not apply to:

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

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

b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or the failure to render any architectural, engineering or surveying services.

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

a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be

performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

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

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

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

1. Required by the contract or agreement you have entered into with the additional insured; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 37 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS [732]

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

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

However:

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

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

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

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

whichever is less.

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT[733]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. **Section II – Who Is An Insured** is amended to include as an additional insured:

1. 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; and

2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

a. Your acts or omissions;[734] or

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

in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured described above:

a. Only applies to the extent permitted by law;[735] and

b. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for the person or organization described in Paragraph **1.** above are completed.

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

This insurance does not apply to:

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

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

b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of, or the failure to render, any professional architectural, engineering or surveying services.

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

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

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

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

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

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

whichever is less.

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CONTRACTUAL LIABILITY LIMITATION 736

This endorsement modifies insurance provided under the following:

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

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

"Insured contract" means:

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

b. A sidetrack agreement;

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

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

e. An elevator maintenance agreement.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – EXPLOSION, COLLAPSE AND UNDERGROUND PROPERTY DAMAGE HAZARD (SPECIFIED OPERATIONS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Location And Description Of Operations	Excluded Hazard(s)
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. The following exclusion is added to Paragraph **2. Exclusions** in **Section I – Coverages:**

This insurance does not apply to "property damage" included within the "explosion hazard", the "collapse hazard" or the "underground property damage hazard" if any of these hazards is entered as an excluded hazard on the Schedule.

This exclusion does not apply to:

a. Operations performed for you by others; or

b. "Property damage" included within the "products completed operations hazard".

B. The following definitions are added to the **Definitions** Section:

1. "Collapse hazard" includes "structural property damage" and any resulting "property damage" to any other property at any time.

2. "Explosion hazard" includes "property damage" arising out of blasting or explosion. The "explosion hazard" does not include "property damage" arising out of the explosion of air or steam vessels, piping under pressure, prime movers, machinery or power transmitting equipment.

3. "Structural property damage" means the collapse of or structural injury to any building or structure due to:

a. Grading of land, excavating, borrowing, filling, back-filling, tunneling, pile driving, cofferdam work or caisson work; or

b. Moving, shoring, underpinning, raising or demolition of any building or structure or removal or rebuilding of any structural support of that building or structure.

4. "Underground property damage hazard" includes "underground property damage" and any resulting "property damage" to any other property at any time.

5. "Underground property damage" means "property damage" to wires, conduits, pipes, mains, sewers, tanks, tunnels, any similar property, and any apparatus used with them beneath the surface of the ground or water, caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, back-filling or pile driving.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 43 12 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – EXPLOSION, COLLAPSE AND UNDERGROUND PROPERTY DAMAGE HAZARD (SPECIFIED OPERATIONS EXCEPTED)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Location And Description Of Operations	Covered Hazard(s)
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. The following exclusion is added to Paragraph **2. Exclusions** in **Section I – Coverages:**

This insurance does not apply to "property damage" arising out of the "explosion hazard", the "collapse hazard" or the "underground property damage hazard".

This exclusion does not apply to:

a. Operations performed for you by others;

b. "Property damage" included within the "products-completed operations hazard"; or

c. Any operation described in the Schedule above, if any of these hazards is entered as a covered hazard.

B. The following definitions are added to the **Definitions** Section:

1. "Collapse hazard" includes "structural property damage" and any resulting "property damage" to any other property at any time.

2. "Explosion hazard" includes "property damage" arising out of blasting or explosion. The "explosion hazard" does not include "property damage" arising out of the explosion of air or steam vessels, piping under pressure, prime movers, machinery or power transmitting equipment.

3. "Structural property damage" means the collapse of or structural injury to any building or structure due to:

a. Grading of land, excavating, borrowing, filling, back-filling, tunnelling, pile driving, cofferdam work or caisson work; or

b. Moving, shoring, underpinning, raising or demolition of any building or structure or removal or rebuilding of any structural support of that building or structure.

4. "Underground property damage hazard" includes "underground property damage" and any resulting "property damage" to any other property at any time.

5. "Underground property damage" means "property damage" to wires, conduits, pipes, mains, sewers, tanks, tunnels, any similar property, and any apparatus used with them beneath the surface of the ground or water, caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, back-filling or pile driving.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 44 07 98

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITATION OF COVERAGE TO DESIGNATED PREMISES OR PROJECT[737]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Premises:
Project:

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

This insurance applies only to "bodily injury", "property damage", "personal and advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or
2. The project shown in the Schedule.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CONSTRUCTION MANAGEMENT ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

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

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

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

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved that which is described in Paragraph **1.** or **2.**

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

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.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

REAL ESTATE PROPERTY MANAGED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following is added to Exclusion **j. Damage To Property** of Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

j. Damage To Property

"Property damage" to:

Property you operate or manage or as to which you act as agent for the collection of rents or in any other supervisory capacity.

B. The following is added to Paragraph **4.b.(1)** of **Other Insurance** of **Section IV – Commercial General Liability Conditions:**

4. Other Insurance

b. Excess Insurance

With respect to your liability arising out of your management of property for which you are acting as real estate manager, this insurance is excess over any other valid and collectible insurance available to you, whether such insurance is primary or excess.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CONTRACTORS – PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

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

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

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

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional services by you or on your behalf with respect to the operations described above.

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

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

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

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 22 94 10 01

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF[738]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

2. Exclusions

This insurance does not apply to:

l. Damage To Your Work

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

EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF – DESIGNATED SITES OR OPERATIONS[739]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description Of Designated Sites Or Operations

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

With respect to those sites or operations designated in the Schedule of this endorsement, Exclusion **l.** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

l. Damage To Your Work

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 24 04 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US 740

This endorsement modifies insurance provided under the following:

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

SCHEDULE

Name Of Person Or Organization:
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

The following is added to Paragraph **8. Transfer Of Rights Of Recovery Against Others To Us** of **Section IV – Conditions:**

We waive any right 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.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURED CONTRACT DEFINITION 741

This endorsement modifies insurance provided under the following:

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

The definition of "insured contract" in the **Definitions** section is replaced by the following:

"Insured contract" means:

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

b. A sidetrack agreement;

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

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

e. An elevator maintenance agreement;

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

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

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

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

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

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

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED LOCATION(S) GENERAL AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designated Location(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section **I** – Coverage **A,** and for all medical expenses caused by accidents under Section **I** – Coverage **C,** which can be attributed only to operations at a single designated "location" shown in the Schedule above:

1. A separate Designated Location General Aggregate Limit applies to each designated "location", and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.

2. The Designated Location General Aggregate Limit is the most we will pay for the sum of all damages under Coverage **A,** except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and for medical expenses under Coverage **C** regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

3. Any payments made under Coverage **A** for damages or under Coverage **C** for medical expenses shall reduce the Designated Location General Aggregate Limit for that designated "location". Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Location General Aggregate Limit for any other designated "location" shown in the Schedule above.

4. The limits shown in the Declarations for Each Occurrence, Damage To Premises Rented To You and Medical Expense continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Location General Aggregate Limit.

B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section **I** – Coverage **A,** and for all medical expenses caused by accidents under Section **I** – Coverage **C,** which cannot be attributed only to operations at a single designated "location" shown in the Schedule above:

1. Any payments made under Coverage **A** for damages or under Coverage **C** for medical expenses shall reduce the amount available under the General Aggregate Limit or the Products-completed Operations Aggregate Limit, whichever is applicable; and
2. Such payments shall not reduce any Designated Location General Aggregate Limit.

C. When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated Location General Aggregate Limit.

D. For the purposes of this endorsement, the **Definitions** Section is amended by the addition of the following definition:

"Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.

E. The provisions of Section **III** – Limits Of Insurance not otherwise modified by this endorsement shall continue to apply as stipulated.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP DS 00 10 00

COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS PAGE[742]

POLICY NO. **EFFECTIVE DATE** ____/ ____/ ____ ☐ **"X" If Supplemental Declarations Is Attached**

NAMED INSURED

DESCRIPTION OF PREMISES

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

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

Prem. No.	Bldg. No.	Coverage	Limit Of Insurance	Covered Causes Of Loss[743]	Coinsurance*	Rates

***If Extra Expense Coverage, Limits On Loss Payment**

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

Prem. No.	Bldg. No.	Agreed Value[744] Expiration Date	Agreed Value[744] Cov.	Agreed Value[744] Amount	Replacement Cost (X)[745] Building	Replacement Cost (X)[745] Pers. Prop.	Replacement Cost (X)[745] Including "Stock"

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

***Applies to Business Income Only**

MORTGAGEHOLDERS[746]

Prem. No.	Bldg. No.	Mortgageholder Name And Mailing Address

DEDUCTIBLE

$500. Exceptions:

FORMS APPLICABLE[747]

To All Coverages:

To Specific Premises/Coverages:

Prem. No.	Bldg. No.	Coverages	Form Number

CP DS 00 10 00

COMMON POLICY CONDITIONS [748]

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

A. Cancellation

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

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

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

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

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

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

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

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

BUILDING AND PERSONAL PROPERTY COVERAGE FORM [749]

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

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

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

A. Coverage

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

1. Covered Property

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

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

(1) Completed additions;

(2) Fixtures, including outdoor fixtures;

(3) Permanently installed:

(a) Machinery; and

(b) Equipment;

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

(a) Fire-extinguishing equipment;

(b) Outdoor furniture;

(c) Floor coverings; and

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

(5) If not covered by other insurance:

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

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

b. Your Business Personal Property consists of the following property located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the building or structure or within 100 feet of the premises described in the Declarations, whichever distance is greater:

(1) Furniture and fixtures;

(2) Machinery and equipment;

(3) "Stock"

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

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

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

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

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

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

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

c. Personal Property Of Others that is:

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

(2) Located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the building or structure or within 100 feet of the premises described in the Declarations, whichever distance is greater.

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

2. Property Not Covered

Covered Property does not include:

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

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

c. Automobiles held for sale;

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

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

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

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

(1) The lowest basement floor; or

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

h. Land (including land on which the property is located), water, growing crops or lawns (other than lawns which are part of a vegetated roof);

i. Personal property while airborne or waterborne;

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

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

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

m. Underground pipes, flues or drains;

n. Electronic data, except as provided under the Additional Coverage[750], Electronic Data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph, n., does not apply to your "stock" of prepackaged software, or to electronic data which is integrated in and operates or

controls the building's elevator, lighting, heating, ventilation, air conditioning or security system;

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

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

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

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

This paragraph does not apply to:

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

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

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

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

q. The following property while outside of buildings:

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

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

3. Covered Causes Of Loss [751]

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

4. Additional Coverages

a. Debris Removal [752]

(1) Subject to Paragraphs **(2)**, **(3)** and **(4)**, we will pay your expense to remove debris of Covered Property and other debris that is on the described premises, when such debris is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

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

(a) Remove debris of property of yours that is not insured under this policy, or property in your possession that is not Covered Property;

(b) Remove debris of property owned by or leased to the landlord of the building where your described premises are located, unless you have a contractual responsibility to insure such property and it is insured under this policy;

(c) Remove any property that is Property Not Covered, including property addressed under the Outdoor Property Coverage Extension;

(d) Remove property of others of a type that would not be Covered Property under this Coverage Form;

(e) Remove deposits of mud or earth from the grounds of the described premises;

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

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

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

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

(b) Subject to **(a)** above, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage. However, if no Covered Property has sustained direct physical loss or damage, the most we will pay for removal of debris of other property (if such removal is covered under this Additional Coverage) is $5,000 at each location.

(4) We will pay up to an additional $25,000 for debris removal expense, for each location, in any one occurrence of physical loss or damage to Covered Property, if one or both of the following circumstances apply:

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

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

Therefore, if **(4)(a)** and/or **(4)(b)** applies, our total payment for direct physical loss or damage and debris removal expense may reach but will never exceed the Limit of Insurance on the Covered Property that has sustained loss or damage, plus $25,000.

(5) Examples

The following examples assume that there is no Coinsurance penalty.

EXAMPLE 1

Limit of Insurance:	$ 90,000
Amount of Deductible:	$ 500
Amount of Loss:	$ 50,000
Amount of Loss Payable:	$ 49,500
	($50,000 - $500)
Debris Removal Expense:	$ 10,000
Debris Removal Expense Payable:	$ 10,000

($10,000 is 20% of $50,000.)

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

EXAMPLE 2

Limit of Insurance:	$ 90,000
Amount of Deductible:	$ 500
Amount of Loss:	$ 80,000
Amount of Loss Payable:	$ 79,500
	($80,000 - $500)
Debris Removal Expense:	$ 40,000
Debris Removal Expense Payable	
Basic Amount:	$ 10,500
Additional Amount:	$ 25,000

The basic amount payable for debris removal expense under the terms of Paragraph **(3)** is

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

The additional amount payable for debris removal expense is provided in accordance with the terms of Paragraph **(4)**, because the debris removal expense ($40,000) exceeds 25% of the loss payable plus the deductible ($40,000 is 50% of $80,000), and because the sum of the loss payable and debris removal expense ($79,500 + $40,000 = $119,500) would exceed the Limit of Insurance ($90,000). The additional amount of covered debris removal expense is $25,000, the maximum payable under Paragraph **(4).** Thus, the total payable for debris removal expense in this example is $35,500; $4,500 of the debris removal expense is not covered.

b. Preservation Of Property

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

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

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

c. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to $1,000 for service at each premises described in the Declarations, unless a higher limit is shown in the Declarations. Such limit is the most we will pay regardless of the number of responding fire departments or fire units, and regardless of the number or type of services performed. This Additional Coverage applies to your liability for fire department service charges:

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

(2) Required by local ordinance.

No Deductible applies to this Additional Coverage.

d. Pollutant Clean-up And Removal

We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs. This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water. The most we will pay under this Additional Coverage for each described premises is $10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

e. Increased Cost Of Construction 753

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

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

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

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

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

(b) You failed to comply with.

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

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

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

(6) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is $10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lesser of $10,000 or 5% times the value of the damaged building as of the time of loss times the applicable Coinsurance percentage.

The amount payable under this Additional Coverage is additional insurance.

(7) With respect to this Additional Coverage:

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

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

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

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

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

increased cost of construction at the new premises.

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

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

f. Electronic Data [754]

(1) Under this Additional Coverage, electronic data has the meaning described under Property Not Covered, Electronic Data. This Additional Coverage does not apply to your "stock" of prepackaged software, or to electronic data which is integrated in and operates or controls the building's elevator, lighting, heating, ventilation, air conditioning or security system.

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

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

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

(b) If the Causes Of Loss - Broad Form applies, coverage under this Additional Coverage, Electronic Data, includes Collapse as set forth in that form.

(c) If the Causes Of Loss form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Electronic Data.

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

(4) The most we will pay under this Additional Coverage, Electronic Data, is $2,500 (unless a higher

limit is shown in the Declarations) for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

5. Coverage Extensions

Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises. If a Coinsurance percentage of 80% or more, or a Value Reporting period symbol, is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

a. Newly Acquired Or Constructed Property

(1) Buildings

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

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

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

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

(ii) Use as a warehouse.

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

(2) Your Business Personal Property

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

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

(ii) Business personal property, including such property that you newly acquire, located at your newly constructed or acquired buildings at the location described in the Declarations. The most we will pay for loss or damage under this Extension is $100,000 at each building.

(b) This Extension does not apply to:

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

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

(3) Period Of Coverage

With respect to insurance provided under this Coverage Extension for Newly Acquired Or Constructed Property, coverage will end when any of the following first occurs:

(a) This policy expires;

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

(c) You report values to us.

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

b. Personal Effects And Property Of Others

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

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

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

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

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

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

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

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

d. Property Off-premises

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

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

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

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

(2) This Extension does not apply to property:

(a) In or on a vehicle; or

(b) In the care, custody or control of your salespersons, unless the

property is in such care, custody or control at a fair, trade show or exhibition.

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

e. Outdoor Property

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

(1) Fire;

(2) Lightning;

(3) Explosion;

(4) Riot or Civil Commotion; or

(5) Aircraft.

The most we will pay for loss or damage under this Extension is $1,000, but not more than $250 for any one tree, shrub or plant. These limits apply to any one occurrence, regardless of the types or number of items lost or damaged in that occurrence. Subject to all aforementioned terms and limitations of coverage, this Coverage Extension includes the expense of removing from the described premises the debris of trees, shrubs and plants which are the property of others, except in the situation in which you are a tenant and such property is owned by the landlord of the described premises.

f. Non-owned Detached Trailers

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

(a) The trailer is used in your business;

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

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

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

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

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

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

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

g. Business Personal Property Temporarily In Portable Storage Units

(1) You may extend the insurance that applies to Your Business Personal Property to apply to such property while temporarily stored in a portable storage unit (including a detached trailer) located within 100 feet of the building or structure described in the Declarations or within 100 feet of the premises described in the Declarations, whichever distance is greater.

(2) If the applicable Covered Causes of Loss form or endorsement contains a limitation or exclusion concerning loss or damage from sand, dust, sleet, snow, ice or rain to property in a structure, such limitation or exclusion also

applies to property in a portable storage unit.

(3) Coverage under this Extension:

(a) Will end 90 days after the business personal property has been placed in the storage unit;

(b) Does not apply if the storage unit itself has been in use at the described premises for more than 90 consecutive days, even if the business personal property has been stored there for 90 or fewer days as of the time of loss or damage.

(4) Under this Extension, the most we will pay for the total of all loss or damage to business personal property is $10,000 (unless a higher limit is indicated in the Declarations for such Extension) regardless of the number of storage units. Such limit is part of, not in addition to, the applicable Limit of Insurance on Your Business Personal Property. Therefore, payment under this Extension will not increase the applicable Limit of Insurance on Your Business Personal Property.

(5) This Extension does not apply to loss or damage otherwise covered under this Coverage Form or any endorsement to this Coverage Form or policy, and does not apply to loss or damage to the storage unit itself. Each of these Extensions is additional insurance unless otherwise indicated. The Additional Condition, Coinsurance, does not apply to these Extensions.

B. Exclusions And Limitations

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

C. Limits Of Insurance

The most we will pay for loss or damage in any one occurrence is the applicable Limit Of Insurance shown in the Declarations. The most we will pay for loss or damage to outdoor signs, whether or not the sign is attached to a building, is $2,500 per sign in any one occurrence. The amounts of insurance stated in the following Additional Coverages apply in accordance with the terms of such coverages and are separate from the Limit(s) Of Insurance shown in the Declarations for any other coverage:

1. Fire Department Service Charge;

2. Pollutant Clean-up And Removal;

3. Increased Cost Of Construction; and

4. Electronic Data.

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

D. Deductible

In any one occurrence of loss or damage (hereinafter referred to as loss), we will first reduce the amount of loss if required by the Coinsurance Condition or the Agreed Value Optional Coverage. If the adjusted amount of loss is less than or equal to the Deductible, we will not pay for that loss. If the adjusted amount of loss exceeds the Deductible, we will then subtract the Deductible from the adjusted amount of loss and will pay the resulting amount or the Limit of Insurance, whichever is less. When the occurrence involves loss to more than one item of Covered Property and separate Limits of Insurance apply, the losses will not be combined in determining application of the Deductible. But the Deductible will be applied only once per occurrence.

EXAMPLE 1

(This example assumes there is no Coinsurance penalty.)

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

The amount of loss to Building 1 ($60,100) is less than the sum ($60,250) of the Limit of

Insurance applicable to Building 1 plus the Deductible.

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

$ 60,100
- 250
$ 59,850 Loss Payable - Building 1

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

Total amount of loss payable:

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

EXAMPLE 2

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

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

Loss to Building 1: (Exceeds Limit of Insurance plus Deductible)	$ 70,000
Loss to Building 2: (Exceeds Limit of Insurance plus Deductible)	$ 90,000
Loss Payable - Building 1: (Limit of Insurance)	$ 60,000
Loss Payable - Building 2: (Limit of Insurance)	$ 80,000
Total amount of loss payable:	$ 140,000

E. Loss Conditions

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

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

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

a. Pay its chosen appraiser; and

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

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

3. Duties In The Event Of Loss Or Damage

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

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

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

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

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

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

(6) As often as may be reasonably required, permit us to inspect the property proving the loss or

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

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

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

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

4. Loss Payment

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

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

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

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

(4) Repair, rebuild or replace the property with other property of like kind and quality, subject to **b.** below. We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

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

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

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

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

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

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

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

(2) An appraisal award has been made.

h. A party wall is a wall that separates and is common to adjoining buildings that are owned by different parties. In settling covered losses involving a party wall, we will pay a proportion of the loss to the party wall based on your interest in the wall in proportion to the interest of the owner of the adjoining building. However, if you elect to repair or replace your building and the owner of the adjoining building elects not to repair or replace that building, we will pay you the full value of the loss to the party wall, subject to all applicable policy provisions including Limits of Insurance, the Valuation and Coinsurance

Conditions and all other provisions of this Loss Payment Condition. Our payment under the provisions of this paragraph does not alter any right of subrogation we may have against any entity, including the owner or insurer of the adjoining building, and does not alter the terms of the Transfer Of Rights Of Recovery Against Others To Us Condition in this policy.

5. Recovered Property

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

6. Vacancy [755]

a. Description Of Terms

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

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

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant[756] unless at least 31% of its total square footage is:

(i) Rented to a lessee or sublessee and used by the lessee or sublessee to conduct its customary operations;[757] and/or

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

(2) Buildings under construction or renovation are not considered vacant.[758]

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days [759] before that loss or damage occurs:

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

(a) Vandalism;

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

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to Covered Causes of Loss other than those listed in **b.(1)(a)** through **b.(1)(f)** above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.[760]

7. Valuation

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

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

b. If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is $2,500 or less, we will pay the cost of building repairs or replacement. The cost of building repairs or replacement does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use

or repair of any property. However, the following property will be valued at the actual cash value, even when attached to the building:

(1) Awnings or floor coverings;

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

(3) Outdoor equipment or furniture.

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

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

e. Tenants' Improvements and Betterments at:

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

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

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

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

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

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

F. Additional Conditions

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

1. Coinsurance

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

a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property. Instead, we will determine the most we will pay using the following steps:

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

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

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

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

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

EXAMPLE 1 (UNDERINSURANCE)

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

Step **(1)**: $250,000 x 80% = $200,000

(the minimum amount of insurance to meet your Coinsurance requirements)

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

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

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

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

EXAMPLE 2 (ADEQUATE INSURANCE)

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

The Deductible is: $ 250
The amount of loss is: $ 40,000

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

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

EXAMPLE 3

When: The value of the property is:

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

Step **(1):** $250,000 x 90% = $225,000

(the minimum amount of insurance to meet your Coinsurance requirements and to avoid the penalty shown below)

Step **(2):** $180,000 $225,000 = .80

Step **(3):** $50,000 x .80 = $40,000

Step **(4):** $40,000 - $1,000 = $39,000

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

2. Mortgageholders [761]

a. The term mortgageholder includes trustee.

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

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

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

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

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

(3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder. All of the terms of this Coverage Part will then apply directly to the mortgageholder.

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

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

(2) The mortgageholder's right to recover the full amount of the mortgageholder's claim will not be impaired. At our option, we may pay to the mortgageholder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

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

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

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

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

G. Optional Coverages

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

1. Agreed Value [762]

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

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

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

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

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

2. Inflation Guard [763]

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

b. The amount of increase will be:

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

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

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

EXAMPLE

If: The applicable Limit of Insurance is: $100,000

The annual percentage increase is: 8%

The number of days since the beginning of the policy year (or last policy change) is: 146

The amount of increase is: $100,000 x .08 x 146 365 = $ 3,200

3. Replacement Cost [764]

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

b. This Optional Coverage does not apply to:

(1) Personal property of others;

(2) Contents of a residence;

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

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

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

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

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

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

(2) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage. With respect to tenants' improvements and betterments, the following also apply:

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

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

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

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

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

(a) Of comparable material and quality; and

(b) Used for the same purpose; or

(3) The amount actually spent that is necessary to repair or replace the lost or damaged property. If a building is rebuilt at a new premises, the cost described in **e.(2)** above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

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

4. Extension Of Replacement Cost To Personal Property Of Others

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

b. With respect to replacement cost on the personal property of others, the following limitation applies: If an item(s) of personal property of others is subject to a written contract which governs your liability for loss or damage to that item(s), then valuation of that item (s) will be based on the amount for which you are liable under such contract, but not to exceed the lesser of the replacement cost of the property or the applicable Limit of Insurance.

H. Definitions

1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

2. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

3. "Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 00 30 10 12

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM [765]

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

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

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

A. Coverage

1. Business Income

Business Income means the:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses incurred, including payroll.

For manufacturing risks, Net Income includes the net sales value of production.

Coverage is provided as described and limited below for one or more of the following options for which a Limit Of Insurance is shown in the Declarations:

(1) Business Income Including "Rental Value".

(2) Business Income Other Than "Rental Value".

(3) "Rental Value".

If option **(1)** above is selected, the term Business Income will include "Rental Value". If option **(3)** above is selected, the term Business Income will mean "Rental Value" only.

If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each.

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of a building, your premises means:

(a) The portion of the building which you rent, lease or occupy;

(b) The area within 100 feet of the building or within 100 feet of the premises described in the Declarations, whichever distance is greater (with

respect to loss of or damage to personal property in the open or personal property in a vehicle); and

(c) Any area within the building or at the described premises, if that area services, or is used to gain access to, the portion of the building which you rent, lease or occupy.

2. Extra Expense

a. Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.

b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

(1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.

(2) Minimize the "Suspension" of business if you cannot continue "operations".

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

3. Covered Causes Of Loss, Exclusions And Limitations

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

4. Additional Limitation - Interruption Of Computer Operations

a. Coverage for Business Income does not apply when a "suspension" of "operations" is caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage, Interruption Of Computer Operations.

b. Coverage for Extra Expense does not apply when action is taken to avoid or minimize a "suspension" of "operations" caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage, Interruption Of Computer Operations.

c. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.

d. This Additional Limitation does not apply when loss or damage to electronic data involves only electronic data which is integrated in and operates or controls a building's elevator, lighting, heating, ventilation, air conditioning or security system.

5. Additional Coverages

a. Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after time of the first action of civil authority that prohibits access to the described premises and will end:

(1) Four consecutive weeks after the date of that action; or

(2) When your Civil Authority Coverage for Business Income ends; whichever is later.

b. Alterations And New Buildings

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense you incur due to direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss to:

(1) New buildings or structures, whether complete or under construction;

(2) Alterations or additions to existing buildings or structures; and

(3) Machinery, equipment, supplies or building materials located on or within 100 feet of the described premises and:

(a) Used in the construction, alterations or additions; or

(b) Incidental to the occupancy of new buildings.

If such direct physical loss or damage delays the start of "operations", the "period of restoration" for Business Income Coverage will begin on the date "operations" would have begun if the direct physical loss or damage had not occurred.

c. Extended Business Income

(1) Business Income Other Than "Rental Value"

If the necessary "suspension" of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

(a) Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and

(b) Ends on the earlier of:

(i) The date you could restore your "operations", with reasonable speed, to

the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or

(ii) 60 consecutive days after the date determined in **(1)(a)** above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

(2) "Rental Value"

If the necessary "suspension" of your "operations" produces a "Rental Value" loss payable under this policy, we will pay for the actual loss of "Rental Value" you incur during the period that:

(a) Begins on the date property is actually repaired, rebuilt or replaced and tenantability is restored; and

(b) Ends on the earlier of:

(i) The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the "Rental Value" that would have existed if no direct physical loss or damage had occurred; or

(ii) 60 consecutive days after the date determined in **(2)(a)** above.

However, Extended Business Income does not apply to loss of "Rental Value" incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of "Rental Value" must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

d. Interruption Of Computer Operations

(1) Under this Additional Coverage, electronic data has the meaning described under Additional Limitation - Interruption Of Computer Operations.

(2) Subject to all provisions of this Additional Coverage, you may extend the insurance that applies to Business Income and Extra Expense to apply to a "suspension" of "operations" caused by an interruption in computer operations due to destruction or corruption of electronic data due to a Covered Cause of Loss. However, we will not provide coverage under this Additional Coverage when the Additional Limitation - Interruption Of Computer Operations does not apply based on Paragraph **A.3.c.** therein.

(3) With respect to the coverage provided under this Additional Coverage, the Covered Causes of Loss are subject to the following:

(a) If the Causes Of Loss - Special Form applies, coverage under this Additional Coverage, Interruption Of Computer Operations, is limited to the "specified causes of loss" as defined in that form and

Collapse as set forth in that form.

(b) If the Causes Of Loss - Broad Form applies, coverage under this Additional Coverage, Interruption Of Computer Operations, includes Collapse as set forth in that form.

(c) If the Causes Of Loss form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Interruption Of Computer Operations.

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

(4) The most we will pay under this Additional Coverage, Interruption Of Computer Operations, is $2,500 (unless a higher limit is shown in the Declarations) for all loss sustained and expense incurred in any one policy year, regardless of the number of interruptions or the number of premises, locations or computer systems involved. If loss payment relating to the first interruption does not exhaust this amount, then the balance is available for loss or expense sustained or incurred as a result of subsequent interruptions in that policy year. A balance remaining at the end of a policy year does not increase the amount of insurance in the next policy year. With respect to any interruption which begins in one policy year and continues or results in additional loss in a subsequent policy year(s), all loss and expense is deemed to be sustained or incurred in the policy year in which the interruption began.

(5) This Additional Coverage, Interruption Of Computer Operations, does not apply to loss sustained or loss incurred after the end of the "period of restoration", even if the amount of insurance stated in (4) above has not been exhausted.

6. Coverage Extension

If a Coinsurance percentage of 50% or more is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

NEWLY ACQUIRED LOCATIONS

a. You may extend your Business Income and Extra Expense Coverages to apply to property at any location you acquire other than fairs or exhibitions.

b. The most we will pay under this Extension, for the sum of Business Income loss and Extra Expense incurred, is $100,000 at each location, unless a higher limit is shown in the Declarations.

c. Insurance under this Extension for each newly acquired location will end when any of the following first occurs:

(1) This policy expires;

(2) 30 days expire after you acquire or begin to construct the property; or

(3) You report values to us.

We will charge you additional premium for values reported from the date you acquire the property.

The Additional Condition, Coinsurance, does not apply to this Extension.

B. Limits Of Insurance

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

Payments under the following Additional Coverages will not increase the applicable Limit of Insurance:

1. Alterations And New Buildings;

2. Civil Authority;

3. Extra Expense; or

4. Extended Business Income.

The amounts of insurance stated in the Interruption Of Computer Operations Additional Coverage and the Newly Acquired Locations Coverage Extension apply in accordance with the terms of those coverages and are separate from the Limit(s) Of Insurance shown in the Declarations for any other coverage.

C. Loss Conditions

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

1. Appraisal

If we and you disagree on the amount of Net Income and operating expense or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser.

The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of Net Income and operating expense or amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

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

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

2. Duties In The Event Of Loss

a. You must see that the following are done in the event of loss:

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

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

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

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

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

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

(6) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our

request. We will supply you with the necessary forms.

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

(8) If you intend to continue your business, you must resume all or part of your "operations" as quickly as possible.

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

3. Loss Determination

a. The amount of Business Income loss will be determined based on:

(1) The Net Income of the business before the direct physical loss or damage occurred;

(2) The likely Net Income of the business if no physical loss or damage had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses;

(3) The operating expenses, including payroll expenses, necessary to resume "operations" with the same quality of service that existed just before the direct physical loss or damage; and

(4) Other relevant sources of information, including:

(a) Your financial records and accounting procedures;

(b) Bills, invoices and other vouchers; and

(c) Deeds, liens or contracts.

b. The amount of Extra Expense will be determined based on:

(1) All expenses that exceed the normal operating expenses that would have been incurred by "operations" during the "period of restoration" if no direct physical loss or damage had occurred. We will deduct from the total of such expenses:

(a) The salvage value that remains of any property bought for temporary use during the "period of restoration", once "operations" are resumed; and

(b) Any Extra Expense that is paid for by other insurance, except for insurance that is written subject to the same plan, terms, conditions and provisions as this insurance; and

(2) Necessary expenses that reduce the Business Income loss that otherwise would have been incurred.

c. Resumption Of Operations

We will reduce the amount of your:

(1) Business Income loss, other than Extra Expense, to the extent you can resume your "operations", in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.

(2) Extra Expense loss to the extent you can return "operations" to normal and discontinue such Extra Expense.

d. If you do not resume "operations", or do not resume "operations" as quickly as possible, we will pay based on the length of time it would have taken to resume "operations" as quickly as possible.

4. Loss Payment

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

a. We have reached agreement with you on the amount of loss; or

b. An appraisal award has been made.

D. Additional Condition

COINSURANCE

If a Coinsurance percentage is shown in the Declarations, the following condition applies in addition to the Common Policy Conditions and the Commercial Property Conditions.

We will not pay the full amount of any Business Income loss if the Limit of Insurance for Business Income is less than:

1. The Coinsurance percentage shown for Business Income in the Declarations; times

2. The sum of:

a. The Net Income (Net Profit or Loss before income taxes); and

b. Operating expenses, including payroll expenses;

that would have been earned or incurred (had no loss occurred) by your "operations" at the described premises for the 12 months following the inception, or last previous anniversary date, of this policy (whichever is later).

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

Step **(1):** Multiply the Net Income and operating expense for the 12 months following the inception, or last previous anniversary date, of this policy by the Coinsurance percentage;

Step **(2):** Divide the Limit of Insurance for the described premises by the figure determined in Step **(1)**; and

Step **(3):** Multiply the total amount of loss by the figure determined in Step **(2)**.

We will pay the amount determined in Step **(3)** or the Limit of Insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

In determining operating expenses for the purpose of applying the Coinsurance condition, the following expenses, if applicable, shall be deducted from the total of all operating expenses:

(1) Prepaid freight - outgoing;

(2) Returns and allowances;

(3) Discounts;

(4) Bad debts;

(5) Collection expenses;

(6) Cost of raw stock and factory supplies consumed (including transportation charges);

(7) Cost of merchandise sold (including transportation charges);

(8) Cost of other supplies consumed (including transportation charges);

(9) Cost of services purchased from outsiders (not employees) to resell, that do not continue under contract;

(10) Power, heat and refrigeration expenses that do not continue under contract (if Form CP 15 11 is attached);

(11) All payroll expenses or the amount of payroll expense excluded (if Form CP 15 10 is attached); and

(12) Special deductions for mining properties (royalties unless specifically included in coverage; actual depletion commonly known as unit or cost depletion - not percentage depletion; welfare and retirement fund charges based on tonnage; hired trucks).

Example 1 (Underinsurance)

When:	The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date, of this policy at the described premises would have been:	$ 400,000
	The Coinsurance percentage is:	50%
	The Limit of Insurance is:	$ 150,000

	The amount of loss is:	$ 80,000

Step **(1):** $400,000 x 50% = $200,000

(the minimum amount of insurance to meet your Coinsurance requirements)

Step **(2)** $150,000 ÷ $200,000 = .75

Step **(3)** $80,000 x .75 = $60,000

We will pay no more than $60,000. The remaining $20,000 is not covered.

Example 2 (Adequate Insurance)

When:	The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date, of this policy at the described premises would have been:	$ 400,000
	The Coinsurance percentage is:	50%
	The Limit of Insurance is:	$ 200,000
	The amount of loss is:	$ 80,000

Step **(1):** $400,000 x 50% = $200,000

(the minimum amount of insurance to meet your Coinsurance requirements)

Step **(2)** $150,000 ÷ $200,000 = .75

Step **(3)** $80,000 x .75 = $60,000

The minimum amount of insurance to meet your Coinsurance requirement is $200,000 ($400,000 x 50%). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than $80,000 (amount of loss).

E. Optional Coverages

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

1. Maximum Period Of Indemnity

a. The Additional Condition, Coinsurance, does not apply to this Coverage Form at the described premises to which this Optional Coverage applies.

b. The most we will pay for the total of Business Income loss and Extra Expense is the lesser of:

(1) The amount of loss sustained and expenses incurred during the 120 days immediately following the beginning of the "period of restoration" or

(2) The Limit Of Insurance shown in the Declarations.

2. Monthly Limit Of Indemnity

a. The Additional Condition, Coinsurance, does not apply to this Coverage Form at the described premises to which this Optional Coverage applies.

b. The most we will pay for loss of Business Income in each period of 30 consecutive days after the beginning of the "period of restoration" is:

(1) The Limit of Insurance, multiplied by

(2) The fraction shown in the Declarations for this Optional Coverage.

Example

When:	The Limit of Insurance is:	$120,000
	The fraction shown in the Declarations for this Optional Coverage is:	1/4
	The most we will pay for loss in each period of 30 consecutive days is:	$30,000

($120,000 x 1/4 = $30,000)

If, in this example, the actual amount of loss is:

Days 1-30	$ 40,000
Days 31-60	$ 20,000
Days 61-90	$ 30,000
	$ 90,000

We will pay:

Days 1-30	$ 30,000
Days 31-60	$ 20,000
Days 61-90	$ 30,000
	$ 80,000

The remaining $10,000 is not covered.

3. Business Income Agreed Value

a. To activate this Optional Coverage:

(1) A Business Income Report/Work Sheet must be submitted to us and must show financial data for your "operations":

(a) During the 12 months prior to the date of the Work Sheet; and

(b) Estimated for the 12 months immediately following the inception of this Optional Coverage.

(2) The Declarations must indicate that the Business Income Agreed Value Optional Coverage applies, and an Agreed Value must be shown in the Declarations. The Agreed Value should be at least equal to:

(a) The Coinsurance percentage shown in the Declarations; multiplied by

(b) The amount of Net Income and operating expenses for the following 12 months you report on the Work Sheet.

b. The Additional Condition, Coinsurance, is suspended until:

(1) 12 months after the effective date of this Optional Coverage; or

(2) The expiration date of this policy;

whichever occurs first.

c. We will reinstate the Additional Condition, Coinsurance, automatically if you do not submit a new Work Sheet and Agreed Value:

(1) Within 12 months of the effective date of this Optional Coverage; or

(2) When you request a change in your Business Income Limit of Insurance.

d. If the Business Income Limit of Insurance is less than the Agreed Value, we will not pay more of any loss than the amount of loss multiplied by:

(1) The Business Income Limit of Insurance; divided by

(2) The Agreed Value.

Example

When:	The Limit of Insurance is:	$ 100,000
	The Agreed Value is:	$ 200,000
	The amount of loss is:	$ 80,000

Step **(1):** $100,000 ÷ $200,000 = .50

Step **(2)** .50 x $80,000 = $ 40,000

We will pay $40,000. The remaining $40,000 is not covered.

4. Extended Period Of Indemnity

Under Paragraph **A.4.d., Extended Business Income,** the number 60 in Subparagraphs **(1)(b)** and **(2)(b)** is replaced by the number shown in the Declarations for this Optional Coverage.

F. Definitions

1. "Finished stock" means stock you have manufactured.

"Finished stock" also includes whiskey and alcoholic products being aged, unless there is a Coinsurance percentage shown for Business Income in the Declarations.

"Finished stock" does not include stock you have manufactured that is held for sale on the premises of any retail outlet insured under this Coverage Part.

2. "Operations" means:

a. Your business activities occurring at the described premises; and

b. The tenantability of the described premises, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

3. "Period of restoration" means the period of time that:

a. Begins 72 hours after the time of direct physical loss or damage for Business Income Coverage; or

b. Ends on the earlier of:

(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

"Period of restoration" does not include any increased period required due to the enforcement of or compliance with any ordinance or law that:

(1) Regulates the construction, use or repair, or requires the tearing down, of any property; or

(2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".

The expiration date of this policy will not cut short the "period of restoration".

4. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

5. "Rental Value" means Business Income that consists of:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the premises described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the described premises which is occupied by you; and

b. Continuing normal operating expenses incurred in connection with that premises, including:

(1) Payroll; and

(2) The amount of charges which are the legal obligation of the tenant(s) but would otherwise be your obligations.

6. "Suspension" means:

a. The slowdown or cessation of your business activities; or

b. That a part or all of the described premises is rendered untenantable, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

COMMERCIAL PROPERTY CONDITIONS [766]

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

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

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

1. This coverage part;

2. The covered property

3. Your interest in the covered property; or

4. A claim under this coverage part.

B. CONTROL OF PROPERTY

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

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

. . . .

I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

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

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

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

a. Someone insured by this insurance;

b. A business firm:

(1) Owned or controlled by you; or

(2) That owns or controls you; or

c. Your tenant.

This will not restrict your insurance.

POLICY NUMBER: **COMMERCIAL PROPERTY**

CP 04 05 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ORDINANCE OR LAW COVERAGE 767

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Building Number/ Premises Number	Coverage A	Coverage B Limit Of Insurance	Coverage C Limit Of Insurance	Coverage B And C Combined Limit Of Insurance
/		$	$	$ *
/		$	$	$ *
/		$	$	$ *

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.
*Do **not** enter a Blanket Limit of Insurance if individual Limits of Insurance are selected for Coverages **B** and **C,** or if one of these Coverages is not applicable.

A. Each Coverage - Coverage **A**, Coverage **B** and Coverage **C** - is provided under this endorsement only if that Coverage(s) is chosen by entry in the above Schedule and then only with respect to the building identified for that Coverage(s) in the Schedule.

B. Application Of Coverage(s)

The Coverage(s) provided by this endorsement applies only if both **B.1.** and **B.2.** are satisfied and are then subject to the qualifications set forth in **B.3.**

1. The ordinance or law:

a. Regulates the demolition, construction or repair of buildings, or establishes zoning or land use requirements at the described premises; and

b. Is in force at the time of loss.

But coverage under this endorsement applies only in response to the minimum requirements of the ordinance or law. Losses and costs incurred in complying with recommended actions or standards that exceed actual requirements are not covered under this endorsement.

2. a. The building sustains direct physical damage that is covered under this policy and as a result of such damage, you are required to comply with the ordinance or law; or

b. The building sustains both direct physical damage that is covered under this policy and direct physical damage that is not covered under this policy, and as a result of the building damage in its entirety, you are required to comply with the ordinance or law.

c. But if the building sustains direct physical damage that is not covered under this policy, and such damage is the subject of the ordinance or law, then there is no coverage under this endorsement even if the building has also sustained covered direct physical damage.

3. In the situation described in **B.2.b.** above, we will not pay the full amount of loss otherwise payable under the terms of Coverages **A**, **B**, and/or **C** of this endorsement. Instead, we will pay a proportion of such loss, meaning the proportion that the covered direct

physical damage bears to the total direct physical damage.

(Section **H.** of this endorsement provides an example of this procedure.)

However, if the covered direct physical damage, alone, would have resulted in a requirement to comply with the ordinance or law, then we will pay the full amount of loss otherwise payable under the terms of Coverages **A, B** and/or **C** of this endorsement.

C. We will not pay under Coverage **A**, **B** or **C** of this endorsement for:

1. Enforcement of or compliance with any ordinance or law which requires the demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or

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

D. Coverage

1. Coverage A - Coverage For Loss To The Undamaged Portion Of The Building

With respect to the building that has sustained covered direct physical damage, we will pay under Coverage **A** for the loss in value of the undamaged portion of the building as a consequence of a requirement to comply with an ordinance or law that requires demolition of undamaged parts of the same building.

Coverage **A** is included within the Limit Of Insurance shown in the Declarations as applicable to the covered building. Coverage **A** does not increase the Limit of Insurance.

2. Coverage B - Demolition Cost Coverage

With respect to the building that has sustained covered direct physical damage, we will pay the cost to demolish and clear the site of undamaged parts of the same building as a consequence of a requirement to comply with an ordinance or law that requires demolition of such undamaged property.

The Coinsurance Additional Condition does not apply to Demolition Cost Coverage.

3. Coverage C - Increased Cost Of Construction Coverage

a. With respect to the building that has sustained covered direct physical damage, we will pay the increased cost to:

(1) Repair or reconstruct damaged portions of that building; and/or

(2) Reconstruct or remodel undamaged portions of that building, whether or not demolition is required;

when the increased cost is a consequence of a requirement to comply with the minimum standards of the ordinance or law.

However:

(1) This coverage applies only if the restored or remodeled property is intended for similar occupancy as the current property, unless such occupancy is not permitted by zoning or land use ordinance or law.

(2) We will not pay for the increased cost of construction if the building is not repaired, reconstructed or remodeled.

The Coinsurance Additional Condition does not apply to Increased Cost of Construction Coverage.

b. When a building is damaged or destroyed and Coverage **C** applies to that building in accordance with 3.a. above, coverage for the increased cost of construction also applies to repair or reconstruction of

the following, subject to the same conditions stated in **3.a.**:

(1) The cost of excavations, grading, backfilling and filling;

(2) Foundation of the building;

(3) Pilings; and

(4) Underground pipes, flues and drains.

The items listed in **b.(1)** through **b.(4)** above are deleted from Property Not Covered, but only with respect to the coverage described in this provision, **3.b.**

E. Loss Payment

1. All following loss payment provisions, **E.2.** through **E.5.**, are subject to the apportionment procedures set forth in Section **B.3.** of this endorsement.

2. When there is a loss in value of an undamaged portion of a building to which Coverage **A** applies, the loss payment for that building, including damaged and undamaged portions, will be determined as follows:

a. If the Replacement Cost Coverage Option applies and the property is being repaired or replaced, on the same or another premises, we will not pay more than the lesser of:

(1) The amount you would actually spend to repair, rebuild or reconstruct the building, but not for more than the amount it would cost to restore the building on the same premises and to the same height, floor area, style and comparable quality of the original property insured; or

(2) The Limit Of Insurance shown in the Declarations as applicable to the covered building.

b. If the Replacement Cost Coverage Option applies and the property is not repaired or replaced, or if the Replacement Cost Coverage Option does not apply, we will not pay more than the lesser of:

(1) The actual cash value of the building at the time of loss; or

(2) The Limit Of Insurance shown in the Declarations as applicable to the covered building.

3. Unless Paragraph **E.5.** applies, loss payment under Coverage **B** - Demolition Cost Coverage will be determined as follows:

We will not pay more than the lesser of the following:

a. The amount you actually spend to demolish and clear the site of the described premises; or

b. The applicable Limit Of Insurance shown for Coverage **B** in the Schedule above.

4. Unless Paragraph **E.5.** applies, loss payment under Coverage **C** - Increased Cost Of Construction Coverage will be determined as follows:

a. We will not pay under Coverage **C**:

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

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

b. If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay under Coverage **C** is the lesser of:

(1) The increased cost of construction at the same premises; or

(2) The applicable Limit Of Insurance shown for Coverage **C** in the Schedule above.

c. If the ordinance or law requires relocation to another premises, the most we will pay under Coverage **C** is the lesser of:

(1) The increased cost of construction at the new premises; or

(2) The applicable Limit Of Insurance shown for Coverage **C** in the Schedule above.

5. If a Combined Limit Of Insurance is shown for Coverages **B** and **C** in the Schedule above, Paragraphs **E.3.** and **E.4.** of this endorsement do not apply with respect to the building that is subject to the Combined Limit, and the following loss payment provisions apply instead:

The most we will pay, for the total of all covered losses for Demolition Cost and Increased Cost of Construction, is the Combined Limit Of Insurance shown for Coverages **B** and **C** in the Schedule above. Subject to this Combined Limit of Insurance, the following loss payment provisions apply:

a. For Demolition Cost, we will not pay more than the amount you actually spend to demolish and clear the site of the described premises.

b. With respect to the Increased Cost of Construction:

(1) We will not pay for the increased cost of construction:

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

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

(2) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the increased cost of construction is the increased cost of construction at the same premises.

(3) If the ordinance or law requires relocation to another premises, the most we will pay for the increased cost of construction is the increased cost of construction at the new premises.

F. The terms of this endorsement apply separately to each building to which this endorsement applies.

G. Under this endorsement we will not pay for loss due to any ordinance or law that:

1. You were required to comply with before the loss, even if the building was undamaged; and

2. You failed to comply with.

H. Example of proportionate loss payment for Ordinance Or Law Coverage Losses (procedure as set forth in Section **B.3.** of this endorsement).

Assume:

- Wind is a Covered Cause of Loss; Flood is an excluded Cause of Loss
- The building has a value of $200,000
- Total direct physical damage to building: $100,000
- The ordinance or law in this jurisdiction is enforced when building damage equals or exceeds 50% of the building's value
- Portion of direct physical damage that is covered (caused by wind): $30,000
- Portion of direct physical damage that is not covered (caused by flood): $70,000
- Loss under Ordinance Or Law Coverage **C** of this endorsement: $60,000

Step 1: Determine the proportion that the covered direct physical damage bears to the total direct physical damage.

$30,000 ÷ $100,000 = .30

Step 2: Apply that proportion to the Ordinance or Law loss.

$60,000 x .30 = $18,000

In this example, the most we will pay under this endorsement for the Coverage **C** loss is $18,000, subject to the applicable Limit of Insurance and any other applicable provisions.

Note**:** The same procedure applies to losses under Coverages **A** and **B** of this endorsement.

1. The following definition is added:

"Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DEBRIS REMOVAL ADDITIONAL INSURANCE

This endorsement modifies insurance provided under the following:

BUILDERS RISK COVERAGE FORM
BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY
TOBACCO SALES WAREHOUSES COVERAGE FORM

SCHEDULE

Premises Number	Building Number	Debris Removal Amount	Additional Premium
		$	$
		$	$
		$	$
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

The additional amount of $25,000 for debris removal in the **Debris Removal** Additional Coverages section is replaced by the higher amount shown in the Schedule.

CAUSES OF LOSS - SPECIAL FORM [768]

Words and phrases that appear in quotation marks have special meaning. Refer to Section **G.** Definitions.

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance Or Law [769]

The enforcement of or compliance with any ordinance or law:

(1) Regulating the construction, use or repair of any property; or

(2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

(a) An ordinance or law that is enforced even if the property has not been damaged; or

(b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

b. Earth Movement

(1) Earthquake, including tremors and aftershocks and any earth sinking, rising or shifting related to such event;

(2) Landslide, including any earth sinking, rising or shifting related to such event;

(3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;

(4) Earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

But if Earth Movement, as described in **b.(1)** through**(4)** above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

(5) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or Volcanic Action, we will pay for the loss or damage caused by that fire, building glass breakage or Volcanic Action.

Volcanic Action means direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:

(a) Airborne volcanic blast or airborne shock waves;

(b) Ash, dust or particulate matter; or

(c) Lava flow.

With respect to coverage for Volcanic Action as set forth in

(5)(a), (5)(b) and **(5)(c),** all volcanic eruptions that occur within any 168-hour period will constitute a single occurrence.

Volcanic Action does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss or damage to the described property.

This exclusion applies regardless of whether any of the above, in Paragraphs **(1)** through **(5),** is caused by an act of nature or is otherwise caused.

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

d. Nuclear Hazard

Nuclear reaction or radiation, or radioactive contamination, however caused.

But if nuclear reaction or radiation, or radioactive contamination, results in fire, we will pay for the loss or damage caused by that fire.

e. Utility Services

The failure of power, communication, water or other utility service supplied to the described premises, however caused, if the failure:

(1) Originates away from the described premises; or

(2) Originates at the described premises, but only if such failure involves equipment used to supply the utility service to the described premises from a source away from the described premises.

Failure of any utility service includes lack of sufficient capacity and reduction in supply.

Loss or damage caused by a surge of power is also excluded, if the surge would not have occurred but for an event causing a failure of power.

But if the failure or surge of power, or the failure of communication, water or other utility service, results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

Communication services include but are not limited to service relating to Internet access or access to any electronic, cellular or satellite network.

f. War And Military Action

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

g. Water [770]

(1) Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);

(2) Mudslide or mudflow;

(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings; or

(5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph **(1)**, **(3)** or **(4)**, or material carried or otherwise moved by mudslide or mudflow.

This exclusion applies regardless of whether any of the above, in Paragraphs **(1)** through **(5),** is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

But if any of the above, in Paragraphs **(1)** through **(5),** results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage (if sprinkler leakage is a Covered Cause of Loss).

h. "Fungus", Wet Rot, Dry Rot And Bacteria

Presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria.

But if "fungus", wet or dry rot or bacteria result in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion does not apply:

(1) When "fungus", wet or dry rot or bacteria result from fire or lightning; or

(2) To the extent that coverage is provided in the Additional Coverage, Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria, with respect to loss or damage by a cause of loss other than fire or lightning.

Exclusions **B.1.a.** through **B.1.h.** apply whether or not the loss event results in widespread damage or affects a substantial area.

2. We will not pay for loss or damage caused by or resulting from any of the following:

a. Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts or otherwise interferes with any:

(1) Electrical or electronic wire, device, appliance, system or network; or

(2) Device, appliance, system or network utilizing cellular or satellite technology.

For the purpose of this exclusion, electrical, magnetic or electromagnetic energy includes but is not limited to:

(a) Electrical current, including arcing;

(b) Electrical charge produced or conducted by a magnetic or electromagnetic field;

(c) Pulse of electromagnetic energy; or

(d) Electromagnetic waves or microwaves.

But if fire results, we will pay for the loss or damage caused by that fire.

b. Delay, loss of use or loss of market.

c. Smoke, vapor or gas from agricultural smudging or industrial operations.

d. **(1)** Wear and tear;

(2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

(3) Smog;

(4) Settling, cracking, shrinking or expansion;

(5) Nesting or infestation, or discharge or release of waste products or secretions, by

insects, birds, rodents or other animals.

(6) Mechanical breakdown, including rupture or bursting caused by centrifugal force. But if mechanical breakdown results in elevator collision, we will pay for the loss or damage caused by that elevator collision.

(7) The following causes of loss to personal property:

(a) Dampness or dryness of atmosphere;

(b) Changes in or extremes of temperature; or

(c) Marring or scratching.

But if an excluded cause of loss that is listed in **2.d.(1)** through **(7)** results in a "specified cause of loss" or building glass breakage, we will pay for the loss or damage caused by that "specified cause of loss" or building glass breakage.

e. Explosion of steam boilers,[771] steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. But if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for the loss or damage caused by that fire or combustion explosion. We will also pay for loss or damage caused by or resulting from the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

f. Continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.

g. Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing, unless:

(1) You do your best to maintain heat in the building or structure; or

(2) You drain the equipment and shut off the supply if the heat is not maintained.

h. Dishonest or criminal act (including theft) by you, any of your partners, members, officers, managers, employees (including temporary employees and leased workers), directors, trustees or authorized representatives, whether acting alone or in collusion with each other or with any other party; or theft by any person to whom you entrust the property for any purpose, whether acting alone or in collusion with any other party.

This exclusion:

(1) Applies whether or not an act occurs during your normal hours of operation;

(2) Does not apply to acts of destruction by your employees (including temporary employees and leased workers) or authorized representatives; but theft by your employees (including temporary employees and leased workers) or authorized representatives is not covered.

i. Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

j. Rain, snow, ice or sleet to personal property in the open.

k. Collapse, including any of the following conditions of property or any part of the property:

(1) An abrupt falling down or caving in;

(2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or

(3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to **(1)** or **(2)** above.

But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion, **k.,** does not apply:

(a) To the extent that coverage is provided under the Additional Coverage, Collapse; or

(b) To collapse caused by one or more of the following:

(i) The "specified causes of loss"

(ii) Breakage of building glass;

(iii) Weight of rain that collects on a roof; or

(iv) Weight of people or personal property.

l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion, **l.,** does not apply to damage to glass caused by chemicals applied to the glass.

m. Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.

3. We will not pay for loss or damage caused by or resulting from any of the following, **3.a.** through **3.c.** But if an excluded cause of loss that is listed in **3.a.** through **3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph **1.** above to produce the loss or damage.

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

c. Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance; of part or all of any property on or off the described premises.

4. Special Exclusions

The following provisions apply only to the specified Coverage Forms:

a. Business Income (And Extra Expense) Coverage Form, Business Income (Without Extra Expense) Coverage Form, Or Extra Expense Coverage Form

We will not pay for:

(1) Any loss caused by or resulting from:

(a) Damage or destruction of "finished stock" or

(b) The time required to reproduce "finished stock".

This exclusion does not apply to Extra Expense.

(2) Any loss caused by or resulting from direct physical loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.

(3) Any increase of loss caused by or resulting from:

(a) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or

(b) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the "suspension" of "operations", we will cover such loss that affects your Business Income during the "period of restoration" and any extension of the "period of restoration" in accordance with the terms of the Extended Business Income Additional Coverage and the Extended Period Of Indemnity Optional Coverage or any variation of these.

(4) Any Extra Expense caused by or resulting from suspension, lapse or cancellation of any license, lease or contract beyond the "period of restoration".

(5) Any other consequential loss.

b. Leasehold Interest Coverage Form

(1) Paragraph **B.1.a.**, Ordinance Or Law, does not apply to insurance under this Coverage Form.

(2) We will not pay for any loss caused by:

(a) Your cancelling the lease;

(b) The suspension, lapse or cancellation of any license; or

(c) Any other consequential loss.

c. Legal Liability Coverage Form

(1) The following exclusions do not apply to insurance under this Coverage Form:

(a) Paragraph **B.1.a.** Ordinance Or Law;

(b) Paragraph **B.1.c.** Governmental Action;

(c) Paragraph **B.1.d.** Nuclear Hazard;

(d) Paragraph **B.1.e.** Utility Services; and

(e) Paragraph **B.1.f.** War And Military Action.

(2) The following additional exclusions apply to insurance under this Coverage Form:

(a) Contractual Liability

We will not defend any claim or "suit", or pay damages that you are legally liable to pay, solely by reason of your assumption of liability in a contract or agreement [772]. But this exclusion does not apply to a written lease agreement in which you have assumed liability for building damage resulting from an actual or attempted burglary or robbery, provided that:

(i) Your assumption of liability was executed prior to the accident; and

(ii) The building is Covered Property under this Coverage Form.

(b) Nuclear Hazard

We will not defend any claim or "suit", or pay any damages, loss, expense or obligation, resulting from nuclear reaction or radiation, or radioactive contamination, however caused.

5. Additional Exclusion

The following provisions apply only to the specified property:

Loss Or Damage To Products

We will not pay for loss or damage to any merchandise, goods or other product caused by or resulting from error or omission by any person or entity (including those having possession under an arrangement where work or a portion of the work is outsourced) in any stage of the development, production or use of the product, including planning, testing, processing, packaging, installation, maintenance or repair. This exclusion applies to any effect that compromises the form, substance or quality of the product. But if such error or omission results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

C. Limitations

The following limitations apply to all policy forms and endorsements, unless otherwise stated:

1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.

a. Steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment. But we will pay for loss of or damage to such equipment caused by or resulting from an explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

b. Hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment, other than an explosion.

c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:

(1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or

(2) The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.

d. Building materials and supplies not attached as part of the building or structure, caused by or resulting from theft.

However, this limitation does not apply to:

(1) Building materials and supplies held for sale by you, unless they are insured under the Builders Risk Coverage Form; or

(2) Business Income Coverage or Extra Expense Coverage.

e. Property that is missing, where the only evidence of the loss or damage is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.

f. Property that has been transferred to a person or to a place outside the described premises on the basis of unauthorized instructions.

g. Lawns, trees, shrubs or plants which are part of a vegetated roof, caused by or resulting from:

(1) Dampness or dryness of atmosphere or of soil supporting the vegetation;

(2) Changes in or extremes of temperature;

(3) Disease;

(4) Frost or hail; or

(5) Rain, snow, ice or sleet.

2. We will not pay for loss of or damage to the following types of property unless caused by the "specified causes of loss" or building glass breakage:

a. Animals, and then only if they are killed or their destruction is made necessary.

b. Fragile articles such as statuary, marbles, chinaware and porcelains, if broken. This restriction does not apply to:

(1) Glass; or

(2) Containers of property held for sale.

c. Builders' machinery, tools and equipment owned by you or entrusted to you, provided such property is Covered Property.

However, this limitation does not apply:

(1) If the property is located on or within 100 feet of the described premises, unless the premises is insured under the Builders Risk Coverage Form; or

(2) To Business Income Coverage or to Extra Expense Coverage.

3. The special limit shown for each category, **a.** through **d.**, is the total limit for loss of or damage to all property in that category. The special limit applies to any one occurrence of theft, regardless of the types or number of articles that are lost or damaged in that occurrence. The special limits are (unless a higher limit is shown in the Declarations):

a. $2,500 for furs, fur garments and garments trimmed with fur.

b. $2,500 for jewelry, watches, watch movements, jewels, pearls, precious and semiprecious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth $100 or less per item.

c. $2,500 for patterns, dies, molds and forms.

d. $250 for stamps, tickets, including lottery tickets held for sale, and letters of credit.

These special limits are part of, not in addition to, the Limit of Insurance applicable to the Covered Property.

This limitation, **C.3.,** does not apply to Business Income Coverage or to Extra Expense Coverage.

4. We will not pay the cost to repair any defect to a system or appliance from which water, other liquid, powder or molten material escapes. But we will pay the cost to repair or replace damaged parts of fire-extinguishing equipment if the damage:

a. Results in discharge of any substance from an automatic fire protection system; or

b. Is directly caused by freezing.

However, this limitation does not apply to Business Income Coverage or to Extra Expense Coverage.

D. Additional Coverage - Collapse

The coverage provided under this Additional Coverage, Collapse, applies only to an abrupt collapse as described and limited in **D.1.** through **D.7.**

1. For the purpose of this Additional Coverage, Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

2. We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:

a. Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;

b. Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;

c. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation.

d. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs after the construction,

remodeling or renovation is complete, but only if the collapse is caused in part by:

(1) A cause of loss listed in **2.a.** or **2.b.**;

(2) One or more of the "specified causes of loss"

(3) Breakage of building glass;

(4) Weight of people or personal property; or

(5) Weight of rain that collects on a roof.

3. This Additional Coverage - Collapse does not apply to:

a. A building or any part of a building that is in danger of falling down or caving in;

b. A part of a building that is standing, even if it has separated from another part of the building; or

c. A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

4. With respect to the following property:

a. Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;

b. Awnings, gutters and downspouts;

c. Yard fixtures;

d. Outdoor swimming pools;

e. Fences;

f. Piers, wharves and docks;

g. Beach or diving platforms or appurtenances;

h. Retaining walls; and

i. Walks, roadways and other paved surfaces;

if an abrupt collapse is caused by a cause of loss listed in **2.a.** through **2.d.,** we will pay for loss or damage to that property only if:

(1) Such loss or damage is a direct result of the abrupt collapse of a building insured under this Coverage Form; and

(2) The property is Covered Property under this Coverage Form.

5. If personal property abruptly falls down or caves in and such collapse is not the result of abrupt collapse of a building, we will pay for loss or damage to Covered Property caused by such collapse of personal property only if:

a. The collapse of personal property was caused by a cause of loss listed in **2.a.** through **2.d.**;

b. The personal property which collapses is inside a building; and

c. The property which collapses is not of a kind listed in 4., regardless of whether that kind of property is considered to be personal property or real property.

The coverage stated in this Paragraph **5.** does not apply to personal property if marring and/or scratching is the only damage to that personal property caused by the collapse.

6. This Additional Coverage, Collapse, does not apply to personal property that has not abruptly fallen down or caved in, even if the personal property shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

7. This Additional Coverage, Collapse, will not increase the Limits of Insurance provided in this Coverage Part.

8. The term Covered Cause of Loss includes the Additional Coverage, Collapse, as described and limited in **D.1.** through **D.7.**

E. Additional Coverage - Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria

1. The coverage described in **E.2.** and **E.6.** only applies when the "fungus", wet or dry rot or bacteria are the result of one or more of the following causes that occur during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence:

a. A "specified cause of loss" other than fire or lightning; or

b. Flood, if the Flood Coverage Endorsement applies to the affected premises.

This Additional Coverage does not apply to lawns, trees, shrubs or plants which are part of a vegetated roof.

2. We will pay for loss or damage by "fungus", wet or dry rot or bacteria. As used in this Limited Coverage, the term loss or damage means:

a. Direct physical loss or damage to Covered Property caused by "fungus", wet or dry rot or bacteria, including the cost of removal of the "fungus", wet or dry rot or bacteria;

b. The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungus", wet or dry rot or bacteria; and

c. The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungus", wet or dry rot or bacteria are present.

3. The coverage described under **E.2.** of this Limited Coverage is limited to $15,000. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage arising out of all occurrences of "specified causes of loss" (other than fire or lightning) and Flood which take place in a 12-month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in "fungus", wet or dry rot or bacteria, we will not pay more than a total of $15,000 even if the "fungus", wet or dry rot or bacteria continue to be present or active, or recur, in a later policy period.

4. The coverage provided under this Limited Coverage does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by "fungus", wet or dry rot or bacteria, and other loss or damage, we will not pay more, for the total of all loss or damage, than the applicable Limit of Insurance on the affected Covered Property.

If there is covered loss or damage to Covered Property, not caused by "fungus", wet or dry rot or bacteria, loss payment will not be limited by the terms of this Limited Coverage, except to the extent that "fungus", wet or dry rot or bacteria cause an increase in the loss. Any such increase in the loss will be subject to the terms of this Limited Coverage.

5. The terms of this Limited Coverage do not increase or reduce the coverage provided under Paragraph **F.2.** (Water Damage, Other Liquids, Powder Or Molten Material Damage) of this Causes Of Loss form or under the Additional Coverage, Collapse.

6. The following, **6.a.** or **6.b.**, applies only if Business Income and/or Extra Expense Coverage applies to the described premises and only if the "suspension" of "operations" satisfies all terms and conditions of the applicable Business Income and/or Extra Expense Coverage Form:

a. If the loss which resulted in "fungus", wet or dry rot or bacteria does not in itself necessitate a "suspension" of "operations", but such "suspension" is necessary due to loss or damage to property caused by "fungus", wet or dry rot or bacteria, then our payment under Business Income and/or Extra Expense is limited to the amount of loss and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.

b. If a covered "suspension" of "operations" was caused by loss or damage other than "fungus", wet or dry rot or bacteria but remediation of "fungus", wet or dry rot or bacteria prolongs the "period of restoration", we will pay for loss and/or expense sustained during the delay (regardless of when such a delay occurs during the "period of restoration"), but such coverage is limited to 30 days. The days need not be consecutive.

F. Additional Coverage Extensions

1. Property In Transit

This Extension applies only to your personal property to which this form applies.

a. You may extend the insurance provided by this Coverage Part to apply to your personal property (other than property in the care, custody or control of your salespersons) in transit more than 100 feet from the described premises. Property must be in or on a motor vehicle you own, lease or operate while between points in the coverage territory.

b. Loss or damage must be caused by or result from one of the following causes of loss:

(1) Fire, lightning, explosion, windstorm or hail, riot or civil commotion, or vandalism.

(2) Vehicle collision, upset or overturn. Collision means accidental contact of your vehicle with another vehicle or object. It does not mean your vehicle's contact with the roadbed.

(3) Theft of an entire bale, case or package by forced entry into a securely locked body or compartment of the vehicle. There must be visible marks of the forced entry.

c. The most we will pay for loss or damage under this Extension is $5,000.

This Coverage Extension is additional insurance. The Additional Condition, Coinsurance, does not apply to this Extension.

2. Water Damage, Other Liquids, Powder Or Molten Material Damage

If loss or damage caused by or resulting from covered water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes. This Coverage Extension does not increase the Limit of Insurance.

3. Glass

a. We will pay for expenses incurred to put up temporary plates or board up openings if repair or replacement of damaged glass is delayed.

b. We will pay for expenses incurred to remove or replace obstructions when repairing or replacing glass that is part of a building. This does not include removing or replacing window displays.

This Coverage Extension **F.3.** does not increase the Limit of Insurance.

G. Definitions

1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

2. "Specified causes of loss" means the following: fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:

(1) The cost of filling sinkholes; or

(2) Sinking or collapse of land into man-made underground cavities.

b. Falling objects does not include loss or damage to:

(1) Personal property in the open; or

(2) The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.

c. Water damage means:

(1) Accidental discharge or leakage of water or steam as the direct result of the breaking apart or

cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam; and

(2) Accidental discharge or leakage of water or waterborne material as the direct result of the breaking apart or cracking of a water or sewer pipe caused by wear and tear, when the pipe is located off the described premises and is part of a potable water supply system or sanitary sewer system operated by a public or private utility service provide pursuant to authority granted by the state of governmental subdivision where the described premises are located.

But water damage does not include loss or damage otherwise excluded under the terms of the Water Exclusion. Therefore, for example, there is no coverage under this policy in the situation in which discharge or leakage of water results from the breaking apart or cracking of a pipe which was caused by or related to weather-induced flooding, even if wear and tear contributed to the breakage or cracking. As another example, and also in accordance with the terms of the Water Exclusion, there is no coverage for loss or damage caused by or related to weather-induced flooding which follows or is exacerbated by pipe breakage or cracking attributable to wear and tear.

To the extent that accidental discharge or leakage of water falls within the criteria set forth in **c.(1)** or **c.(2)** of this definition of "specified causes of loss," such water is not subject to the provisions of the Water Exclusion which preclude coverage for surface water or water under the surface of the ground.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 12 18 06 07

LOSS PAYABLE PROVISIONS [773]

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
BUILDERS' RISK COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Premises Number:		**Building Number:**		**Applicable Clause (Enter C., D., E., or F.):**	
Description Of Property: **Loss Payee Name:** **Loss Payee Address:**					
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.					

A. When this endorsement is attached to the Standard Property Policy **CP 00 99,** the term Coverage Part in this endorsement is replaced by the term Policy.

B. Nothing in this endorsement increases the applicable Limit of Insurance. We will not pay any Loss Payee more than their financial interest in the Covered Property, and we will not pay more than the applicable Limit of Insurance on the Covered Property.

The following is added to the **Loss Payment** Loss Condition, as indicated in the Declarations or in the Schedule:

C. Loss Payable Clause

For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:

1. Adjust losses with you; and

2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

D. Lender's Loss Payable Clause

1. The Loss Payee shown in the Schedule or in the Declarations is a creditor, including a mortgageholder or trustee, whose interest in Covered Property is established by such written instruments as:

a. Warehouse receipts;

b. A contract for deed;

c. Bills of lading;

d. Financing statements; or

e. Mortgages, deeds of trust, or security agreements.

2. For Covered Property in which both you and a Loss Payee have an insurable interest:

a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear.

b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.

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

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

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

(3) Has notified us of any change in ownership, occupancy or substFal change in risk known to the Loss Payee.

All of the terms of this Coverage Part will then apply directly to the Loss Payee. **….**

3. If we cancel this policy, we will give written notice to the Loss Payee at least:

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

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

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

E. Contract Of Sale Clause

….

F. Building Owner Loss Payable Clause

1. The Loss Payee shown in the Schedule or in the Declarations is the owner of the described building, in which you are a tenant.

2. We will adjust losses to the described building with the Loss Payee. Any loss payment made to the Loss Payee will satisfy your claims against us for the owner's property.

3. We will adjust losses to tenants' improvements and betterments with you, unless the lease provides otherwise.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SCHEDULED BUILDING PROPERTY TENANT'S POLICY

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Location Of Building:	
Causes of Loss Form (and related endorsements, if any):	
Valuation Condition: Actual Cash Value ☐ Or Replacement Cost ☐	
Coinsurance (if applicable): **%**	
Deductible On Building Glass (if any): **$**	
Deductible On Building Property Other Than Glass **$**	
Description Of Building Glass	**Limit Of Insurance**
	$
Description Of Other Building Property	**Limit Of Insurance**
	$
	$
	$
	$
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Under this endorsement, building property means the building glass, building fixtures and permanently installed machinery and equipment described in the Schedule, which are part of the building shown in the Schedule.

B. We will pay for direct physical loss of or damage to the described building property at the building shown in the Schedule caused by or resulting from a Covered Cause of Loss shown in the Schedule, provided that:

1. You are a tenant of the building shown in the Schedule; and

2. You have a contractual responsibility to insure such property, or a contractual responsibility to pay for loss or damage to such property.

C. The value of building property covered under this endorsement will be determined in accordance with the terms of the Valuation Condition indicated in the Schedule, or at the amount for which you are liable under contract, whichever is less. If required by law, glass is covered at the cost of replacement with safety glazing material. However, the most we will pay for the coverage provided under this endorsement is the applicable Limit Of Insurance shown in the Schedule.

D. The Coinsurance Condition applies to the property described in the Schedule only if a Coinsurance percentage is shown in the Schedule.

E. Any coverage provided under this Coverage Form or Policy for Your Business Personal Property or Personal Property Of Others does not apply to the property described in the Schedule.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UNSCHEDULED BUILDING PROPERTY TENANT'S POLICY

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Location Of Building:	
Causes Of Loss Form (and related endorsements, if any):	
Valuation Condition: Actual Cash Value ☐ Or Replacement Cost ☐	
Coinsurance (if applicable):	**%**
Deductible On Building Glass (if any):	**$**
Limit Of Insurance On Building Glass:	**$**
Deductible On Building Property Other Than Glass:	**$**
Limit Of Insurance On Building Property Other Than Glass:	**$**
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. If a Limit Of Insurance is shown in the Schedule for Building Glass, building property means building glass that is part of the building shown in the Schedule.

B. If a Limit Of Insurance is shown in the Schedule for Building Property Other Than Glass, building property means building fixtures and permanently installed machinery and equipment that are part of the building shown in the Schedule.

C. We will pay for direct physical loss of or damage to building property at the building shown in the Schedule caused by or resulting from a Covered Cause of Loss shown in the Schedule, provided that:

1. You are a tenant of the building shown in the Schedule; and
2. You have a contractual responsibility to insure such property, or a contractual responsibility to pay for loss or damage to such property.

D. The value of building property covered under this endorsement will be determined in accordance with the terms of the Valuation Condition indicated in the Schedule, or at the amount for which you are liable under contract, whichever is less. If required by law, glass is covered at the cost of replacement with safety glazing material. However, the most we will pay for the coverage provided under this endorsement is the applicable Limit Of Insurance shown in the Schedule.

E. The Coinsurance Condition applies to the property covered under this endorsement only if a Coinsurance percentage is shown in the Schedule.

F. Any coverage provided under this Coverage Form or Policy for Your Business Personal Property or Personal Property Of Others does not apply to the property covered under this endorsement.

ADDITIONAL INSURED – BUILDING OWNER [774]

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

SCHEDULE

Premises Number:		**Building Number:**	
Building Description: **Building Owner Name:** **Building Owner Address:**			
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

The building owner identified in this endorsement is a Named Insured, but only with respect to the coverage provided under this Coverage Part or Policy for direct physical loss or damage to the building(s) described in the Schedule.

LEASEHOLD INTEREST COVERAGE FORM [775]

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

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION **F.** – DEFINITIONS.

A. COVERAGE

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

1. Covered Leasehold Interest

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

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

(1) Rent you pay at the described premises; and

(2) Rental value of the described premises that you lease.

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

(1) Rent, whether or not prepaid; or

(2) Security.

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

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

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

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

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

(1) The beginning of each month; or

(2) Any other rental period.

2. Covered Causes Of Loss

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

B. EXCLUSIONS AND LIMITATIONS

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

C. LIMITS OF INSURANCE

1. Applicable to Tenants' Lease Interest

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

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

(1) The difference between the rent you now pay and the rent you will pay under the new lease or other arrangement; or

(2) Your "net leasehold interest" at the time of loss.

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

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

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

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

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

(1) The loss sustained by you; or

(2) Your "net leasehold interest" at the time of loss.

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

D. LOSS CONDITIONS

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

1. Appraisal

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

a. Pay its chosen appraiser; and

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

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

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

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

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

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

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

(4) Take all reasonable steps to protect the property at the described premises from further damage by a Covered Cause of Loss. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.

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

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

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

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

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

3. Loss Payment

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

a. You have complied with all of the terms of this Coverage Part; and

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

(2) An appraisal award has been made.

4. Vacancy

a. Description of Terms

(1) As used in this Vacancy Condition, with respect to the tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

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

b. Vacancy Provisions – Subleased Premises

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

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

(a) Vandalism;

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

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to a Covered Cause of Loss not listed in **(1)(a)** through **(1)(f)** above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

c. If you have not entered into an agreement to sublease the described premises as of the time of loss or damage, we will not pay for any loss of Covered Leasehold Interest.

E. ADDITIONAL CONDITION

The following condition replaces the Cancellation Common Policy Condition:

CANCELLATION

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

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

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

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

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

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

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

6. If this coverage is cancelled, we will calculate the earned premium by:

a. Computing the average of the "net leasehold interest" at the:

(1) Inception date, and

(2) Cancellation date,

of this coverage.

b. Multiplying the rate for the period of coverage by the average "net leasehold interest".

c. If we cancel, we will send you a premium refund based on the difference between the:

(1) Premium you originally paid us; and

(2) Proportion of the premium calculated by multiplying the amount in paragraph **a.** times the rate for the period of coverage for the expired term of the policy.

d. If you cancel, your refund may be less than the refund calculated in paragraph **c.**

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

F. DEFINITIONS

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

a. Monthly rental value of the premises you lease; and

b. Actual monthly rent you pay including taxes, insurance, janitorial or other service that you pay for as part of the rent.

This amount is not changed:

(1) Whether you occupy all or part of the premises; or

(2) If you sublet the premises.

Example:

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

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

Example:

Original cost of Bonus Payment	$12,000
With 24 months left in the lease at time of Bonus Payment	÷ 24
"Monthly Leasehold Interest"	$500

3."Net Leasehold Interest":

a. Applicable to Tenants' Lease Interest.

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

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

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

Example:

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

"Gross Leasehold Interest"	$ 1,000
Leasehold Interest Factor	× 18.419
"Net Leasehold Interest"	$18,419

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

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

Example:

"Monthly Leasehold Interest"	$ 500
With 10 months left in lease	× 10
"Net Leasehold Interest"	$5,000

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER. 776

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

PRODUCER 777	CONTACT NAME:	
	PHONE (A/C, No, Ext): FAX (A/C, No):	
	E-MAIL ADDRESS:	
	INSURER(S) AFFORDING COVERAGE	NAIC #
INSURED	INSURER A :	
	INSURER B :	
	INSURER C :	
	INSURER D :	
	INSURER E :	
	INSURER F :	

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

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

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
	COMMERCIAL GENERAL LIABILITY						DAMAGE TO RENTED PREMISES (Ea occurrence)	$
	☐ CLAIMS-MADE ☐ OCCUR						MED EXP (Any one person)	$
							PERSONAL & ADV INJURY 778	$
							GENERAL AGGREGATE 779	$
	GEN'L AGGREGATE LIMIT APPLIES PER:						PRODUCTS - COMP/OP AGG 780	
	☐ POLICY ☐ PROJECT 781 ☐ LOC							$
	☐ OTHER							
	AUTOMOBILE LIABILITY 782						COMBINED SINGLE LIMIT (Ea accident)	$
	☐ ANY AUTO 783 ☐ SCHEDULED AUTOS						BODILY INJURY (Per person)	$
	☐ ALL OWNED AUTOS ☐ NON-OWNED AUTOS						BODILY INJURY (Per accident)	$
	☐ HIRED AUTOS						PROPERTY DAMAGE (Per accident)	$
	☐ ☐							$
	UMBRELLA LIAB ☐ OCCUR						EACH OCCURRENCE	$
	EXCESS LIAB ☐ CLAIMS-MADE						AGGREGATE	$
	DED RETENTION $ 784							$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y / N						☐ PER STATUTE ☐ OTHER	
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? ☐ (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	N / A					E.L. EACH ACCIDENT	$
							E.L. DISEASE - EA EMPLOYEE	$
							E.L. DISEASE - POLICY LIMIT	$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required) 785

CERTIFICATE HOLDER 786

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. 787

AUTHORIZED REPRESENTATIVE 788

EVIDENCE OF COMMERCIAL PROPERTY INSURANCE

DATE (MM/DD/YYYY)

THIS EVIDENCE OF COMMERCIAL PROPERTY INSURANCE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE ADDITIONAL INTEREST NAMED BELOW. THIS EVIDENCE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS EVIDENCE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE ADDITIONAL INTEREST.[789]

PRODUCER NAME,[790] CONTACT PERSON AND ADDRESS / PHONE (A/C, No, Ext):	COMPANY NAME AND ADDRESS / NAIC NO:
FAX (A/C, No): / E-MAIL ADDRESS:	IF MULTIPLE COMPANIES, COMPLETE SEPARATE FORM FOR EACH
CODE: / SUB CODE:	POLICY TYPE
AGENCY CUSTOMER ID #:	
NAMED INSURED AND ADDRESS	LOAN NUMBER / POLICY NUMBER
	EFFECTIVE DATE / EXPIRATION DATE / ☐ CONTINUED UNTIL TERMINATED IF CHECKED
ADDITIONAL NAMED INSURED(S)[791]	THIS REPLACES PRIOR EVIDENCE DATED:

PROPERTY INFORMATION (Use REMARKS on page 2, if more space is required) ☐ **BUILDING OR** ☐ **BUSINESS PERSONAL PROPERTY**

LOCATION/DESCRIPTION

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

COVERAGE INFORMATION

PERILS INSURED ☐ BASIC[792] ☐ BROAD[793] ☐ SPECIAL[794]

COMMERCIAL PROPERTY COVERAGE AMOUNT OF INSURANCE: $ DED:

	YES	NO	N/A	
☐ BUSINESS INCOME[795] ☐ RENTAL				If YES, LIMIT: Actual Loss Sustained; # of months:
BLANKET COVERAGE				If YES, indicate value(s) reported on property identified above: $
TERRORISM COVERAGE[796]				Attach Disclosure Notice / DEC
IS THERE A TERRORISM-SPECIFIC EXCLUSION?				
IS DOMESTIC TERRORISM EXCLUDED?				
LIMITED FUNGUS COVERAGE				If YES, LIMIT: DED:
FUNGUS EXCLUSION (If "YES", specify organization's form used)				
REPLACEMENT COST[797]				
AGREED VALUE[798]				
COINSURANCE[799]				If YES, %
EQUIPMENT BREAKDOWN (If Applicable)				If YES, LIMIT: DED:
ORDINANCE OR LAW[800] - Coverage for loss to undamaged portion of				
- Demolition Costs				If YES, LIMIT: DED:
- Incr. Cost of Construction				If YES, LIMIT: DED:
EARTH MOVEMENT (If Applicable)				If YES, LIMIT: DED:
FLOOD (If Applicable)[801]				If YES, LIMIT: DED:
WIND / HAIL INCL ☐ YES ☐ NO Subject to Different Provisions:				If YES, LIMIT: DED:
NAMED STORM INCL ☐ YES ☐ NO Subject to Different Provisions:				If YES, LIMIT: DED:
PERMISSION TO WAIVE SUBROGATION IN FAVOR OF MORTGAGE HOLDER PRIOR TO LOSS				

CANCELLATION[802]

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

ADDITIONAL INTEREST

☐ MORTGAGEE[803] ☐ LENDERS LOSS PAYABLE[804] ☐ CONTRACT OF SALE	LENDER SERVICING AGENT NAME AND ADDRESS
NAME AND ADDRESS	AUTHORIZED REPRESENTATIVE[805]

COVERAGES

INSURANCE BINDER

DATE (MM/DD/YYYY)

THIS BINDER IS A TEMPORARY INSURANCE CONTRACT, SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS

AGENCY	COMPANY	BINDER #
	EFFECTIVE DATE / TIME	EXPIRATION DATE / TIME
	☐ AM ☐ PM	☐ 12:01 AM ☐ NOON
PHONE (A/C, No, Ext):	FAX (A/C, No):	☐ THIS BINDER IS ISSUED TO EXTEND COVERAGE IN THE ABOVE NAMED COMPANY PER EXPIRING POLICY #:
CODE:	SUB CODE:	
AGENCY CUSTOMER ID:		DESCRIPTION OF OPERATIONS/VEHICLES/PROPERTY (Including Location)
INSURED AND MAILING ADDRESS		

TYPE OF INSURANCE	COVERAGE/FORMS	DEDUCTIBLE	COINS %	AMOUNT
PROPERTY CAUSES OF LOSS[806]				
☐ BASIC[807] ☐ BROAD[808] ☐ SPEC[809]				
GENERAL LIABILITY		EACH OCCURRENCE		$
		DAMAGE TO RENTED PREMISES		$
☐ CLAIMS MADE[811] ☐ OCCUR[812]		MED EXP (Any one person)		$
		PERSONAL & ADV INJURY[813]		$
		GENERAL AGGREGATE[814]		$
	RETRO DATE FOR CLAIMS MADE:	PRODUCTS - COMP/OP[815]		$
VEHICLE LIABILITY[816]		COMBINED SINGLE LIMIT		$
ANY AUTO[817]		BODILY INJURY (Per person)		$
ALL OWNED AUTOS		BODILY INJURY (Per accident)		$
SCHEDULED AUTOS		PROPERTY DAMAGE		$
HIRED AUTOS		MEDICAL PAYMENTS		$
NON-OWNED AUTOS		PERSONAL INJURY PROT		$
		UNINSURED MOTORIST		$
				$
VEHICLE PHYSICAL DAMAGE	☐ ALL VEHICLES ☐ SCHEDULED VEHICLES	☐ ACTUAL CASH VALUE		
COLLISION: DED _____		☐ STATED AMOUNT		$
OTHER THAN COL:				
GARAGE LIABILITY		AUTO ONLY - EA ACCIDENT		$
☐ ANY AUTO		OTHER THAN AUTO ONLY:		
☐ _____		EACH ACCIDENT		$
		AGGREGATE		$
EXCESS LIABILITY		EACH OCCURRENCE		$
☐ UMBRELLA FORM		AGGREGATE		$
☐ OTHER THAN UMBRELLA FORM	RETRO DATE FOR CLAIMS MADE:	SELF-INSURED RETENTION[818]		$
WORKER'S COMPENSATION AND EMPLOYER'S LIABILITY[819]		☐ WC STATUTORY LIMITS		
		E.L. EACH ACCIDENT		$
		E.L. DISEASE - EA EMPLOYEE		$
		E.L. DISEASE - POLICY LIMIT		$
SPECIAL CONDITIONS / OTHER COVERAGES		FEES		$
		TAXES		$
		ESTIMATED TOTAL PREMIUM		

NAME & ADDRESS

	☐ MORTGAGEE ☐ LOSS PAYEE[820]	☐ ADDITIONAL INSURED[821]
	LOAN #	
	AUTHORIZED REPRESENTATIVE[822]	

CONDITIONS

This Company binds the kind(s) of insurance stipulated on the reverse side. The Insurance is subject to the terms, conditions and limitations of the policy(ies) in current use by the Company.

This binder may be cancelled by the Insured by surrender of this binder or by written notice to the Company stating when cancellation will be effective. This binder may be cancelled by the Company by notice to the Insured in accordance with the policy conditions. This binder is cancelled when replaced by a policy. If this binder is not replaced by a policy, the Company is entitled to charge a premium for the binder according to the Rules and Rates in use by the Company.

Applicable in California

When this form is used to provide insurance in the amount of one million dollars ($1,000,000) or more, the title of the form is changed from "Insurance Binder" to "Cover Note".

Applicable in Colorado

With respect to binders issued to renters of residential premises, home owners, condo unit owners and mobile home owners, the insurer has thirty (30) business days, commencing from the effective date of coverage, to evaluate the issuance of the insurance policy.

Applicable in Delaware

The mortgagee or Obligee of any mortgage or other instrument given for the purpose of creating a lien on real property shall accept as evidence of insurance a written binder issued by an authorized insurer or its agent if the binder includes or is accompanied by: the name and address of the borrower; the name and address of the lender as loss payee; a description of the insured real property; a provision that the binder may not be canceled within the term of the binder unless the lender and the insured borrower receive written notice of the cancellation at least ten (10) days prior to the cancellation; except in the case of a renewal of a policy subsequent to the closing of the loan, a paid receipt of the full amount of the applicable premium, and the amount of insurance coverage.

Chapter 21 Title 25 Paragraph 2119

Applicable in Florida

Except for Auto Insurance coverage, no notice of cancellation or nonrenewal of a binder is required unless the duration of the binder exceeds 60 days. For auto insurance, the insurer must give 5 days prior notice, unless the binder is replaced by a policy or another binder in the same company.

Applicable in Maryland

The insurer has 45 business days, commencing from the effective date of coverage to confirm eligibility for coverage under the insurance policy.

Applicable in Michigan

The policy may be cancelled at any time at the request of the insured.

Applicable in Nevada

Any person who refuses to accept a binder which provides coverage of less than $1,000,000.00 when proof is required: (A) Shall be fined not more than $500.00, and (B) is liable to the party presenting the binder as proof of insurance for actual damages sustained therefrom.

Applicable in the Virgin Islands

This binder is effective for only ninety (90) days. Within thirty (30) days of receipt of this binder, you should request an insurance policy or certificate (if applicable) from your agent and/or insurance company.

B. Samples of Manuscripted Endorsements [823]

All effective dates are 12:01 a.m. Standard Time at the address of the First Named Insured.

Endorsement No.	Forming Part of Policy No.	First Named Insured
Effective Date of Endorsement		

SCHEDULED ADDITIONAL INSUREDS ENDORSEMENT WITH NOTICE OF CANCELLATION [824]

In consideration of the payment of the additional premium due, if any, and in reliance upon the representations of all **Insureds**, the **Company** and the **Insureds** agree to amend the policy as follows:

The following persons or entities scheduled below are added as **additional insureds** under the Insuring Agreement indicated below, but only with respect to any damages payable as a result of the **additional insured's** vicarious liability for the acts of omissions of an **Insured** otherwise covered under the applicable Insuring Agreement. This insurance does not apply to **losses** arising from or in connection with liability for any acts or omissions alleged against the **additional insured**.

All **additional insureds** share the Limits of Liability applicable to any **claim** or **suit** with any **Insured** for which the additional insured is alleged to be vicariously liable with respect to that same **claim** or **suit**.

It is further agreed that in the event that the **Company** cancels this policy for any reasons other than either non-payment of premium before the expiration date of the **policy period**, or at the request of the **first named insured**, the **Company** shall provide prior notice of such cancellation to the **additional insured** listed on the schedule below at the same time notice is provided to the **first named insured**.

Al other terms and conditions of the policy remain unchanged

SCHEDULE OF ADDITIONAL INSUREDS

NFM-PCE-8104-00-01 Edition Date: 08/2014

All effective dates are 12:01 a.m. Standard Time at the address of the First Named Insured.

Endorsement No.	Forming Part of 4. Policy No.	First Named Insured
5. Effective Date of Endorsement		

ADDITIONAL INSURED ENDORSEMENT - LEASED PREMISES COMMERCIAL GENERAL LIABILITY INSURING AGREEMENT [825]

In consideration of the payment of the additional premium due, if any, and in reliance upon the representations of all **Insureds**, the **Company** and the **Insureds** agree to amend the Commercial General Liability Insuring Agreement as follows:

MODIFIED COVERAGES

The following provision is added to *ADDITIONAL CONDITIONS — ALL COMMERCIAL GENERAL LIABILITY COVERAGES*:

Additional Insureds – Premises Lessors.

The **Company's** duty to defend and pay damages on behalf of an **Insured** shall extend to any **premises lessor** named in a **claim** solely as a result of the acts or omissions of an **Insured** in the maintenance, operation, or use of that part of a premises leased to an **insured business**. However, this extension of coverage shall only apply to a **claim** that arises from an **event** or offense that took place during the term of the lease and that is otherwise covered under the Commercial General Liability Insuring Agreement. In addition, under no circumstances shall the **Company** have any duty to defend or pay damages on behalf of a **premises lessor** with regard to any damages caused by, or allegedly caused by, the **premises lessor**. If a **premises lessor** is entitled to a defense and indemnity under this policy, all terms and conditions of the policy shall apply as if the **premises lessor** were an **Insured**.

The following definition is added to *DEFINITIONS-ALL COMMERCIAL GENERAL LIABILITY COVERAGES*:

Premises lessor means any person or entity listed on the Schedule of Premises Lessors below.

It is further agreed that in the event that the **Company** cancels this policy for any reasons other than either non-payment of premium before the expiration date of the **policy period**, or at the request of the **first named insured**, the **Company** shall provide prior notice of such cancellation to the **premises lessor** listed on the schedule below at the same time notice is provided to the **first named insured**.

All other terms and conditions of the policy remain unchanged.

SCHEDULE OF PREMISES LESSORS	
PREMISES LESSOR	DESCRIPTION OF PROPERTY

Policy Number:	First Named Insured:

SCHEDULE OF PREMISES LESSORS	
PREMISES LESSOR	DESCRIPTION OF PROPERTY

COMMENTARY

CHAPTER 1. RISK MANAGEMENT

[1] **Premises Liability.** *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010).

[2] **Elements of a Premises Liability Claim.** *Coastal Corp v. Torres*, 133 S.W.3d 776, 782 n. 6 (Tex. App. – Corpus Christi 2004, pet. denied).

[3] **Control.** The party that controls a premises is the party with the duty under premises liability law. "Control means the power or authority to manage, direct, govern, administer , or oversee. *American Fid. & Cas. Co. v. Traders & Gen. Ins. Co.*, 334 S.W.2d 772, 775 (Tex. 1960).

[4] **Possession or Occupancy with Control.** The occupier of premises is generally the party in control of the premises. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 324 (Tex. 1993); *Liberty Mutual Fire Insurance Company*, 446 S.W.3d 835, 846 (Tex. App. – San Antonio, no pet.). See

> A **possessor** of land is
> (a) a person who is in occupation of the land with intent to control it, or
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a and (b).
>
> RESTATEMENT (SECOND) OF TORTS § 328E (1965).

[5] **Leases and Premises Liability.** *Johnson County Sheriff's Posse, Inc. v. Endsley,* 926 S.W.2d 284, 285 (Tex. 1996); *City of Irving v. Seppy*, 301 S.W.3d 435, 445-46 (Tex. App. – Dallas 2009, no pet.).

[6] **Easements and Premises Liability.** *Delhi-Taylor Oil Corp v. Henry*, 416 S.W.2d 390, 392 (Tex. 1967).

[7] **Construction Site.** *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 214 (Tex. 2008). See further discussion below of Construction and Construction Sites.

[8] **Chapter 95 Applicable to Owners of Commercial or Business Purpose Property But Not Applicable to Tenants or Other Occupiers of Property.** TEX. CIV. PRAC. REM. CODE ANN. § 95.001 Definitions provides

> (1) "Claim" means a claim for damages caused by negligence, including a counterclaim, cross-claim, or third party claim.
> (2) "Claimant" means a party making a claim subject to this chapter.
> (3) "**Property owner**" means a person or entity that **owns** real property primarily used for commercial or business purposes.

[9] **Chapter 95 Pre-emption of Common Law Claims.** *Abarca v. Scott Morgan Residential, Inc.*, 305 S.W.3d 110, 126 (Tex. App. – Hou. [1st Dist.] 2009, pet. denied).

[10] **Both Control and Actual Knowledge Required.** *Moreno v. BP America Production Co.*, 2008 WL 4172248 at p. 2 (Tex. App. – San Antonio 2008, pet. denied) – "An owner may be aware of the danger, but exercise no control, or he may exercise control and have no actual knowledge of the danger; in each instance, the owner is statutorily shielded from liability."

[11] **Older Common Law – Absent Misrepresentation Landlord Not Liable for Latent Defect.** *American Exch. Nat'l Bank v. Swope & Mangold*, 101 S.W. 872, 873 (Tex. Civ. App. 1907, *no writ*).

[12] **Landlord Retains Control of Portion of Premises.** *McCreless Props., Ltd. v. F. W. Woolworth Co.*, 533 S.W.2d 863, 866 (Tex. Civ. App.–San Antonio 1976, writ ref'd n.r.e.).

[13] **Liability of Tenant for Damage to the Leased Property Due to His Acts or Neglect.** *See generally* C. R. McCorkle, Annot., *Liability of Tenant for Damage to the Leased Property Due to His Acts or Neglect*, 10 A.L.R.2d 1012 covering cases in which landlord seeks to recover damages for specific injuries to property due to a tenant's own acts or negligence as distinguished from cases in which tenant's liability is predicated upon breach of duty to keep property in repair or to return it in good condition; and C. Jhong, Annot., *Measure of Damages in Landlord's Action for Waste Against Tenant*, 82 A.L.R.2d 1106 covering cases dealing with landlord's measure of damages resulting from a

tenant's violation of its implied duty to care for leased property as distinguished from cases concerned with damages resulting from violation of an express covenant to keep property in repair, to use it for a certain specific purpose, or to return it in good condition.

[14] **Tenant Takes Risk of Casualty Loss.** *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809, 813 (Tex. Civ. App.—Dallas 1970, writ ref d n.r.e.).

[15] **Majority Rule – Implied Coinsureds.** See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11. INSURANCE LAW, Keeton and Widiss, §4.4(b). *Metal Works, Inc. v. North Star Reinsurance Corp. v. Continental Ins. Co.*, 624 N.E.2d 647 (1993); *Cook Paint & Varnish Co.*, 418 F.Supp 56 (N.D. Tex. 1976); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. 1975).

[16] **Texas – Minority Rule.** *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956); FRIEDMAN ON LEASES (5th ed. 2011), § 9.12 *No Implication of Co-Insured Status Unless Explicitly and Unambiguously Stated Otherwise in the Lease*.

[17] **Conflicting Risk Management Provisions – aka a "Pretzel Loops".** See Beat Steiner, *Three (Or More) Pretzels in a Lease Sorting Through Intertwined Provisions*, 32 PROBATE & PROPERTY 4, pp. 46 (July/August 2018):

> Pretzels are distinguished by their unique shape. Wikipedia notes that "[t]he traditional pretzel shape is a distinctive nonsymmetrical form, with the ends of a long strip of dough intertwined and then twisted back into itself in a certain way (creating 'a pretzel loop)." Wikipedia, *Pretzel*, Wikipedia.com (last visited Apr. 25, 2018), https://en.wikipedia.org/org/wiki/Pretzel. The pretzel provides a useful image, which evokes how some lease clauses are intertwined.
>
> Certain provision of a lease are inherently intertwined. In a badly drafted lease, intertwined clauses are drafted as if they stand alone, and, as a consequence, sometimes conflict. In a well-drafted lease, the intertwined provisions work together. When Intertwined provisions conflict, they read like a mental pretzel-the clauses are twisted back into one another as in a pretzel loop.
>
> Three inherently intertwined clauses that often create pretzel loops are (1) insurance, exculpation, and indemnification clauses; (2) tenant improvement, maintenance, casualty loss, insurance, and surrender clauses; and (3) operating expense inclusions, exclusions, and the landlord maintenance and repair provisions. *Id.* at 46.

[18] **Common Lease Pretzel Loops.** Beat Steiner, *Id.* at 47, identifies the following common pretzel loop in leases in addition to others:

> **The Waiver of Subrogation Indemnity Twist**
> An effective waiver of subrogation in favor of the tenant keeps the tenant from being sued by the landlord's insurance company if, for example, the tenant's negligence causes a covered casualty loss and the insurance company pays on the policy. The "waiver of subrogation," as commonly referred to in a lease, is a misnomer. Properly worded, it is a waiver of claims, usually limited to property damage claims. The lease should contain, at a minimum, the landlord's waiver of the tenant's liability for property damage to the extent that the damage is covered by the landlord's insurance (although the tenant might want the waiver to extend to coverage that the landlord could obtain, as discussed below). What is needed from the landlord's insurance company is an agreement of the insurer either to waive any right of subrogation in this circumstance or, in the alternative, that the landlord's coverage is not impaired because the waiver effectively eliminates the insurer's right of subrogation. A waiver of subrogation clause in favor of the tenant makes particular sense when the tenant is paying all or a pro-rata share of the landlord's property insurance. Indeed, a mutual waiver of subrogation makes sense in most leases.
>
> To avoid creating a pretzel, many related lease clauses need to be made subject to, or consistent with, the waiver or subrogation provision. Initially, the waiver the landlord gives the tenant should contain no exceptions that unnecessarily reduce the scope of the waiver of subrogation. Sometimes a lease will state that the waiver doesn't apply if the tenant is negligent. That limitation, of course, misses the point of the waiver of subrogation provision altogether, since the objective of the waiver is to prevent the insurance company from making a claim against the negligent party.
>
> The insurance provision of the lease also need to be consistent with the waiver of subrogation. If the waiver of subrogation applies to claims covered by property insurance the landlord actually carries, but the landlord carries no insurance, then the waiver will be meaningless. The tenant should be given a way to determine what insurance the landlord is carrying. If the waiver applies to claims covered by insurance the landlord is required to carry, that is much better for the tenant, but equally useless if the lease does not require the landlord to carry any specific insurance or if the landlord fails to carry the insurance.
>
> Similarly, the clauses by which the tenant indemnifies the landlord should not be so broad as to make the tenant responsible for damages that are covered by insurance and to which the waiver of subrogation applies. The clause in which the tenant agrees to pay for repairs and replacements to the premises should except repairs and replacements required because a casualty loss has occurred if that loss is covered by insurance. Clauses that make the tenant responsible for property damage should except property damage covered by insurance. A classic mistake is a clause that makes the tenant responsible for damage to the building caused by the tenant. On its face, that sounds right-the tenant should take responsibility for what damage it causes-but it's not sensible if there is insurance coverage. That is, after all, the point of carrying insurance.
>
> The waiver granted by the landlord, however, should apply only to the extent the landlord could recover under a typical special causes of loss property insurance policy. If, for example, the cause of the loss is not insurable, it might be appropriate for the tenant to be liable.

[19] **Forms – Insurance Specifications.** See Chapter 5 Forms and Commentary.

[20] **Forms – Texas Real Estate Forms Manual – Retail Lease.** See Chapter 5 Forms and Commentary.

[21] **Forms – Insurance Industry Forms.** See Chapter 5 Forms and Commentary

[22] **Forms – Manuscripted Insurance Forms.** See Chapter 5 Forms and Commentary

[23] **Texas Real Estate Forms Manual**. The Manual has the following discussion of indemnities in Texas:

§ 17.2 Indemnities and Waivers

§ 17.2:1 Types of Indemnities and Waivers

Insurance professionals sometimes describe indemnities as being "limited," "intermediate," or "broad."

1. A limited indemnity clause imposes liability on the indemnitor only to the extent of the indemnitor's fault or negligence and is the most favorable type of indemnity clause for an indemnitor.
2. Under an intermediate indemnity clause, the indemnitor assumes all liability except for the sole negligence of the indemnitee.
3. A broad-form indemnity clause imposes the entire risk of loss on the indemnitor, including the sole negligence of the indemnitee, and is the most favorable type of indemnity clause for an indemnitee.

§ 17.2:2 Drafting Considerations for Indemnities and Waivers

1. Does the party giving the indemnity or waiver have the authority or capacity to enter into the indemnity or waiver? (See section 17.2:3 below.)
2. What is the creditworthiness of the indemnitor? Is a guaranty, a surety bond, or insurance necessary?
3. Should persons other than the contracting parties (for example, shareholders, directors, officers, employees, contractors, or subcontractors) benefit from the indemnity or waiver?
4. Will liabilities arising out of the acts or omissions of persons other than the party giving the indemnity or waiver (for example, employees, agents, and contractors) be subject to the indemnity or waiver?
5. Is the recovery against the party giving the indemnity or waiver limited as to amount, ability to seek a deficiency judgment, or source of funds to pay damages?
6. What risks are covered by the indemnity or waiver?
7. Is the indemnity or waiver consistent with insurance coverages carried by the parties, both as to amounts and risks insured?
8. Is the obligation to defend and the entire cost of defense included in the indemnity? If so, will the beneficiary of the indemnity be entitled to separate counsel of its choosing?
9. Are there any types of damages (for example, punitive or consequential) that are excluded?
10. Are there any limitations as to the time period the indemnity or waiver will be in effect or the time period for making a claim under the indemnity or waiver?
11. Do any anti-indemnity statutes apply? (See section 17.2:4 below.)
12. Is compliance with the fair notice doctrine necessary? (See section 17.2:5 below.)

§ 17.2:3 Indemnities by Cities and Counties Prohibited

The Texas Constitution states that no debt for any purpose may be incurred by any city or county unless provision is made at the time of creating the debt for levying and collecting a sufficient tax to repay the debt. *See* Tex. Const. art. XI, §§ 5, 7. Because an indemnity is by its nature uncertain as to the timing and amount of the liability that could be incurred, an indemnity by a city or county is invalid. *See T, & N.O.R.R. Co. v. Galveston County*, 169 S.W.2d 713 (Tex. 1943).

§ 17.2:4 Anti-Indemnity Laws

With some exceptions, Texas Insurance Code chapter 151 prohibits broad-form and intermediate indemnities in construction contracts and requirements in a construction contract for insurance policies or endorsements that cover broad-form or intermediate indemnities. Under Tex. Ins. Code § 151.102, an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. Under Tex. Ins. Code **§** 151.104, a provision in a construction contract that requires the purchase of additional insured coverage or any coverage endorsement or provision within an insurance policy providing additional insured coverage is void and unenforceable to the extent that it requires coverage that is prohibited under Tex. Ins. Code § 151.102.

The definition of a "construction contract" contained in Tex. Ins. Code § 151.001(5) is extremely broad, including any "contract, subcontract, or agreement . . . made by an owner . . . for the design, construction, alteration, renovation, remodeling, repair, or maintenance of . . . a building, structure, appurtenance, or other improvement to or on . . . real property." Whether the definition covers a lease that contemplates leasehold improvements or contains provisions regarding repairs, maintenance, or alterations is, at best, unclear.

Among the exceptions under Insurance Code chapter 151 are the following:

1. There is a broad exception for any provision in a construction contract that requires a party to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (that is, so-called third-party-over actions). Tex. Ins. Code § 151.103.
2. Indemnity provisions contained in loan and financing documents other than construction contracts to which the contractor and owner's lender are parties. Tex. Ins. Code § 151.105(3).

3. An indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).

Texas law also prohibits certain indemnities by a contractor with respect to an architect's negligence and certain indemnities by an architect with respect to an owner's negligence. *See* Tex. Civ. Prac. & Rem. Code § 130.002.

§ 17.2:5 Fair Notice Doctrine

Even if no anti-indemnity statute applies, when an indemnity, release, or waiver provision seeks to shift the risk of one party's future negligence or other fault to the other party, Texas imposes a fair notice requirement before enforcing that agreement. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). The fair notice requirements are set out as the express negligence doctrine and the conspicuousness requirement. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004). The fair notice requirement is a rule of contract interpretation and is therefore determinable as a matter of law. *Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813, 814 (Tex. 1994).

Express Negligence Rule: If the parties to a contract want to indemnify one of the parties against its own negligence, the parties must express their intent in specific terms within the four corners of the contract. *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 707-08 (Tex. 1987). This same rule applies to releases. *Dresser Industries, Inc.*, 853 S.W.2d 505. There is no specific required language to use to comply with the express negligence doctrine in Texas, other than use of the terms *negligence* or *fault*, but a good example to follow states: "TENANT WILL RELEASE, DEFEND, AND INDEMNIFY LANDLORD [AND ANY OTHER INDEMNITEES] FROM ANY CLAIM OR LOSS EVEN THOUGH CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT), STRICT LIABILITY, OR OTHER LEGAL. FAULT OF LANDLORD [OR ANY OTHER INDEMNITEES]." Whether a release or indemnity for gross negligence is enforceable is unclear, but any release or indemnity intended to apply to gross negligence may need to specifically mention gross negligence to meet the express negligence test. *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915 (Tex. App.—Dallas 2013, no pet.).

Conspicuousness Rule: The indemnity, release, or waiver provision indemnifying or releasing a party from its own negligence must be conspicuous (for example, a separate indemnity and waiver provision in contrasting, capitalized, or colored type with a clear and informative heading). *Dresser Industries, Inc.*, 853 S.W.2d at 510-11.

Extensions of Fair Notice Doctrine: The fair notice doctrine has also been held to apply to indemnities or waivers—for strict liability *(Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 890 S.W.2d 455, 459 (Tex. 1994)) and of a third party by a subscribing employer notwithstanding the exclusive recovery (or one action) rule under the Workers' Compensation Act *(Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990)).

[24] **Indemnity.** See Chapter 3 Indemnity Common Law Indemnity and Contractual Indemnity by Party; and see Locke, State Bar of Texas, 28th Annual Advanced Real Estate Drafting Course, Drafting Indemnities and their Relationship to Insurance (Houston, Texas, March, 2017).

[25] **Insurance 101 and 201**. This article and presentation on insurance is presented from the author's perspective and experience as a real estate lawyer. This article addresses the insurance leg on a "101" level, addressing some of the basic concepts and terminology involved in commercial real estate transactions. Included in this article is Chapter 3 "**Insurance**," which addresses these concepts and terminology on a more detailed and applied level. References are made in this article to Insurance Specifications and the forms attached in the **Forms** attached to Chapter 5 Forms and Commentary. The Commentary on Insurance Forms are Endnotes annotating the Insurance Specifications and the forms in the appendix of Forms.

[26] **Waiver of Subrogation.** See Chapter 3 Insurance at Common Law Waiver of Subrogation and Contractual Waiver of Subrogation.

[27] **Owned, Rented and Occupied Property Exclusions from CGL Coverage.** See Exclusion 2.j(1) of the ISO Commercial General Liability Coverage Form in Chapter 5.

[28] **Personal Property in Insured's Care, Custody or Controlled Exclusion.** See Exclusion 2.j(4) of the ISO Commercial General Liability Coverage Form in Chapter 5.

[29] **Named Insureds.** The Declarations Page of a liability policy names the person or organization who is the insured and such person or organization is the "**named insured**". If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the first named insured. See ISO Commercial General Liability Declarations (aka the "**Declarations Page**") in Chapter 5.

[30] **Automatic Insureds**. Additionally, the liability policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy on which an organization is the named insured, may provide that the organization's employees are automatically covered and are automatic insureds. The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; partners and joint venturers in a named insured partnership or joint venture; members and managers of a named insured limited liability company; officers, directors, and stockholders of a named insured corporation or other named insured organization; trustees of a named insured trust; employees and volunteer workers of the named insured business; the named insured's real estate manager; any person having proper temporary custody of a deceased named insured's property; the deceased named

insured's legal representative; and newly acquired or formed organizations. See Section II – Who Is An Insured of the ISO Commercial General Liability Coverage Form in Chapter 5.

[31] **Additional Insureds.** An "**additional insured**" is a person other than the named insured who is protected under the terms of the contract. Usually, additional insureds are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself. The reason for including another person might be to protect the other person because of the named insured's close relationship with that person or to comply with a contractual obligation that requires the named insured to do so (*e.g.*, owner of property leased by the named insured-landlord). Under a CGL policy many types of persons or organizations may be added by endorsement as an additional insured, upon approval of the insurer. Many liability insurers issue blanket endorsements specifying certain parties that are "automatic additional insureds" under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. A common error in liability insurance specifications is to specify that a party is to be added to the named insured's policy as an "**additional named insured**". Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. See samples of the most commonly issued ISO additional insured endorsement forms to the ISO CGL policy in Chapter 5.

[32] **ISO Definition of an "Occurrence".** The ISO CGL policy defines an "**occurrence**" in Section V – Definitions to the ISO Commercial General Liability Form in Chapter 5 as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

[33] **Indemnity for Defense.** See the Insuring Agreements for Coverages A and B in the ISO Commercial General Liability Coverage Form in Chapter 5 providing

> We will have the right and **duty to defend** the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> **(1)** The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and
>
> **(2)** Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B.** (Emphasis added by author.)

[34] **ISO Forms.** See the ISO Commercial General Liability Declarations and Commercial General Liability Coverage Form in Chapter 5.

[35] **Declarations Page.** See the ISO Commercial General Liability Declarations in Chapter 5.

[36] **Commercial General Liability Form.** See the ISO Commercial General Liability Coverage Form in Chapter 5.

[37] **Bodily Injury.** "**Bodily Injury**" means "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." See definition at Section V – Definitions 3. "bodily injury" to the ISO Commercial General Liability Coverage Form in Chapter 5.

[38] **Property Damage.** "**Property Damage**" means "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." See definition at Section V – Definitions 17. "property damage" to the ISO Commercial General Liability Coverage Form in Chapter 5.

[39] **Section I - Coverage A - Insuring Agreement – An Occurrence Policy.** See the ISO Commercial General Liability Coverage Form in Chapter 5 setting out the Insuring Agreement for Coverage A. It provides in part "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…." and further states in part "This insurance applies to "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; (2) The "bodily injury" or "property damage" occurs during the policy period…."

[40] **Section I - Coverage A - Exclusions.** See the Section I, Par. 2. Exclusions to the ISO Commercial General Liability Coverage Form in Chapter 5 setting out the following exclusions from coverage for the named insured's liability for bodily injury and property damage arising out of: (a) Expected or Intended Injury, (b) Contractual Liability, (c) Liquor Liability, (d) Workers' Compensation And Similar Law, (e) Employer's Liability, (f) Pollution, (g) Aircraft, Auto Or Watercraft, (h) Mobile Equipment, (i) War, (j) Damage to Property, (k) Damage To Your Product, (l) Damage to Your Work, (m) Damage to Impaired Property Or Property Not Physically Injured, (n) Recall of Products, Work Or Impaired

Property, (o) Personal and Advertising Injury, (p) Electronic Data, (q) Recording and Distribution Of Material Or Information in Violation of Law.

[41] **Section I - Coverage B – Personal and Advertising Injury Liability.** See the Insuring Agreement at Par. 1 to Section I – Coverage B Personal and Advertising Injury Liability in Chapter 5. See Section V – Definitions, Par. 14 in Chapter 5 defining "**Personal and advertising injury**" as injury, including consequential bodily injury, arising out of one or more of the following offenses: (a) false arrest, detention or imprisonment; (b) malicious prosecution; (c) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (d) oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; (e) oral or written publication, in any manner, of material that violates a person's right of privacy; (f) the use of another's advertising idea in the insured's advertisement; or (g) infringing upon another's copyright, trade dress or slogan in the insured's advertisement.

[42] **Section I - Coverage C – Medical Payments.** "**Medical Payments**" is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured's operations. See the Insuring Agreement at Par. 1 to Coverage C Medical Payments in Chapter 5.

[43] **Section II – Who Is An Insured.** See Section II – Who is an Insured to the ISO Commercial General Liability Coverage Form in Chapter 5.

[44] **Section III – Limits of Insurance.** See Section III – Limits of Insurance to the ISO Commercial General Liability Coverage Form in Chapter 5.

[45] **Section IV – Commercial General Liability Conditions.** See Section IV – Commercial General Liability Conditions to the ISO Commercial General Liability Coverage Form in Chapter 5.

[46] **Section IV – Definitions.** See Section V – Definitions to the ISO Commercial General Liability Coverage Form in Chapter 5.

[47] **Amendments and Endorsements.** See in Chapter 5 the forms of Amendments and Endorsements.

[48] **Contractual Liability Insurance.** See the ISO Commercial General Liability Coverage Form, Section I – Coverages, Coverage A, Par. 2 Exclusions, Par. **2.b** Contractual Liability in Chapter 5. "**Contractual Liability Insurance**" is an "exception" to an "exclusion" from coverage.

The exclusion provides:

> **2. Exclusions.** This insurance does **not** apply to:
> **b. Contractual Liability**
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This **exclusion** does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
> (2) Assumed in a contract or agreement that is an "**Insured Contract**", provided the "**Bodily Injury**" or "**Property Damage**" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. (Emphasis added by author.)

[49] **Insured Contracts.** An "**Insured Contract**" is defined in the standard CGL policy as:

9. "**Insured contract**" means:

a. A contract for a **lease** of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
b. A sidetrack agreement;
c. Any **easement** or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
e. An elevator maintenance agreement;
f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work 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. (Emphasis added by author.)

Also see ISO CG 21 39 Contractual Liability Limitation (form attached to this Article), which when added to the standard CGL policy by endorsement deletes "**f**" altogether from the definition of an insured contract; and discussion in Chapter 3 Insurance at **II.A.11** *Exclusions May Be Invisible*.

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

[51] **ACORD Certificates.** See the ACORD certificates attached in Chapter 5.

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

[53] **ISO Form Numbering System.** See Endnote **66** (ISO) to Chapter 5 Forms and Commentary for an explanation of the ISO form numbering system.

[54] **Pogo.** "We have met the enemy and he is us." Pogo by Walt Kelly (1913 - 1973).

[55] **Not Reasonable to Rely Upon an ACORD Certificate.** Macbeth, "It is a tale, told by an idiot, full of sound and fury, signifying nothing." W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

[56] **Fictitious Insured Syndrome.** An amazingly common problem in the insurance industry is the issuance by the Producer of a certificate of insurance certifying to a party to be protected that it is an additional insured on the protecting-party's insurance, but then its failure to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company refuses to provide coverage. As observed by one commentator:

> Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This practice may not provide additional insured status and, thus is sometimes called the "fictitious insured syndrome." A certificate representing that there is additional insured coverage would be false, but the holder may not be aware of that fact. Because of the disclaimers saying that the certificate conveys no rights upon the holder other than what are granted in the underlying policy, courts usually conclude that the holder is out of luck in this situation …. Sometimes this problem stems from a lack of communication. The insurance agent, for example may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the additional insured later seeks protection, the insurer denies such protection, shifting the blame elsewhere.

The ADDITIONAL INSURED BOOK 7th Ed., Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance pp. 361-362 (International Risk Management Institute, Inc. www.IRMI.com 2013).

[57] **Benefits From Obtaining A Certificate.** Even though it may not be reasonable to rely upon a certificate of insurance which contains disclaimers, there are benefits to having a certificate and potential detriments from a failure to obtain a certificate. Some courts have held that the party to be protected has waived the protecting party's obligation to procure contractually specified insurance by failing to insist upon being furnished the contractually required certificate. There are benefits arising from the standard certificate, even though it contains disclaimers, which will not obtain in the absence of a certificate. Some of the benefits are the following: (1) the standard certificate sets out important information, which in the event of a claim, may provide a quick means of resolution (*e.g.*, agent and insurer contact information, policy numbers); (2) under particular circumstances a court may be willing to disregard the certificate's disclaimers and find coverage for the party to be protected; (3) an erroneous certificate may provide a basis for recovery on the issuing agent's E & O policy or establish a contractual undertaking by the agent to provide the certificated coverage.

[58] **"Comprehensive General Liability Policy".** A "comprehensive general liability policy" was anything but comprehensive. It was a very basic liability insurance policy to which numerous endorsements had to be added. When the commercial general liability policy was introduced, it incorporated many of those changes that were previously required to be added by endorsement.

[59] **"Blanket or Broad Form Contractual Liability Coverage".** Since 1986, "blanket" or "broad form contractual liability coverage" has not existed. The current commercial general liability definition of contractual liability in the standard CGL policy achieves the same result.

[60] **"Broad Form Property Damage," "Broad Form CGL Endorsement," and "Deletion of the Personal Injury Employee Exclusion".** The same thing is true of "broad form property damage," "broad form CGL endorsement," and "deletion of the personal injury employee exclusion." Use of such terminology is indicative of lack of awareness of changes that occurred almost 27 years ago.

[61] **"Cross Liability Endorsement" or "Separation of Insureds Endorsement".** Requiring a "cross liability endorsement" is even more problematic. A cross liability endorsement in today's vernacular is an exclusion, not a provision or extension of coverage, the purpose of which is to prevent one insured from being provided coverage when sued by another insured. A "separation of insureds endorsement" or "severability of interests provision" states that each insured against whom claim is made or suit is brought will be provided a separate defense. This protection is automatically included in today's standard form commercial general liability policy.

[62] **Products-Completed Operations.** A requirement that coverage be provided for a specified number of years following substantial completion of a construction job is not a requirement that can be met by any standard insurance program, as all such programs expire annually. A requirement for the continued provision of coverage is instead a performance requirement being placed on the insured.

[63] **Notice of Nonrenewal to First Named Insured in ISO CGL Policy.** See in Chapter 5**,** Section IV – Common Policy Conditions, Par. 9 When We Do Not Renew providing that the CGL policy issuer is to give notice of nonrenewal only to the first Named Insured.

[64] **Notice Only to First Named Insured In ISO Property Policy .** See **Par. A** Cancellation in the ISO IL 00 17 11 98 Common Policy Conditions setting out the notices to be provided by the insurer to the first Named Insured attached in the Appendix of Forms at p. 146. See the Commentary on Forms for a discussion of the change in 2006 to the ACORD Certificate of Insurance deleting the statement that the insurer is to endeavor to give notice of policy cancellation to the certificate holder.

[65] **No Notice to Landlord.** See ISO **CP 12 18 06 07** Loss Payable Provisions p. 196 and ISO **CP 12 19 06 07** Additional Insured – Building Owner in Chapter 5.

[66] **The Risk of Failing to Confirm Insured Status.** If you want to find out how bad it can be when you do not insist on confirming the issuance of the requisite additional insured and notice of cancellation endorsements to the tenant's property policy, read *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5th Cir. – Tex.) – landlord of the Taste of Katy restaurant failed to obtain endorsements on its tenant's property policy designating it as an additional insured and the insurer's agreement to give the landlord notice of policy cancellation. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found, "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". The landlord sustained a catastrophic uninsured loss.

[67] **Texas: Better Than Most.** The Texas Department of Insurance ("**TDI**") currently permits a "notice of cancellation or material change" endorsement. See ISO **CG 02 05 12 04** Texas Changes – Amendment of Cancellation Provisions or Coverage Change in Chapter 5. TDI has not defined what constitutes a "material change".

[68] **Contractual Liability Coverage.** See in Chapter 5 ISO Commercial General Liability Coverage Form Section I, Par. 2 Exclusions **2.b** Contractual Liability; and in Chapter 5 the **Endnote 402** (Contractual Liability Coverage – An Exception to an Exclusion From Coverage) discussing the ISO CGL policy provision granting contractual liability coverage for bodily injury and property damage to the policy's Named Insured for its contractual indemnities.

[69] **ISO and ACORD Forms.** See **Endnote 427** in Chapter 5 for a discussion of ISO and the ISO insurance form numbering system. See the Commentary in Chapter 5 for a discussion of the ACORD certificate forms. Many insurance companies utilize manuscript additional insured endorsements. A manuscript endorsement is one that an insurance company makes up, which may or may not include some ISO wording. Beware of any endorsement that includes a footer reading "Includes Copyrighted Material of Insurance Services Office, Inc. With Its Permission". All manuscript endorsements require careful scrutiny. They frequently:

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

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

[70] **Limitations.** Note, some manuscripted additional insured endorsements specify a sublimit for additional insured coverage that is less than the policy limits applicable to the Named Insured. See MALECKI ON INSURANCE, *Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (August, 2005, Vol. 14. No. 10, pp. 1-8) which reviews the following manuscripted endorsement to a CGL policy that specified on its Declaration Page a sublimit for additional insured coverage an amount less than the policy limits applicable to the Named Insured:

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

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

[71] **Primary Liability vs. Horizontal Exhaustion.** Neither the recommended insurance spec nor the new ISO endorsement resolves the horizontal exhaustion issue which is beyond the scope of this paper. See the Endnote (Primary and Noncontributing) in Chapter 5 for further discussion of the term "**primary and noncontributing**".

[72] **Insurable Interest.** Generally, to be eligible for insured status under a property policy, the insured must have an insurable interest in the insured property. The assumption by a tenant of liability for damage to leased premises is recognized as creating an insurable interest in the tenant. Leases for single tenant buildings sometime require the tenant to insure the improvements and to name the owner-lessor as an additional insured. Unlike the standard mortgagee coverage, other additional insurable interests endorsements do not provide coverage despite the acts of the insured, whether the first named insured (e.g., tenant) or the additional insured or loss payee (e.g., landlord). Under current ISO commercial property forms, intentional concealment or misrepresentation of a material fact by any insured voids coverage for the additional insured. In November 2008 ISO issued its form CP 12 19 Additional Insured – Building Owner endorsement to designate a building owner as a "Named Insured" for damage to the building on a tenant's property policy covering the building. It is the "insureds" who receive the loss payment under a property policy. Thus, it is unnecessary to specify that the building owner also be designated as a loss payee when it is designated as an insured.

[73] **Mortgageholder Rights.** See ISO Building and Personal Property Coverage Form Par. F.2 Mortgageholders setting out the rights of a mortgageholder which is scheduled on the Declarations Page of the ISO property policy in Chapter 5.

[74] **ISO CP 12 18 Loss Payable Provisions.** See ISO CP 12 18 Loss Payable Provisions form in Chapter 5.

[75] **Basic Causes of Loss.** A "basic causes of loss" policy is extremely basic in the scope of coverage provided.

[76] **Broad Causes of Loss.** A "broad causes of loss" policy is broader than a basic form, but is not very broad.

[77] **Special Causes of Loss.** The most comprehensive ISO property policy is called "Special Form" or "Special Causes of Loss Form." A "special causes of loss" policy is what most lawyers, laymen and many insurance professionals think of as an "all risk" form and is by far the most common form of property insurance in use. This form is in contrast to "Named Perils Coverage" which applies only to loss arising out of causes that are listed as covered. See Endnote (*Property Insurance – "Causes of Loss"*) in Chapter 5.

[78] **Declarations Page with Schedule of Forms.** See the ISO Commercial Property Coverage Part Declarations Page with Schedule of Forms in Chapter 5.

[79] **Common Policy Conditions.** See the ISO Common Policy Conditions in Chapter 5. Condition A of this form provides for the policy to be cancelled by the "first Named Insured" and by the insurer upon notice to the "first Named Insured".

[80] **Building and Personal Property Coverage Form.** See the ISO Building and Personal Property Coverage Form in Chapter 5.

[81] **Coverages.** Section A provides for (1) Covered Property; (2) Property Not Covered; (3) Covered Causes of Loss; (4) Additional Coverages as to (a) Debris Removal, (b) Preservation of Property, (c) Fire Department Service Charge, (de) Pollutant Clean-up And Removal, (e) Increased Cost of Construction, and (f) Electronic Data; (5) Coverage Extensions as to (a) Newly Acquired Or Constructed Property, (b) Personal Effects and Property Of Others; (c) Valuable Papers and Records (Other Than Electronic Data), (d) Property Off-premises, (e) Outdoor Property, (f) Non-owned Detached Trailers, (g) Business Personal Property Temporarily in Portable Storage Units.

[82] **Loss Conditions.** The property policy at Section E sets out certain conditions to payment including (6) Vacancy.

[83] **Additional Conditions.** The property policy provides in Section F for certain additional conditions applicable to payment including (1) Coinsurance and (2) Mortgageholders.

[84] **Optional Coverages.** The property policy addresses at Section G selected valuation methods if selected on the Declarations Page: (1) Agreed Value; (2) Inflation Guard; and (3) Replacement Cost; and (4) Extension of Replacement Cost To Personal Property Of Others.

[85] **Business Income Insurance.** See the ISO Business Income (And Extra Expense) Coverage Form in Chapter 5.

[86] **Leasehold Interest Coverage Form.** See the ISO Leasehold Interest Coverage Form in Chapter 5.

[87] **Leasehold Interest Coverage Form - Coverages.** This endorsement is to insure the Tenant for its "**Covered Leasehold Interest**" lost due to the cancellation of its lease resulting from physical loss of or damage to property at the premises caused by a Covered Cause of Loss in the amount of the "**net leasehold interest**" shown in the Leasehold Interest Coverage Schedule for the following as designated on the Declarations Page: (a) Tenants' Lease Interest; (b) Bonus Payments; (c) Improvements and Betterments; and (d) Prepaid Rent.

[88] **Commercial Property Conditions.** See the ISO Commercial Property Conditions in Chapter 5 addressing among other matters authorizing pre-loss waiver by landlord or tenant, and authorizing post-loss waiver by landlord of tenant.

[89] **Endorsements.** See the following Endorsements to the ISO Commercial Property in Chapter 5 as follows: Ordinance or Law Coverage; Debris Removal Additional Insurance; Loss Payable Provisions; Scheduled Building Property Tenant's Property; Unscheduled Building Property Tenant's Policy; Additional Insured – Building Owner.

[90] **Replacement Cost.** See in Chapter 5 Building and Personal Property Coverage Form, **Par. G.3** Optional Coverages – Replacement Cost and Declarations Page.

[91] **ACV.** See in Chapter 5 Building and Personal Property Coverage Form, **Par. G.1** Agreed Value – Replacement Cost and Declarations Page.

[92] **Inflation Guard.** See in Chapter 5 Building and Personal Property Coverage Form, **Par. G.2** Optional Coverages – Inflation Guard Cost and Declarations Page.

[93] **Specific Specifications Are Better than General Narrative Specifications.** See Chapter 3 Insurance.

CHAPTER 2. INDEMNITY

[94] **Insurance and Insurance Provisions**. "**Insurance**" is a form of contractual indemnity. However, Texas courts on public policy grounds construe the same "**arising out of**" indemnity triggering language in indemnity provisions in leases, construction contracts and other contracts strictly against coverage of an indemnified party's negligence and broadly in favor of coverage of an additional insured's negligence in additional insured endorsements issued pursuant to the same contract. As discussed in the articles drafted by the author cited in the author's bibliography, drafting by insurance companies of coverage for additional insureds has evolved considerably since 1986 to address various courts' finding coverage for an additional insured's sole negligence or independent negligence contributing to the insurer's named insured's liability. Also, see articles written by the author and cited in the author's bibliography and the writings of others cited in the Helpful Materials addressing the crafting of insurance specifications for inclusion in contracts to specify insurance to be obtained by the Protecting Party. An indemnification may be executed in connection with another contract, as in the case of a subcontractor's indemnity protecting a contractor in connection with contractor's construction contract with the property owner. See 14 TEX. JUR. 3d *Contribution and Indemnification* § 2 *Distinctions* 477.

[95] **Indemnity Provision.** An "**Indemnity**" 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. The risk of loss may be contractual or tortious. Many times scriveners use an indemnity provision when they do not know whether the Protected Party 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*." Indemnity agreements are strictly construed in favor of the

Protecting Party. 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*; 26 TEX. JUR. 3d *Statute of Frauds* § 29.

[96] **Exculpation Provision**. "**Exculpation**" 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 nonoccurrence of events.

[97] **Release Provision.** A **"Release**" 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.

[98] **Indemnity, a Shift in Risk.** *B&B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816 (Tex. 1980); see Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150, 150 151 (1947).

[99] **Contribution, an Allocation of Risk.** see Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150, 150 151 (1947)

[100] **Respondeat Superior.** 33 TEX. JUR. 3d, *Employer and Employee*; and § 299 *Respondeat superior, and vicarious liability generally* (1996, March 2018 Update).

[101] **Independent Contractors – Specially Qualified.** 44 TEX. JUR. 3d, *Independent Contractors* (1996, March 2018 Update).

[102] **Independent Contractor Rule.** *Elliott-Williams Co, Inc. v. Diaz*, 9 S.W.3d 801 (Tex. 1999).

[103] **Illustration.** set out in 44 TEX. JUR.3d *Independent Contractors* § 24 *Manner of retaining control* (1996, March 2018 Update) *citing Elliott-Williams Co., Inc. v. Diaz*, 9 S.W.3d 801 (Tex. 1999)

[104] **Exceptions Swallow the Rule.** W. P. Keeton, PROSSER AND KEETON ON THE LAW OF TORTS, § 71 (5th Ed. 1984).

[105] **Negligent Hiring.** 44 TEX. JUR. 3d, *Independent Contractors* § 56 *In general, Selection of Incompetent Contractor* p. 283 (1996, March 2018 Update); *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).

[106] **No Negligent Hiring by an Independent Contractor of Another Independent Contractor.** *Hagins v. E-Z Mart Stores, Inc.*, 128 S.W.3d 383 (Tex. App. – Texarkana 2004).

[107] **Work Unlawful or Creates a Nuisance.** 44 TEX. JUR. 3d, *Independent Contractors*, § 56 *Unlawful Work* p. 291 (1996, March 2018 Update).

[108] **Project Necessarily Causes Injury.** 44 TEX. JUR. 3d, *Independent Contractors* § 68 *Project necessarily causes loss or injury* p. 293 (1996, March 2018 Update).

[109] **Violation of Statute.** 44 TEX. JUR. 3d, *Independent Contractors* § (1996, March 2018 Update).

[110] **Exercise of Public Franchise.** 44 TEX. JUR. 3d, *Independent Contractors* § 72 *Exercise of public franchise* p. 296 (1996, March 2018 Update).

[111] **Inherently Dangerous Work.** 44 TEX. JUR. 3d, *Independent Contractors* § 59 *What constitutes inherently dangerous work*; and § 73 *Inherently dangerous work* p. 297 (1996, March 2018 Update).

[112] **Safe Work Place.** 59 TEX. JUR. 3d, *Premises Liability* § 7 *Negligent activity and premises defect bases for premises liability—Negligent activity claim* (1996, March 2018 Update); 44 TEX. JUR. 3d, *Independent Contractors* § 27 *Generally*; § 28 *Liability arising from premises defect*; § 29 *Liability arising from premises defect – Where condition arises from work activity*; § 30 *Liability arising from negligent activity*; § 44 *Failure to provide safe workplace* (1996, March 2018 Update).

[113] **Overlapping Duties of Owner and Independent Contractor.** *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523 (Tex. 1997).

[114] **Furnishing Dangerous Appliances.** 44 TEX. JUR. 3d, *Independent Contractors*, § 45 *Furnishing dangerous appliances* (1996, March 2018 Update).

[115] **Liability of Independent Contractor Who Retains Control to Subcontractor.** 44 TEX. JUR. 3d, *Independent Contractors*, § 33 *Liability where independent contractor retains control* 276 (1996, March 2018 Update).

[116] **Assumption that Subcontractor will Perform Safely.** *Gonzalez v. VATR Const. LLC*, 418 S.W.3d 777 (Tex. App. – Dallas 2013).

[117] **Independent Contractor Creating Unsafe Work Place for Other Independent Contractors.** *Living, Inc. v. Redinger*, 667 S.W.2d 846 (Tex. App. – Hou. [1st Dist. 1984), writ granted, and judgment rev'd on other grounds, *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985).

[118] **Retention of Control.** *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985); *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28 (Tex. App. – Ft. Worth 2002); *GSF Energy, LLC v. Padron*, 355 S.W.3d 700 (Tex. App. - Hou. [1st Dist.] 2011, review denied); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233 (Tex. App. – Tyler 2003); *R.R. Street & Co., Inc. v. Pilgrim Enterprises, Inc.*, 166 S.W.3d 232 (Tex. 2005). See 44 TEX. JUR. 3d, *Independent Contractors*, § 24 *Manner of retaining control*; § 25 *Extent and exercise of control*; § 31 *Retention and extent of control*; § 33 *Liability where independent contractor retains control*; § 34 *Proof of "right to control"* (1996, March 2018 Update).

[119] **Borrowed Servant.** *USF & G v. Goodson*, 568 S.W.2d 443 (Tex. Civ. App. - Texarkana 1978, writ ref'd n.r.e.).

[120] **Actual Control Exercised.** *Exxon Corp. v. Perez*, 842 S.W.2d 629 (Tex. 1992).

[121] **Special Employer.** *Marshal v. Toys R Us Ntyex, Inc.*, 825 S.W.2d 193 (Tex. App. - Houston [4th Dist.] 1992, writ denied).

[122] **1917 Statute.** TEX. CIV. PRAC. & REM. CODE ANN. §§ 32.001 to 32.003.

[123] **1973 Statute and Amendments.** TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001 *et seq*.

[124] **Abolition of Common-Law Indemnity**. *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179 (Tex. 1988); *Cypress Creek Utility Service Co., Inc. v. Muller*, 640 S.W.2d 860 (Tex. 1982); *B & B Auto Supply, Sand Pit., and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980); *Federal Petroleum Co. v. Gas Equipment Co.*, 105 S.W.3d 281 (Tex. App. – Corpus Christi 2003).

[125] **Common-Law Indemnity Available for Liability of a Purely Vicarious Nature.** *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179 (Tex. 1988); *Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co.*, 127 S.W.3d 134 (Tex. App. – Hou. [1st Dist.] 2003); *St. Anthony's Hosp. v. Whitfield*, 946 S.W.2d 174 (Tex. App. – Amarillo 1997, writ den'd).

[126] **Recovery by Employer Against Employee.** *South Austin Drive-In Theatre v. Thompson*, 421 S.W.2d 933, 348 (Tex. Civ. App. – Austin 1967, writ ref'd n.r.e.).

[127] **No Liability for Latent Defects.** *American Exch. Nat'l Bank v. Swope & Mangold*, 101 S.W. 872, 873 (Tex. Civ. App. 1907, no writ).

[128] **Landlord Retains Control of Portion of Property.** *McCreless Props., Ltd. v. F. W. Woolworth Co.*, 533 S.W.2d 863, 866 (Tex. Civ. App.–San Antonio 1976, writ ref'd n.r.e.).

[129] **Multitenant Building.** *O'Connor v. Andrews*, 16 S.W. 628, 629 (Tex. 1891).

[130] **Tenant's Obligations.** See generally C. R. McCorkle, Annot., *Liability of Tenant for Damage to the Leased Property Due to His Acts or Neglect*, 10 A.L.R.2d 1012 covering cases in which landlord seeks to recover damages for specific injuries to property due to a tenant's own acts or negligence as distinguished from cases in which tenant's liability is predicated upon breach of duty to keep property in repair or to return it in good condition; and C. Jhong, Annot., *Measure of Damages in Landlord's Action for Waste Against Tenant*, 82 A.L.R.2d 1106 covering cases dealing with landlord's measure of damages resulting from a tenant's violation of its implied duty to care for leased property as distinguished from cases concerned with damages resulting from violation of an express covenant to keep property in repair, to use it for a certain specific purpose, or to return it in good condition.

[131] **Tenant Takes the Risk.** *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809, 813 (Tex. Civ. App.—Dallas 1970, writ ref d n.r.e.).

[132] **Tenant Liable for Negligently Damaged Property.** *Nagorny v. Gray*, 261 S.W.2d 741 (Tex. Civ. App.—Galveston 1953, no writ).

[133] **ISO.** "**ISO**" refers to Insurance Service Office, Inc., a public company that acts as a source of information about property/casualty insurance risk. ISO provides statistical, actuarial, underwriting, and claims information; policy language; information about specific locations; fraud-identification tools; and technical services for a broad spectrum of commercial and personal lines of insurance. The form policies and endorsements ISO produces are used in whole or in part by many insurers when preparing their form policies. ISO's forms are considered the standard form for most insurance forms and its liability policy and property policy and the endorsements thereto are referred to herein as the "**standard form**". Number designations for ISO's standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1986 *endorsement* forms for use in connection with its commercial general liability policy. **Endorsement** is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement's promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction. Each ISO designation is composed of four elements. The following is an example for the additional insured endorsement form appearing in the Appendix as **ISO Form CG 20 26 04 13** Additional Insured–Designated Person or Organization:

CG	20	26	04 13
The "CG" prefix in the endorsement's designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as "GL" in connection with its *comprehensive* general liability forms.	The first set of numbers identifies the "group" to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number "20" refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group–in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled "Additional Insured–Designated Person or Organization."	The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "04 13" or April 2013. November 1985 is the initial date of all ISO forms for the "CG" system. The *coverage* forms have been revised a number of times since then and currently bear an edition date of 04 13. Many of the *endorsement* forms were revised at the same time as the coverage forms and also bear a 04 13 edition date.

[134] **Mostly No Magic Words.** 14 TEX. JUR. 3d *Contribution and Indemnification* § 14 *Form*; 26 TEX. JUR. 2d *Statute of Frauds* § 29.

[135] **Not Applicable to Claims Between the Indemnified and Indemnifying Parties?** *Wallerstein v. Spirt*, 8 S.W.3d 774, 780 (Tex. App. – Austin 1999, no pet.).

[136] **Duty to Defend.** *D. R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co., Ltd.*, 300 S.W.3d 773, 781 (Tex. App. – Hou. [14th Dist.] 2006), order withdrawn and judgment aff'd in part, rev'd in part, 300 S.W.3d 740, 741-745 (Tex. 2009) (noting distinction between duty to defend and duty to indemnify); *Crimson Exploration, Inc. v. Intermarket Management, LLC*, 341 S.W.3d 432, 441 (Tex. App. – Hou. [1st Dist.] 2010).

[137] **When Does Duty to Defend Arise?** See the following insurance cases: *D. R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co., Ltd.*, 300 S.W.3d 773, 781 (Tex. App. – Hou. [14th Dist.] 2006), order withdrawn and judgment aff'd in part, rev'd in part, 300 S.W.3d 740 (Tex. 2009) (noting distinction between duty to defend and duty to indemnify); *English v. BGP Intern., Inc.*, 174 S.W.3d 366, 371 (Tex. App. – Hou [14th Dist.] 2005); *Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997); *Lancer Ins. Co. v. Perez*, 308 S.W.3d 35, 40 (Tex. App. – San Antonio 2009), judgment rev'd, 345 S.W.3d 50 (Tex. 2011).

[138] **Mixed Claims, Some Triggering Duty to Defend.** *English v. BGP Intern., Inc.*, 174 S.W.3d 366, 371 (Tex. App. – Hou [14th Dist.] 2005)

[139] **Duty to Defend.** See also *Reser v. State Farm & Fire Casualty Co.*, 981 S.W.2d 260, 263 (Tex. App.– San Antonio 1998, no pet.) noting that the duty to defend is unaffected by the ultimate outcome of the case. See also *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118 (Tex. App. – Hou. [1st Dist.] 2003, pet denied); *E & L Chipping Co.*, 962 S.W.2d 272, 274 (Tex. App. – Beaumont 1998, no pet.) - if the pleadings do not allege facts that trigger the indemnity, the Protecting Party is not required to defend the Protected Party; *Tesoro* at 125.

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

[141] **Liability Between Jointly Liable Protecting Persons.** *Hobbs v. Teledyne Movible Offshore, Inc.*, 632 F.2d 1238, 1241 (5th Cir. Unit A 1980) applying Louisiana law.

[142] **Indemnification of a Protecting Party.** 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).

[143] **Bonds.** *Fidelity & Deposit Co. of Maryland v. Reed*, 108 S.W.2d 939 (Tex. Civ. App. - San Antonio 1937, no writ); 10 TEX. JUR. 3d, *Bonds and Undertakings*.

[144] **All Bills Paid Affidavits.** *House of Falcon, Inc. v. Gonzalez*, 583 S.W.2d 902 (Tex. Civ. App. - Corpus Christi 1979, no writ).

[145] **Creditors Are Only Incidental Beneficiaries of an Indemnity.** Hurley v. Lano International, Inc., 569 S.W.2d 602 (Tex. Civ. App. Texarkana 1978, writ ref'd n.r.e.).

[146] **"In Connection With".** *Sun Oil Co. v. Renshaw Well Serv., Inc.*, 571 S.W.2d 64, 70 71 (Tex. App. — Tyler 1978, writ ref'd n.r.e.); *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806, 832 (Tex. App. — Ft. Worth 1961, writ ref'd); and *Martin Wright Electric Co. v. W.R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), cert. denied, 397 U.S. 1022 (1970).

[147] **"In Connection With" under the "Clear and Unequivocal" Test.** See *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 479 (5th Cir. 1993).

[148] **Additional "In Connection With" Cases.** 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).

[149] **Work Completed for the Day.** 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 Protected Party 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.

[150] **Injuries to Employees of the Protected Person.** *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).

[151] **Injuries to the Protecting Party Not Same as Injuries to Protecting Party's Employees.** *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) ,aff'd in part and rev'd in part on other grounds 100 S.W.2d 97 (Tex. Comm. 1937).

[152] **Injury to Independent Contractor not Injury to "Employee".** *Ideal Lease Service, Inc. v. Amoco Production Co.*, 662 S.W.2d 951 (Tex. 1983).

[153] **"Employees" and "Agents".** 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);

[154] **Indemnity Against Liability.** *Russell v. Lemons*, 205 S.W.2d 629, 631 (Tex. Civ. App. Amarillo 1947, writ ref'd n.r.e.).

[155] **Indemnity Not Yet Triggered for "Future Hypothetical Event".** *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.

[156] **Indemnity Against Damages.** *Holland v. Fidelity & Deposit Co, of Maryland*, 623 S.W.2d 469, 470 (Tex. App. - Corpus Christi 1981, no writ).

[157] **Indemnity as to Penalties.** *Tubb v. Bartlett*, 862 S.W.2d 740, 751 (Tex. App. - El Paso 1993, writ denied).

[158] **Indemnity as to Future Economic Damages.** *Transcontinental Gas Pipeline Corp. v. Texaco*, 35 S.W.3d 658 (Tex. App. – Hou. [1st Dist.] 2000, no writ).

[159] **Express Negligence Doctrine Not Applicable to Indemnity for Contractual Damages.** *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.

[160] **Indemnity as to Injury Caused by Protected Party's Negligence.** *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).

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

[162] **Gross Negligence is Negligence.** Also see *Sieber & Calicutt v. La Gloria*, 66 S.W.3d 340 (Tex. App. – Hou. [12th Dist.] 2001, no writ) where the court assumed without discussion that negligence of the Protected Party included its gross negligence.

[163] **Punitive Damages Included in Indemnified Liabilities.** *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. - Hou. [14th Dist.] 1975, writ ref'd n.r.e.). 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*.

[164] **Continuum of Intent Indemnified.** *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984).

[165] **Indemnity for Intentional Acts and Gross Negligence.** See Comment by Meagan McKeown, *Indemnification Agreements for Intentional Misconduct: Balancing Public Policy and Freedom to Contract in Texas*, 46 ST. MARY'S L. J. 345, 355 (2015) at FN. 53 citing following cases and discussion at pp. 376 – 376: *Hamblin v. Lamont*, 433 S.W.3d 51, 55 (Tex. App. - San Antonio 2013, *pet. denied*) (applying fair notice requirements to case involving indemnification against a party's intentional acts, but questioning whether a party can prospectively exculpate itself from the results of intentional conduct under Texas public policy); *Oxy USA, Inc. v. Sw. Energy Prod. Co.*, 161 S.W.3d 277, 283 (Tex. App. - Corpus Christi 2005, *pet. denied*) (declining to apply fair notice requirements to an agreement shifting liability arising from the indemnitee's intentional torts to the indemnitor where the conduct occurred before the agreement was executed); *Solis v. Evins*, 951 S.W.2d 44, 50 (Tex. App. - Corpus Christi 1997, *no writ*) (stating contractual exculpation with respect to intentional torts is contrary to public policy); *Webb v. Lawson-Avila Constr., Inc.*, 911 S.W.2d 457, 462 (Tex. App. - San Antonio 1995, *writ dism'd*) (declining to hold that an agreement for indemnity against gross negligence violated public policy); *Valero Energy Corp. v. M. W. Kellogg Constr. Co.*, 866 S.W.2d 252, 254 (Tex. App. - Corpus Christi 1993, *writ denied*) ("The waiver and indemnity provision absolving Kellogg of all liability sounding in products liability and gross negligence does not offend public policy."); see also *Budner v. Wellness Int'l Network, Ltd.*, No. 3:06-CV-0329-K, 2007 WL 806642, at *8 (N.D. Tex. Mar. 15, 2007) (refusing to dismiss a complaint on the grounds that the defendant could not prospectively limit liability for intentional torts); *Ott v. Sonic Land Corp. & Sonic Rests., Inc.*, No. 09-94-209CV, 1996 WL 185347, at *7 (Tex. App. - Beaumont Apr. 18, 1996, *writ denied*) (not designated for publication) ("If a release must expressly state it will release future negligence, then surely it must expressly state it will release future intentional tortious conduct."); *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App. - Beaumont 1986, *no writ*) ("A term in a release attempting to exempt one from liability or damages occasioned by gross negligence is against public policy.").

[166] **Indemnified Liabilities May Not Include Injuries Beyond Scope of Work.** *Sun Oil Co. v. Renshaw Well Serv., Inc.*, 571 S.W.2d 64, 70 71 (Tex. App. - Tyler 1978, writ ref'd n.r.e.); *Westinghouse Electric Corp. v. Childs Bellows*, 352 S.W.2d 806, 832 (Tex. App. - Ft. Worth 1961, writ ref'd); and *Martin Wright Electric Co. v. W.R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), cert. denied, 397 U.S. 1022 (1970).

[167] **Scope of Work Limits under the Clear and Unequivocal Test.** See *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 479 (5th Cir. 1993).

[168] **Additional Scope of Work Cases.** 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).

[169] **Contemplated Time Covered.** *M. M. Sundt Constr. Co. v. Contractors Equipment Co.*, 656 S.W.2d 643 (Tex. App. - El Paso 1983, no writ).

[170] **Treatment of Negligence under the Clear and Unequivocal Test.** *Humble Oil & Refining Co. v. Wilson*, 339 S.W.2d 954 (Tex. Civ. App. - Waco 1960, *writ ref'd n.r.e.*) and numerous other cases cited herein.

[171] **Oil and Gas Service Contracts.** Indemnity contracts in oil and gas service contracts are void as against public policy unless certain statutory requirements are met. TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001-.007. This statute is known as the Texas Oilfield Anti-Indemnity Statute; this statute, formerly TEX. REV. CIV. STAT. ANN. Art. 2212b, was originally enacted in 1973, and amended in 1979. Article 2212b was recodified as Chapter 127 of the Civil Practice and Remedies Code in 1985, and amended again in 1989. *See* White, *Winding Your Way Through the Texas Oilfield Anti-Indemnity Statute, the Fair Notice Requirements and Other Indemnity Related Issues*, 37 S. TEX. L. REV. 161 (1996); Powell, *Indemnity and Insurance Provisions in Oil and Gas Agreements*, Advanced Oil, Gas and Mineral Course (State Bar of Texas 1996); Tade, *Indemnification - Who Wins, Who Loses Under Texas, Louisiana and Maritime Law*, 20TH ANNUAL OIL, GAS & MINERAL LAW INSTITUTE 12-21 (UNIV. TEX. 1994); Tade, *Texas Anti-Indemnity Law Update*, 53 TEX. B. J. 107 (1990). *Also see Transworld Drilling Co. v. Levingston Shipbuilding*, 693 S.W.2d 19, 23 (Tex. App.--Beaumont 1985, *no writ*) for a review of the types of contracts governed by this statute. The Texas Oilfield Anti-Indemnity Statute provides that an agreement pertaining to an oil and gas well is void if it purports to indemnify a party from loss or liability for damage arising out of its own negligence.

Prior to the enactment of Article 2212b in 1973, many oil companies and oil well operators had imposed "hold harmless" agreements on oil well drilling and service contractors to indemnify the oil companies and operators for losses caused by the negligence of the drilling contractor, and often for the negligence of the oil company, operator and third parties as well. Many believed that such agreements placed an undue financial burden on what were perceived to be small contractors with less bargaining power than the oil companies and operators with whom they were negotiating contracts. *See* HOUSE INTERIM STUDY COMMITTEE ON HOLD HARMLESS AGREEMENTS, REPORT, 63rd Leg., at 3-8 (1973). The legislature enacted the Oilfield Anti-Indemnity Statute in 1973 to cure this perceived inequity by prohibiting agreements pertaining to oil and gas wells that indemnify a party for its own negligence.

(1) Void Agreements. Section 127.003 TEX. CIV. PRAC. & REM. CODE ANN. provides

> (a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a **well for oil, gas, or water or to a mine for a mineral** is void if it purports to indemnify a person against loss or liability for damage that:
>
> (1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and
> (2) arises from:
> (A) personal injury or death;
> (B) property damage; or
> (C) any other loss, damage, or expenses that arises from personal injury, death, or property injury.

(2) Excluded Activities.

(a) Joint Operating Agreements. Following the ruling in *Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex. App.--San Antonio 1989, *no writ*), oil operators were successful in having joint operating agreements excluded from the Oilfield Anti- Indemnity Statute and in creating a legislative exception to the court-created express negligence test. Section 127.002(c) adopted in 1991 (Vernon 1997) provides:

> (c) The legislature finds that joint operating agreement provisions for the sharing of costs or losses arising from joint activities, including costs or losses attributable to the negligent acts or omissions of any party conducting the joint activity:
>
> (1) are commonly understood, accepted, and desired by the parties to joint operating agreements;
> (2) encourage mineral development;
> (3) are not against the public policy of this state; and
> (4) are enforceable unless those costs or losses are expressly excluded by written agreement.

Prior to the adoption of this amendment, great concern was expressed among oil operators that the standard provisions exculpating and indemnifying the operator by the non-operators, contained in the model form joint operating agreement published by the American Association of Petroleum Landmen ("**A.A.P.L.**"), would fail the express negligence test. The A.A.P.L. form provides that the operator, in its capacity as operator, is to have no liability to the other parties for losses or liabilities, unless such losses or liabilities result from the gross negligence or willful misconduct of the operator. The A.A.P.L. model form provides that costs attributable to the negligence of the operator are to be borne and paid by each party according to its interest. Even though the A.A.P.L. form was revised in 1989, these provisions dealing with release and indemnification of the operator were not revised to bring the form into compliance with the Texas express negligence rule. A. Derman, The New and Improved 1989 Joint Operating Agreement: A Working Manual, NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW SECTION, MONOGRAPH SERIES No. 15. A.A.P.L. Form 610 1989 Model Form Operating Agreement; A.A.P.L. Form 610 1982 Model Form Operating Agreement; A.A.P.L. Form 610 1977 Model Form Operating Agreement; and A.A.P.L. Form 610 1956 Model Form Operating Agreement. Darden, In Support of the Operator Liability Provision of the A.A.P.L. Model Form Joint Operating Agreement: A Pre-Emptive Strike Against Possible Claims Made Under Page Petroleum, Inc. v. Dresser Industries, Inc., 18 TEX. ST. B. SEC. REP. OIL GAS & MIN. L. 20 (1994). However, there still may exist an issue as to whether these exculpatory and indemnity provisions of the Joint Operating Agreement must still meet the fair notice requirements, and if they do not, then whether they are enforceable. White, Winding Your Way Through the Texas Oilfield Anti Indemnity Statute, the Fair Notice Requirements and Other Indemnity Related Issues, 37 S. TEX. L. REV. 161, 176 77 (1996).

(b) Gas Pipelines. "Well or mine service" is defined in § 127.001(4). Gas pipelines and "fixed associated facilities" are expressly excluded from the prohibitions of the statute by being excluded from the definition of "well or mine service." Section 127.001(4)(B).

(3) Permitted Indemnity: "Indemnity Supported by Insurance". Section 127.005 TEX. CIV. PRAC. & REM. CODE ANN. permits specified forms of indemnity if supported by specifically permitted levels of insurance. Section 127.005 as amended in 1995 provides

> (a) This Chapter does not apply to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to the limitations specified in Subsection (b) or (c).
>
> (b) With respect to a *mutual indemnity obligation* (defined below), the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit as to the other party as indemnitee.
>
> (c) With respect to a *unilateral indemnity obligation* (defined below), the amount of insurance required may not exceed $500,000.

Section 127.001 contains the following definitions of "mutual indemnity obligation" and "unilateral indemnity obligation":

> (3) "Mutual indemnity obligation" means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which the parties agree to indemnify each other and each other's contractors and their employees against loss, liability, or damages arising in connection with bodily injury, death, and damage to property of the respective employees, contractors or their employees, and invitees of each party arising out of or resulting from the performance of the agreement. ….
>
> (6) "Unilateral indemnity obligation" means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee with respect to claims for personal injury or death to the indemnitor's employees or agents or to the employees or agents of the indemnitor's contractors but in which the indemnitee does not make a reciprocal indemnity to the indemnitor.

The Fifth Circuit in *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992) held that under the Texas Oilfield Anti-Indemnity Act, an indemnitee may collect indemnity up to the amount of insurance *actually obtained* by the indemnitor (in this case the indemnitor had $10,000,000 insurance coverage even though the Texas Oilfield Anti-Indemnity Act prohibited *requiring* the indemnitor to carry in excess of $300,000 in insurance). In this case, Union Texas Petroleum Corporation ("*UTP*") hired a drilling vessel from Sonat Offshore Drilling ("*Sonat*") to drill a well on the outer continental shelf off the coast of Louisiana. UTP also entered into an agreement with Frank's Casing Crew and Rental Tools, Inc. ("*Frank's*") to perform casing and other services on board the drilling vessel. Campbell, an employee of Frank's, was injured while transferring to Sonat's drilling vessel from a supply boat hired by UTP. After Campbell sued UTP and Sonat, UTP filed a third-party complaint against Frank's and Frank's insurers seeking indemnity pursuant to the indemnity provision contained in the purchase order between UTP and Frank's.

The "indemnity supported by insurance" exception to the prohibition against indemnities does not apply to agreements with respect to the purchase, gathering, storage, or transportation of oil, gas, brine water, fresh water, produced water, petroleum products, or other liquid commodities. In other words, no indemnity against one's own negligence is allowed in these instances. Section 127.005(a) (Vernon Supp. 2002). Only Texas, Louisiana, New Mexico and Wyoming have anti-indemnity statutes directed particularly at oil and gas operations. *See generally* Battiato & Gilbertson, *The Changing Insurance Market-- Who Will Bear the Risks?*, 32 ROCKY MTN. MIN. L. INST. § 17.04 at 17- 16 (1986); Owen L. Anderson, *The Anatomy of an Oil and Gas Drilling Contract*, 25 TULSA L. J. 359, 421-31 (1990).

[172] **Contract Interpretation Rules Apply – Intent.** *Ohio Oil Co. v. Smith*, 365 S.W.2d 621, 627 (Tex. 1963); *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 637 (Tex. 1963); *Mitchell's, Inc. v. Friedman*, 303 S.W.2d 775, 777-78 (Tex. 1957); and *Sun Oil Co. v. Renshaw Well Service, Inc.*, 571 S.W.2d 64, 68 (Tex. Civ. App.-Tyler 1978, *writ ref'd n.r.e.*).

[173] **Contract Interpretation Rules Apply – *Strictissimi Juris* – Strict Construction.** *Liberty Steel Co. v. Guardian Title Co. of Houston, Inc.*, 713 S.W.2d 358, 360 (Tex. App.-Dallas 1986, *no writ*); *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).

[174] "**Negligence" includes All Shades of Negligence.** *Webb v. Lawson-Avila Const., Inc.*, 911 S.W.2d 457 (Tex. App. - San Antonio 1995, *writ dism'd by agreement*).

[175] **Fair Notice – Conspicuous – Appearance and Placement.**

Provisions Held Conspicuous: *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.*). *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. *Banzhaf v. ADT Sec. Sys.*, 28 S.W.3d 180 (Tex. App.– Eastland [11th Dist.] 2000, *writ ref'd*) held 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 is the directive: "**ATTENTION IS DIRECTED TO THE WARRANTY, LIMIT OF LIABILITY AND OTHER CONDITIONS ON REVERSE SIDE.**"

Provisions Held Not Conspicuous: *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." Indemnity provision was held not to meet the conspicuousness requirement in *U.S. Rentals, Inc. v. Mundy Service Corp.*, 901 S.W.2d 789 (Tex. App.—Houston [14th Dist.] 1995, *writ denied*) when it was buried on the back of a rental contract with all provisions printed in the same respective type and sizes, and the heading did not alert the reader that it created an indemnity obligation ("LIABILITY FOR DAMAGE TO EQUIPMENT, PERSONS AND PROPERTY"). The Texas Supreme Court in *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex. 1997) found that a release was not conspicuous when it was set in a type font too small to read even though the heading was in larger font (heading was 4 point font and the terms of the release were in smaller font); the release was outlined in a box; the heading was all caps, in bold type and read "**RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT**"; and above the signature line appeared the caption in all caps, bold-faced centered and underlined type the following statement "**I UNDERSTAND MOTORCYCLE RACING IS DANGEROUS. YES, I HAVE READ THIS RELEASE.**" The court did not accept the argument that the release was conspicuous because of its small contrasting type. The court of appeals in *Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503 (Tex. App.–Texarkana 1999, *writ denied*) held that the indemnity provision was not conspicuous as it was in the same size and type and without a separate heading identifying the paragraph as an indemnity in a 22 paragraph, 13 page document. The court was not persuaded that the conspicuousness requirement applied only to "**forms**." The court of appeals in *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex. App.– Houston [14th Dist.] 2000, *writ ref'd*) determined that an indemnity was not conspicuous if it was printed in same the size and type as the balance of a 1 page document.

[176] **Actual Notice.** *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. Certainteed 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 [14th Dist.] 2000, *writ den'd*) finding that an 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. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509 (Tex. 1993); *Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503 (Tex. App. – Texarkana 1999, *no writ*). *Ayers Welding Co., Inc. v. Conoco, Inc.*, 243 S.W.3d 177, 181 n. 3 (Tex. App. Hou. [14th Dist.] 2007, *pet. ref'd*) "The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement."; and In United States for the *Use and Benefit of E. J. Smith Construction, Co., LLC v. Travelers Casualty & Surety Co.* 2016 WL 1030154, 1 (W .D. Tex. 2016), the district court found that the fair notice requirements imposed by the common law were inapplicable because the indemnitor had actual knowledge of the indemnity agreement. The court also found, however, that even if the indemnitor had not possessed actual knowledge of the indemnification clause that the clause satisfied the express negligence doctrine.

[177] **Failure to Read Not an Excuse.** *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).

[178] **Actual Notice – Procedural Fact.** See *Sydlik v. REEII, Inc.*, 195 S.W.3d 329, 333 (Tex. App. – Hou. [14th Dist.] 2006, *no pet.*).

[179] **Actual Notice – Substantive Law Issue.** *E.g., Silsbee Hosp., Inc. v. George*, 163 S.W.3d 284 (Tex. App. – Beaumont 2005, pet. ref'd).

[180] **The "Clear and Unequivocal" Test.** Before Texas adopted the express negligence doctrine in *Ethyl*, it followed the "clear and unequivocal" test, which says that an intent to indemnify a party against its own negligence must be stated in clear and unequivocal language. *Joe Adams and Son v. McCann Constr. Co.*, 475 S.W.2d 721, 723 (Tex. 1971); *Eastman Kodak Co. v. Exxon Corp*, 603 S.W.2d 208, 211 (Tex.

1980). Some states continue to follow this test. *See, e.g., Gulf Oil Corp. v. Atlantic C.L. R. Co.*, 196 So.2d 456 (Fla. App.2d 1967); *Washington Elem. School Dist. No. 6 v. Baglino Corp.*, 817 P.2d 3 (Ariz. 1991); *Arkansas Craft Corp v. Boyed Sanders Constr.*, 764 S.W.2d 452 (Ark. 1989); *Royal Ins. Co. v. Whitaker Constr. Corp.*, 824 So.2d 747 (Ala. 2002). Because these doctrines exist in so many jurisdictions and have the potential to render indemnity provisions unenforceable, it is prudent both to be aware of and to draft in accordance with the doctrines to best convey the intention of the parties.

181 **Prior Common Law Approach.** Prior to 1971: Generally-Worded and Broad Statements of Indemnity. Prior to 1971, a broad general statement regarding indemnity for any injury or death of any persons or damage to property resulting from the use of equipment was effective against the Protecting Party. *James Stewart & Co. v. Mobley*, 282 S.W.2d 290 (Tex. Civ. App. - Dallas 1955, *writ ref'd*). Under this rule, an indemnity contract was sufficiently worded to pass liability to the Protecting Party when it was sufficiently broad as to cover the negligence of the indemnified person and it was clear that the intent was to do so. *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963); *Alamo Lumber Co. v. Warren Petroleum Corp.*, 316 F.2d 287, 290-91 (5th Cir. 1963).

1971 – 1987 Broad Statements No Longer Sufficient Unless Obligation Expressed in Clear and Unequivocal Terms. In 1971, the Texas Supreme Court made a significant change in indemnity contract law. Broad, general indemnity provisions would no longer suffice to protect a Protected Party against the consequences of its own negligence. In *Joe Adams & Son v. McCann Const. Co.*, 475 S.W.2d 721 (Tex. 1971), the Texas Supreme Court held that an indemnity agreement will not protect the Protected Party against the consequences of his own negligence unless the obligation was expressed in unequivocal terms. In holding that the indemnity agreement in question did not protect the indemnified person, the court stated:

> It is not necessary for the parties to say, in so many words, that they intend to save the indemnitee harmless from liability for his own wrongs, but it is necessary for that intention to clearly appear when all the provisions of the contract are considered in light of the circumstances surrounding its execution.

The indemnity provision construed by the court is as follows:

Insured Contract Provision:

The Contractor (Adams) shall effectually secure and protect its work and shall bear and be liable for all loss or damages of any kind which may happen to the work or any materials to be incorporated therein at any time prior to the final completion and acceptance thereof. McCann Construction ... shall not be responsible for any damage done to the work or property of the Contractor, unless such damage shall be caused by the direct negligence of McCann Construction. ...

The Contractor shall protect, indemnify and save McCann Construction ... and Owner harmless from any and all claims, suits, and actions of any kind or description, for damage or injuries to persons or property received or sustained by any party or parties through or on account of any act or in connection with the work of the Contractor or its agents or servants or subcontractors, or any default or omission of the Contractor, or its agents or servants or subcontractors in the performance of this contract, or through the use of improper or defective materials or tools or on account of injury of damage to adjacent buildings or property occasioned by work under this contract, or through failure to give the usual requisite and suitable notices to all parties, whose persons, estates or premises may be, in any way, interested in or affected by the performance of this work, and at its own cost shall defend any and all suits or actions that may be brought against McCann Construction... or Owner by reason thereof, and in the event of the failure of the Contractor to defend such suits McCann Construction... shall have the right and power to defend same and charge all costs of such defense to the Contractor or its Surety.

(Emphasis added by author.)

While the "clear and unequivocal" rule appeared to be simple and straight forward, it was not easy in its application and only a small number of indemnity provisions were judicially enforced to protect the Protected Party against its own conduct. See Scheer, *The Contractual Indemnity Provision Effective to Protect an Indemnitee Against His Own Negligence or Other Fault*, 17 TEX. TECH L. REV. 845, 856 874 (1986).

In *Fireman's Fund Insurance Co. v. Commercial Standard Indemnity Co.*, 490 S.W.2d 818 (Tex. 1972), the Texas Supreme Court established the "clear and unequivocal" standard. The majority of the court attempted to define this stricter standard:

> (w)e have, in fact, progressed toward the so-called "express negligence" rule as near as is judicially possible without adopting it. *Id*. at 822.

The court, however, failed to define the stricter standard. The indemnity provision construed by the court read as follows:

Insured Contract Provision:

All Contractors shall be responsible each for his work and every part thereof, and for all materials, tools, appliances and property of every description used in connection therewith, (in case of general contract, General Contractor assumes entire responsibility). They shall specifically and distinctly assume and do so assume all risks of damage or injury from any cause except negligence of Owner, its officers, agents and employees, to property or persons used or employed on or in connection with the work, and of all damage or injury to any persons or property wherever located, resulting from any action or operation under the contract or in connection with the work, and undertake and promise to protect and defend the Owner and Architect Engineer against all claims on account of any such damage or injury.

Id. At 821.

The court found that this broad language of "protecting ... the Owner ... against all claims" did not clearly and unequivocally indicate an intent to indemnify the owner (General Motors) from its own negligence.

182 **Express Negligence – Matter of Law.** *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 814 (Tex. 1994).

183 **Express Negligence.** The following is a discussion of various Texas court decisions determining whether the indemnity provision in an Insured Contract passed the express negligence test.

Texas Supreme Court Cases

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.

Insured Contract 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.)

In *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.

Insured Contract 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 Liability.

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:

Insured Contract 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 underling emphasis. This author's bolding.)

The court found that it was clear that "**respect of 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.

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 Texas Supreme Court found the following provision **met** the express negligence standard:

Insured Contract 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.)

The court held the language "**any negligent act of ARCO**" was sufficient to define the parties' intent.

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:

Insured Contract 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 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:

Insured Contract 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.)

The *Maxus* case is discussed below concerning the advisability of having a choice of laws provision in an indemnity agreement. The oil well drilling contract in *Maxus* failed to contain a choice of laws provision. Diamond Shamrock (n/k/a Maxus), the operator, defended Moran Bros., the contractor, against a claim filed in a Kansas court by Boydstun, an employee of a contractor of Diamond Shamrock, against Moran. The Kansas jury found that Moran Bros. was 90% liable and awarded a $3,000,000 verdict, which was thereupon reduced to $2,700,000. Diamond Shamrock then sued in Texas for a declaratory judgment to declare the indemnity invalid. In applying the balancing test set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971), the Texas Supreme Court held that Kansas law applied and under the "clear and unequivocal language " applicable to indemnities in Kansas, the indemnity was enforceable. However, the court additionally found that the indemnity provisions conformed to the public policy of Texas contained in the express negligence test. The indemnity provisions in *Maxus* are from the standard form Daywork Drilling Contract published by the International Association of Drilling Contractors.

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:

Insured Contract 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' attorney's fees in defending against Fisk's employee's suit. *Id.* at 815.

Court of Appeals Applications of *Ethyl*:

Beaumont Court of Appeals

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

Insured Contract 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.

Corpus Christi Court of Appeals

Atlantic Richfield Oil & Gas Co. v. McGuffin, 773 S.W.2d 711 (Tex. App. - Corpus Christi 1989, *writ dism'd*). *McGuffin* is an earlier court of appeals' decision upholding the language from the Daywork Drilling Contract later approved by the Texas Supreme Court in *Maxus*. In *McGuffin*, ARCO sought indemnity for the $300,000 portion of a $1,000,000 agreed judgment in the wrongful death action brought by the estate of the contractor's deceased employee as was covered by the insurance requirement imposed by the contract on the contractor. The contract required the contractor to maintain the following insurance:

Insured Contract Provision:

> 8.1 Without limiting the indemnity obligations or liabilities of Contractor or its insurers, at any and all times during the term of this agreement, Contractor agrees to carry insurance of the types and in minimum amounts as follows:
>
> ...
>
> c. Comprehensive General Liability Insurance; including contractual liability insuring the indemnity agreement as set down in the agreement with minimum limits of $300,000 applicable to bodily injury, sickness or death in any one occurrence. ...

Id. at 714. The court **upheld** the contractor's agreement to indemnify the owner and found that the indemnity language expressly covered the owner's negligence. The court found that the insurance requirement did not exceed the limits imposed on indemnity insurance contained in TEX. CIV. PRAC. & REM. CODE ANN. § 127.005 in what is known as the Texas Oilfield Anti-Indemnity Statute. The insurance did not exceed the limit so-imposed of 12 times the State's basic limits for personal injury as approved by the State Board of Insurance (12 x $25,000). [Higher limits are now permitted; *see* § 127.005.] Therefore, the contractor's indemnity was within the exception permitted by the Oilfield Anti-Indemnity Statute prohibiting indemnities in oil and gas contracts except when the indemnity is supported by liability insurance up to the permitted amount. The court found that the indemnity was enforceable up to the permitted level of insurance.

The Corpus Christi Court of Appeals in *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App. - Corpus Christi 1986, *writ ref'd n.r.e.*) held the following provision meant what it said, that the indemnified person was **not** being indemnified for its own negligence, in a case where the jury found the indemnified person (Getty) was 100% negligent.

Insured Contract Provision:

> Seller (NL Industries-the chemical supplier) shall indemnify ... Purchaser (Getty) ... from any and all losses .... Seller shall not be held responsible for any losses ... caused by the negligence of Purchaser.
>
> (Emphasis added by author.)

This provision is not quoted in the 1986 opinion (Round 1) but is set forth in the 1991 opinion (Round 2) discussed below in the portion of this Article concerning Coordinating Insurance With Indemnity Provisions.

Dallas Court of Appeals

Adams v. Spring Valley Const. Co., 728 S.W.2d 412 (Tex. App. - Dallas 1987, *writ ref'd n.r.e.*). This case involved construction of an indemnity provision in a subcontract between the general contractor and the subcontractor and in a certificate of insurance. The court held that the contract provisions, even when taken together with the insurance certificate, **did not meet** the express negligence standard. Both documents contained a provision whereby the subcontractor would indemnify the contractor for all liability arising from or out of the contractor's work on the project. The insurance certificate contained an indemnity as to liabilities "caused in whole or in part by a negligent act of the Subcontractor ... regardless

of whether it is caused in part by a party, indemnified hereunder." The court found that the indemnity provision did not cover liabilities in the event that the contractor was 100% negligent.

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 Protected Party's negligence, breach of warranty, and strict product liability:

> When purchaser (Arthur's Garage), in the ordinary court 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.
>
> (Emphasis added by author.)

This case is also discussed in this Article in connection with the enforceability of contractual limitations of liability.

Eastland Court of Appeals

In *Banzhaf v. ADT Sec. Sys.*, 28 S.W.3d 180 (Tex. App. - Eastland [11th Dist.] 2000, *writ denied*) the court of appeals **upheld** the following indemnity provision in an alarm security services contract. The court rejected Herman's argument that the identification of claims arising out of ADT's negligence as being covered by the indemnity had to be in the same sentence with the word "*indemnify.*" ADT obtained indemnity against its customer, Herman Sporting Goods, Inc., for claims made by the estate of a Herman's employee who was killed in a robbery. The alarm service purchased by Herman's was fire alarm and after-hours unauthorized entry detection services and not robbery or hostage detection services. The alarm service purchased by Herman's was designed to go on only when no employees were in the store. Herman's had declined to add the "duress code" feature to the alarm. The decedent employee's estate argued that ADT's project was defective in not having this feature as a mandatory service.

Insured Contract Provision:

> In the event any person, not a party to this agreement, shall make any claim or file any lawsuit against ADT for failure of its equipment or service in any respect, customer [Herman's] agrees to indemnify, defend, and hold ADT harmless from any and all such claims, and hold ADT harmless from any and all such claims and lawsuits including the payment of all damages, expenses, costs, and attorney's fees. The customer [Herman's] ... agrees that ADT shall be exempt from liability for loss, damage or injury due directly or indirectly to occurrences, or consequences therefrom, which the service or system is designed to detect or avert; that if ADT should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% of the annual service charge or $10,000, whichever is less ... as the exclusive remedy; and that the provisions of this paragraph shall apply if loss, damage, or injury, irrespective of cause or origin, results directly or indirectly to person or property from performance or nonperformance of obligations imposed by this contract or from ***negligence***, active or otherwise, of ADT, its agents or employees.
>
> (Emphasis added by author.)

El Paso Court of Appeals

In *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:

Insured Contract 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.)

Fort Worth Court of Appeals

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).

Insured Contract 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.)

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

Insured Contract 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.)

Houston Court of Appeals

1st District. *Monsanto Co. v. Owens-Corning Fiberglass Corp.*, 764 S.W.2d 293 (Tex. App. – Hou. [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:

Insured Contract 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.

The court in *Jobs Building Services, Inc. v. Rom, Inc.*, 846 S.W.2d 867 (Tex. App. - Houston [1st Dist.] 1992, *writ denied*) found that the following provision in a window washing subcontract with the building maintenance contractor was **not** specific enough to indemnify the contractor for its own negligence:

Insured Contract Provision:

> The Subcontractor agrees to indemnify and hold harmless the Contractor ... for (i) bodily injury, illness or death of any person; ... which ... damage is caused by the Subcontractor's negligent act or omission or by the negligent act or omission of anyone employed by the Subcontractor or for whose acts the **Contractor** or the Subcontractor **may be liable** or for which the Subcontractor is liable or responsible.
>
> (Court's italics; author's bold.)

Id. at 870.

The court in *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App. – Hou. [1st Dist.] 1995, *writ denied*), following the Texas Supreme Court's ruling in *Fisk Electric Co. v. Constructors, Inc.*, 888 S.W.2d 813 (Tex. 1994) construing a similar provision, held the following provision did **not** pass the express negligence test. A general contractor sought indemnity from a heating, ventilation, and air conditioning subcontractor for liability to a duct mechanic who was electrocuted when the duct work he was installing became electrically charged. The indemnification agreement stated that the subcontractor would indemnify the contractor for losses "arising out of or resulting from the performance of the subcontractor's work." The agreement also stated that the subcontractor owed an obligation to indemnify the general contractor to the extent that loss was "caused in whole or in part by a negligent act or omission of the subcontractor … regardless of whether it is caused in part by a party indemnified hereunder."

Insured Contract Provision:

> 11.11 Indemnification:
>
> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees 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 the Subcontractor's work under this Subcontract provided that any such claim ... to the extent caused in whole or in part by a negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone whose acts he may be liable (**the Protecting Party**), <u>regardless of whether it is caused in part by a party indemnified hereunder</u> (**the Protected Party**).
>
> (<u>Underlining</u> added by author; Identification of Protecting Party and the Protected Party added by author.)

The language referring to the Protected Party only referred to injuries "<u>whether caused in part</u>" by the Protecting Party, and <u>did not expressly state that the cause was the "negligence" of the Protected Party</u>. This type of indemnity provision is the same as is contained in the **AIA forms**. The court also noted that the next provision in the indemnity, the standard waiver of the workers' compensation bar (the "indemnification obligation ... shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under workers' or workmen's compensation acts...") was irrelevant since the indemnity was not otherwise enforceable.

<u>14th District</u>. The court in *Adams Resources Exploration Corp. v. Resource Drilling, Inc.*, 761 S.W.2d 63 (Tex. App.--Houston [14th Dist.] 1988, *writ dism'd*) found the indemnity provision **passed** the express negligence test. The indemnity language in this case is identical to the language recently reviewed by 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 (Tex. 1991) discussed above and is contained in the standard form Daywork Drilling Contract published by the International Association of Drilling Contractors.

In *DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880 (Tex. App. – Hou. [14th 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:

Insured Contract 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] ...

(Emphasis added by author.)

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.

San Antonio Court of Appeals

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:

Insured Contract 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.

(Emphasis added by author.)

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.

Texarkana Court of Appeals

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.

Insured Contract 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.

(Emphasis added by author.)

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.

Tyler Court of Appeals

In *State Department of Highways & Public Transportation v. Reynolds-Land, Inc.*, 757 S.W.2d 868, 869 (Tex. App.--Tyler 1988, *no writ*), the Tyler Court of Appeals held **unenforceable** the following indemnity provision in a highway construction contract between the State Highway Department and the contractor:

Insured Contract Provision:

The contractor (Reynolds-Land) shall save harmless the (Department) from all account of any injuries or damages sustained by any person or property in consequence of any neglect in safeguarding the work by ... (Reynolds-Land); or from any claims or amounts arising or recovered under the "Workmen's' Compensation Laws" or any other laws.

(Emphasis added by author.)

The amounts for which indemnity was sought were paid by the Department pursuant to an agreed judgment setting a negligence suit brought by the injured employee of the contractor against the Department. The contractor's workers' compensation carrier had intervened in the suit to seek subrogation against the Department for amounts it had paid to the employee. Unfortunately for the Department, the court held that the settlement amounts paid by the Department were in the nature of settlement payments on the claim against the Department for its own negligence, rather than amounts paid by it on a workers' compensation claim. The indemnity clause neither expressly covered the Department's negligence nor amounts paid by the Department to settle claims against the Department for its own negligence. Also, even though the indemnity clause expressly covers "any claims over amounts arising or recovered under the Workmen's Compensation Laws," the Department could only be liable at common law for its own negligence; and therefore, the settlement agreement could not transform the payment from a payment on account of the Department's negligence to a claim paid by it under the Workers' Compensation Act.

184 **Express Negligence Requirement Not Applicable if Protected Party Not Negligent.** *Tutle & Tutle Trucking, Inc. v. EOG Resources, Inc.*, 391 S.W.3d 240, 246 (Tex. App. - Waco 2012), rule 53.7(f) motion granted, (Dec. 27, 2012).

185 **Express Negligence Requirement Applies Only to Future Negligence.** *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724, 726 (Tex. 1989); *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987); *Fisk Electric Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813, 814 (Tex. 1994); *Spawglass, Inc. v. E. T. Services, Inc.*, 143 S.W.3d 897, 899-900 (Tex. App. – Beaumont 2004).

186 **Express Negligence Requirement and Non-Negligence Based Indemnities.** Cases holding express negligence requirement not applicable to non-negligence based indemnity actions: *English v. BGP Int'l, Inc.*, 174 S.W.3d 366, 375 (Tex. App. – Hou. [14th Dist.] 2005, *no pet.*); *Devon SFS Operating, Inc. v. First Seismic Corp.*, 2006 WL 374257 (Tex. App. – Hou. [1st Dist.); *B. R. Brick & Masonry, Inc. v. Phillips*, 2003 WL 22724752, at 2 (Tex. App. – Hou. [14th Dist.], *no pet.*).

187 **Indemnity for Strict Liability – Products Liability.** The Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) cited the following cases as examples in which the indemnity provision did not expressly identify strict products liability as an indemnified liability and therefore were not enforceable: *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; and *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.

[188] **Attorney's Fees as Indemnified Damages.** *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App. -Dallas 1999, *no writ*). The purpose of indemnification is to make the Protected Party 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. – Hou. 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. – Hou. 1959); *Barnes v. Calgon Corp.*, 872 F. Supp. 349, 353 (E. D. Tex. 1994).

[189] **Expenses Incurred in Good Faith.** *Central Surety & Ins. Corp. v. Martin*, 224 S.W.2d 773 (Tex. Civ. App. - Beaumont 1949, *writ ref'd*); *Shaw v. Massachusetts Bonding & Ins. Co.*, 373 S.W.2d 553 (Tex. Civ. App. - Dallas 1963, *no writ*).

[190] **Prior Notice Provisions.** *Stool v. J. C. Penney Co.*, 404 F.2d 562 (5th Cir. 1968).

[191] **No Common Law Indemnity for Settlements of Indemnified Liability.** *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).

[192] **Contractually Granted Settlement Rights.** *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.3d. 340 (Tex. App. – Tyler 2001, *no writ*) and *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex. App. – Hou. [14th Dist.] 2000, *writ denied*) upholding settlement authority granted by an Protecting Party to an Protected Party.

[193] **Settlement Binding.** *Engbrock v. Federal Ins. Co.*, 370 F.2d 784 (5th Cir. 1967).

[194] **Settlement Standard – Reasonable and Prudent.** *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.3d 340 (Tex. App.-Tyler 2001, *no writ*) and *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex. App. – Hou. [14th Dist.] 2000, *writ denied*); *Texas Property Casualty Ins. Gty. Ass'n v. BSA*, 947 S.W.2d 682 (Tex. App. - Austin 1997); *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475, 477 (Tex. App.--Corpus Christi 1986, *writ ref'd n.r.e.*).

[195] **Burden of Proof on Settling Protected Party.** *Aerospatiale Helicopter Corp. v. Universal Health 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).

[196] **Establishing Reasonableness.** *See Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). *Also see Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.3d 340 (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. – Hou. [14th Dist.] 2000, *writ denied*) **upheld** a settlement as being reasonable and entirely covered by the indemnity agreement even though another defendant was also released because the expert's testimony supported the trial court's finding that the settlement amount was reasonable as to the Protected Party's potential liability independent of the other released defendant's potential liability; no apportionment of the settlement amount was required.

[197] **Good Faith Requirement.** *H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 880 (Tex. App.--Corpus Christi 1996, *writ denied*).

[198] **One Recovery Rule.** *Sterling*, at 8; and *Ojeda de Toca v. Wise, 748 S.W.2d* 449 (Tex. 1988). *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 233-34, 240 (Tex. App. – Hou. [1st Dist.] 1994, *writ denied*).

[199] **"Partial Success" Covered.** Two commentators offer the following good advice at Howard and Horowitz, *Negotiating and Drafting Indemnification Provisions*, 71 TEX. B. J. 648 (Sept. 2008):

> Coverage for partial success -- defined as some resolution resulting from something less than an authoritative decision on the merits of an indemnified claim -- is often neglected when defining the scope of coverage. Texas statutes mandate payments to directors and officers if a suit is defended successfully -- on the merits or otherwise. However, indemnification provisions can provide coverage for dismissals based on procedural grounds (for example, due to the application of a statute of limitations). An indemnifying party may wish to encourage the indemnified party to seek early resolution on procedural grounds, rather than incurring additional time and expense to obtain a decision on the merits. The indemnification provision also can provide coverage regardless of whether settlement of a claim constitutes "success on the merits or otherwise." If language such as "wholly successful" is used, that may preclude partial indemnification in instances where the indemnified party achieves only partial success on the merits; whereas "to the extent successful" language may afford partial indemnification where there was partial success.

[200] **Covenant Not to Sue.** *See Garcia v. Am. Physicians Ins. Exch.*, 812 S.W.2d 25, 33 (Tex. App. - San Antonio 1991), *rev'd on other grounds*, 876 S.W.2d 842 (Tex. 1994); *Y.M.C.A. of Metro. Ft. Worth v. Commercial Standard Ins. Co.*, 552 S.W.2d 497, 595 (Tex. App. - Ft. Worth 1977), *writ ref'd n.r.e., per curium*, 563 S.W.2d 246 (Tex. 1978).

[201] **Legal Effect of a Covenant Not to Sue.** *Garcia*, 812 S.W.2d at 32-33; *Y.M.C.A.*, 552 S.W.2d at 505. *Also generally see RTC v. Northpark Joint Venture*, 958 F.2d 1313 (5th Cir. 1992) where the court rejected the argument of a guarantor that it had no liability on its guaranty because the debt guaranteed was a non-recourse liability of the note maker.

[202] **CGL Coverage "A".** Coverage A under standard form CGL policies is for loss arising out of "Bodily Injury" or "Property Damage." "**Bodily Injury**" is in such policies defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." "**Property Damage**" in such policies is defined as "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured."

[203] **Illusory Coverage.** *See* the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist*., 158 Ill. 116, 632 N.E.2d 1039 (Ill. 1994).

[204] ***Getty 1*.** Previously, in a 1986 case ("***Getty* 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.

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

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

[206] **To the Extent Permitted by Law.** This change was brought about by the wave of anti-indemnification sweeping the country and the many different manners in which the legislation is drafted. Anti-indemnity statutes in some states are silent or unclear as to whether the statute's prohibitions apply to insurance as well as indemnification. Most of ISO's additional insured endorsements provide coverage to the additional insured for negligence shared with the named insured. In those states, like Texas, where the statute expressly prohibits additional insured coverage for another party's negligence (except in specified exceptions), this language is to make clear that despite the wording extending coverage to an additional insured for its concurrent negligence (or even sole negligence), coverage applies only to the extent permitted by law.

This change permitted the use of a uniform endorsement throughout the United States in lieu of the tailored state-by-state endorsements that ISO had previously promulgated for states with varying anti-indemnity statutes.

207 **Dollar Limit Required by Contract or Agreement, Whichever is Less.** This change was made to limit the dollar limits of coverage afforded the additional insured to the lesser of the policy limits or the limit required in the underlying contract or agreement that specified additional insured coverage. For example, if the contract requires the contractor to maintain CGL limits of $1,000,000 per occurrence, but the contractor obtains coverage for $2,000,000 per occurrence, the additional insured owner in insured only to the extent of $1,000,000.

More Questions Abound

- What constitutes "the amount of insurance … required by the contract"?

- What happens in cases where the named insured/indemnitor's indemnity is not capped by a specific dollar amount, but the insurance specification provides for a specific dollar amount of coverage, and the named insured actually has greater limits? (In such case, the dollar amount of the additional insured coverage is limited to the amount specified for the liability policy, but the additional insured/indemnitee can claim against the named insured/indemnitor for amounts greater than the contract specified CGL limit. The named insured/indemnitor can then make a claim against its CGL policy for the limits within its actual policy. But what if the named insured/indemnitor does not pursue its claim on its CGL policy as it has no assets?) A court addressing a manuscripted additional insured endorsement held the limits for the additional insured were capped at the amount specified in the contract as the dollar coverage amount. *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140 (N.Y. App. Div. [1st Dept.] 2008).

- What if the contract calls for coverage to be provided in an amount "**of at least**" or "**shall be no less than**" a stated amount? See *Mobil Oil Corp. v. Maryland Cas. Co.*, 681 N.E.2d 552 (1997) - court held that the additional insured's coverage under the CGL policy and excess layer policies was not limited by contract language that the insured was required to procure "at least $250,000" of coverage, but extended to the full face value of the policies. Other cases construing similar language are cited at footnote 8 to *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. [Tex.] 1991] in which the court found that an underlying contract's "with limits of not less than" a specified amount did not limit the additional insured's coverage to the contractually specified "not less than amount" and also held the primary insurer was not entitled to subrogate as to its insured against the excess insurer for a claim settled by the primary insurer above the "not less than amount" but below the actual limits of the primary coverage.

208 ***In re Deepwater Horizon* - Fifth Circuit.** *In re Deepwater Horizon*, 728 F.3d 491, 500 (5th Cir. 2013) certified questions to the Texas Supreme Court, including the following question:

1. Whether *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008) compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?

2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, 256 S.W.3d at 668, given the facts of this case?

This certified questions came after the Fifth Circuit withdrew its prior opinion, 710 F.3d 338 (5th Cir. 2013), where it held that BP was an additional insured covered by $750,000,000 in primary and umbrella policies.

209 **Incorporation by Reference of Limitations into Insurance Coverage for Protected Party – "Following Form": Excess-Insurance.** The Texas Supreme Court in *In re Deepwater Horizon*, cites the discussion of following form excess-insurance policies *ATOFINA*, 256 S.W.3d 664 in support of its finding in *In re Deepwater Horizon* that insurance coverage can be limited by incorporating extrinsic documents to limit coverage. Following form excess-insurance policies incorporate as limitations on the scope of coverage afforded by the excess insurance policy the scope of coverage of scheduled underlying liability policies.

210 **Incorporation by Reference of Limitations in an Extrinsic Document into Insurance Coverage for Protected Party – Car Rental Agreements.** The Texas Supreme Court in *In re Deepwater Horizon* identifies the rental agreement reviewed in *Urrutia v. Decker*, 992 S.W.2d 440, 441, 443 (Tex. 1999) as an example of an insurance policy which incorporates the limits of an extrinsic document to limit the scope of insurance afforded the protected party. The court *In re Deepwater Horizon* noted that the court does not require "magic" words to incorporate a restriction from another contract into an insurance policy; "rather, it is enough that the policy clearly manifests an intent to include the contract as part of the policy." The *Urrutia* court found that an auto rental agreement, which called for liability insurance to be afforded the renter by the rental agency of a specified amount, was effectively "written into" the rental agency's master insurance policy by virtue of endorsement language extending additional-insured status to the rental agency's customers "to the extent of liability agreed to under the [rental agreement]".

CHAPTER 3. INSURANCE

211 **Owned, Rented and Occupied Property Exclusions from CGL Coverage.** See Exclusion 2.j(1) of the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[212] **Personal Property in Insured's Care, Custody or Controlled Exclusion.** See Exclusion 2.j(4) of the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[213] **Named Insureds.** The Declarations Page of a liability policy names the person or organization who is the insured and such person or organization is the "**named insured**". If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the first named insured. See ISO Commercial General Liability Declarations (aka the "**Declarations Page**") in Chapter 5 Forms and Commentary.

[214] **Automatic Insureds**. Additionally, the liability policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy on which an organization is the named insured, may provide that the organization's employees are automatically covered and are automatic insureds. The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; partners and joint venturers in a named insured partnership or joint venture; members and managers of a named insured limited liability company; officers, directors, and stockholders of a named insured corporation or other named insured organization; trustees of a named insured trust; employees and volunteer workers of the named insured business; the named insured's real estate manager; any person having proper temporary custody of a deceased named insured's property; the deceased named insured's legal representative; and newly acquired or formed organizations.

[215] **Additional Insureds.** An "**additional insured**" is a person other than the named insured who is protected under the terms of the contract. Usually, additional insureds are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself. The reason for including another person might be to protect the other person because of the named insured's close relationship with that person or to comply with a contractual obligation that requires the named insured to do so (*e.g.*, owner of property leased by the named insured-landlord). Under a CGL policy many types of persons or organizations may be added by endorsement as an additional insured, upon approval of the insurer. Many liability insurers issue blanket endorsements specifying certain parties that are "automatic additional insureds" under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. A common error in liability insurance specifications is to specify that a party is to be added to the named insured's policy as an "**additional named insured**". Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. See samples of the most commonly issued ISO additional insured endorsement forms to the ISO CGL policy in Chapter 5 Forms and Commentary.

[216] **ISO Definition of an "Occurrence".** The ISO CGL policy defines an "**occurrence**" in Section V – Definitions to the ISO Commercial General Liability Form in Chapter 5 Forms and Commentary as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

[217] **Indemnity for Defense.** See the Insuring Agreements for Coverages A and B in the ISO Commercial General Liability Coverage Form Chapter 5 Forms and Commentary providing

> We will have the right and **duty to defend** the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> **(1)** The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and
>
> **(2)** Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B.** (Emphasis added by author.)

[218] **ISO Forms.** See the ISO Commercial General Liability Declarations and the ISO Commercial General Liability Coverage Form Chapter 5 Forms and Commentary.

[219] **Declarations Page.** See the ISO Commercial General Liability Declarations in Chapter 5 Forms and Commentary.

[220] **Commercial General Liability Form.** See the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[221] **Bodily Injury.** "**Bodily Injury**" means "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." See definition at Section V – Definitions 3. "bodily injury" to the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[222] **Property Damage.** "**Property Damage**" means "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." See definition at Section V – Definitions 17. "property damage" to the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[223] **Section I - Coverage A - Insuring Agreement – An Occurrence Policy.** See the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary setting out the Insuring Agreement for Coverage A. It provides in part "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…." and further states in part "This insurance applies to "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; (2) The "bodily injury" or "property damage" occurs during the policy period…."

[224] **Section I - Coverage A - Exclusions.** See the Section I, Par. 2. Exclusions to the ISO Commercial General Liability Coverage Form Chapter 5 Forms and Commentary setting out the following exclusions from coverage for the named insured's liability for bodily injury and property damage arising out of: (a) Expected or Intended Injury, (b) Contractual Liability, (c) Liquor Liability, (d) Workers' Compensation And Similar Law, (e) Employer's Liability, (f) Pollution, (g) Aircraft, Auto Or Watercraft, (h) Mobile Equipment, (i) War, (j) Damage to Property, (k) Damage To Your Product, (l) Damage to Your Work, (m) Damage to Impaired Property Or Property Not Physically Injured, (n) Recall of Products, Work Or Impaired Property, (o) Personal and Advertising Injury, (p) Electronic Data, (q) Recording and Distribution Of Material Or Information in Violation of Law.

[225] **Section I - Coverage B – Personal and Advertising Injury Liability.** See the Insuring Agreement at Par. 1 to Section I – Coverage B Personal and Advertising Injury Liability in Chapter 5 Forms and Commentary. See Section V – Definitions, Par. 14 at p. 114 of **Insurance** defining "**Personal and advertising injury**" as injury, including consequential bodily injury, arising out of one or more of the following offenses: (a) false arrest, detention or imprisonment; (b) malicious prosecution; (c) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (d) oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; (e) oral or written publication, in any manner, of material that violates a person's right of privacy; (f) the use of another's advertising idea in the insured's advertisement; or (g) infringing upon another's copyright, trade dress or slogan in the insured's advertisement.

[226] **Section I - Coverage C – Medical Payments.** "**Medical Payments**" is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured's operations. See the Insuring Agreement at Par. 1 to Coverage C Medical Payments Chapter 5 Forms and Commentary.

[227] **Section II – Who Is An Insured.** See Section II – Who is an Insured to the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[228] **Section III – Limits of Insurance.** See Section III – Limits of Insurance to the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[229] **Section IV – Commercial General Liability Conditions.** See Section IV – Commercial General Liability Conditions to the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[230] **Section IV – Definitions.** See Section V – Definitions to the ISO Commercial General Liability Coverage Form in Chapter 5 Forms and Commentary.

[231] **Amendments and Endorsements.** See the forms of Amendments and Endorsements in Chapter 5 Forms and Commentary.

[232] **Contractual Liability Insurance.** See the ISO Commercial General Liability Coverage Form, Section I – Coverages, Coverage A, Par. 2 Exclusions, Par. **2.b** Contractual Liability in Chapter 5 Forms and Commentary. "**Contractual Liability Insurance**" is an "exception" to an "exclusion" from coverage.

The exclusion provides:

> **2. Exclusions.** This insurance does **not** apply to:
>
> **b. Contractual Liability**
>
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This **exclusion** does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "**Insured Contract**", provided the "**Bodily Injury**" or "**Property Damage**" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
>
> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
>
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. (Emphasis added by author.)

[233] **Insured Contracts.** An "**Insured Contract**" is defined in the standard CGL policy as:

> **9.** "**Insured contract**" means:
>
> a. A contract for a **lease** of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
>
> b. A sidetrack agreement;
>
> c. Any **easement** or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
>
> d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
>
> e. An elevator maintenance agreement;
>
> **f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work 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. (Emphasis added by author.)

Also see ISO CG 21 39 Contractual Liability Limitation (form attached to this Article), which when added to the standard CGL policy by endorsement deletes "**f**" altogether from the definition of an insured contract; and discussion in this Chapter 3 at **II.A.11** *Exclusions May Be Invisible*.

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

[235] **ACORD Certificates.** See the ACORD certificates attached in Chapter 5 Forms and Commentary.

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

[237] **ISO Form Numbering System.** See **Endnote 427** (ISO) to the Commentary on Insurance Forms in Chapter 5 Forms and Commentary to this Article for an explanation of the ISO form numbering system.

[238] **Pogo.** "We have met the enemy and he is us." Pogo by Walt Kelly (1913 - 1973).

[239] **Amendments to Insurance Code on Insurance Certificates.** Section 1811.052(b) of the Texas Insurance Code proves that "A person may not execute, issue, or require the issuance of a certificate of insurance for risks located in this state, unless the certificate of insurance form has been filed with and approved by the [Texas Department of Insurance]." Under Section 1811.103 of the Texas Insurance Code a standard certificate of insurance form promulgated by ACORD or ISO is deemed approved when filed with the Texas Department of Insurance, unless the from violates certain parameters contained in Chapter 1811 of the Texas Insurance Code. Any certificate in violation of Texas Insurance Code

Chapter 1811 "is void and has no effect." Section 1811.103 prohibits any alteration or modification of a certificate of insurance form approved by the Texas Department of Insurance. Section 1811.051 forbids an agent from issuing a certificate of insurance that alters, amends, or extends the coverage or terms and conditions provided by the referenced insurance policy. Section 1811.154 provides "A certificate of insurance may not contain a reference to a legal or insurance requirement contained in a contract other than the underlying contract of insurance, including a contract for construction or services."

[240] **Not Reasonable to Rely Upon an ACORD Certificate.** Macbeth, "It is a tale, told by an idiot, full of sound and fury, signifying nothing." W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

[241] **Fictitious Insured Syndrome.** An amazingly common problem in the insurance industry is the issuance by the Producer of a certificate of insurance certifying to a party to be protected that it is an additional insured on the protecting-party's insurance, but then its failure to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company refuses to provide coverage. As observed by one commentator:

> Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This practice may not provide additional insured status and, thus is sometimes called the "fictitious insured syndrome." A certificate representing that there is additional insured coverage would be false, but the holder may not be aware of that fact. Because of the disclaimers saying that the certificate conveys no rights upon the holder other than what are granted in the underlying policy, courts usually conclude that the holder is out of luck in this situation …. Sometimes this problem stems from a lack of communication. The insurance agent, for example may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the additional insured later seeks protection, the insurer denies such protection, shifting the blame elsewhere.

The ADDITIONAL INSURED BOOK 5th Ed., Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance pp. 361-362 (International Risk Management Institute, Inc. www.IRMI.com 2004).

[242] **Contractual Liability Coverage – An Exception to an Exclusion From Coverage.** See **Endnote 453** (Contractual Liability Coverage – An Exception to an Exclusion From Coverage) in the Commentary on Insurance Forms.

[243] **Commercial General Liability Insurance (CGL).** See **Endnote 447** (Commercial General Liability Insurance (CGL) in Chapter 5 Forms and Commentary.

[244] **Separation of Insureds.** See **Endnote 454** (Separation of Insureds) in Chapter 5 Forms and Commentary.

[245] **Products-Completed Operations.** See **Endnote 495** (Products-Completed Operations) in Chapter 5 Forms and Commentary.

[246] **Notice of Nonrenewal to Only to First Named Insured in ISO CGL Policy.** See in Chapter 5 Forms and Commentary**,** Section IV – Common Policy Conditions, Par. 9 When We Do Not Renew providing that the CGL policy issuer is to give notice of nonrenewal only to the first Named Insured.

[247] **Notice Only to First Named Insured in ISO Property Policy.** See **Par. A** Cancellation in the ISO IL 00 17 11 98 Common Policy Conditions attached in Chapter 5 Forms and Commentary setting out the notices to be given by the insurer to the First Named Insured. See **Endnote 441** in Chapter 5 Forms and Commentary for a discussion of the change in 2008 to the ACORD Certificate of Insurance deleting the statement that the insurer is to endeavor to give notice of policy cancellation to the certificate holder.

[248] **No Notice to Landlord.** See ISO **CP 12 18 06 07** Loss Payable Provisions and ISO **CP 12 19 06 07** Additional Insured – Building Owner attached in Chapter 5 Forms and Commentary.

[249] **The Risk of Failing to Confirm Insured Status.** If you want to find out how bad it can be when you do not insist on confirming the issuance of the requisite additional insured and notice of cancellation endorsements to the tenant's property policy, read *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5th Cir. – Tex.) – landlord of the Taste of Katy restaurant failed to obtain endorsements on its tenant's property policy designating it as an additional insured and the insurer's agreement to give the landlord notice of policy cancellation. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found, "Nothing

in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". The landlord sustained a catastrophic uninsured loss.

[250] **Texas: Better Than Most.** The Texas Department of Insurance ("**TDI**") currently permits a "notice of cancellation or material change" endorsement. See ISO **CG 02 05 12 04** Texas Changes – Amendment of Cancellation Provisions or Coverage Change. TDI has not defined what constitutes a "**material change**".

[251] **Contractual Liability Coverage.** See **Endnote 453** (Contractual Liability Coverage – An Exception to an Exclusion From Coverage) in the Commentary to Forms in Chapter 5 Forms and Commentary for the ISO CGL policy provision granting contractual liability coverage for bodily injury and property damage to the policy's Named Insured for its contractual indemnities.

[252] **ISO and ACORD Forms.** In Chapter 5 following the appendix of Forms is a Commentary on Insurance Forms which sets out by Endnotes a discussion of various provisions in the Forms. See **Endnote 427** in the Commentary on Insurance Forms for a discussion of ISO and the ISO insurance form numbering system. See **Endnotes 434 - 437** and **441 - 444** in Chapter 5 Forms and Commentary for a discussion of the ACORD certificate forms. Many insurance companies utilize manuscript additional insured endorsements. A manuscript endorsement is one that an insurance company makes up, which may or may not include some ISO wording. Beware of any endorsement that includes a footer reading "Includes Copyrighted Material of Insurance Services Office, Inc. With Its Permission". All manuscript endorsements require careful scrutiny. They frequently:

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

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

[253] **Limitations.** Note, some manuscripted additional insured endorsements specify a sublimit for additional insured coverage that is less than the policy limits applicable to the Named Insured. See MALECKI ON INSURANCE, *Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (August, 2005, Vol. 14. No. 10, pp. 1-8) which reviews the following manuscripted endorsement to a CGL policy that specified on its Declaration Page a sublimit for additional insured coverage an amount less than the policy limits applicable to the Named Insured:

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

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

[254] **2013 Additional Limitations.** See this language appearing in the ISO Additional Insured Endorsements in Chapter 5 Forms and Commentary.

[255] **To the Extent Permitted by Law.** This change was brought about by the wave of anti-indemnification sweeping the country and the many different manners in which the legislation is drafted. Anti-indemnity statutes in some states are silent or unclear as to whether the statute's prohibitions apply to insurance as well as indemnification. Most of ISO's additional insured endorsements provide coverage to the additional insured for negligence shared with the named insured. In those states, like Texas, where the statute expressly prohibits additional insured coverage for another party's negligence (except in specified exceptions), this language is to make clear that despite the wording extending coverage to an additional insured for its concurrent negligence (or even sole negligence), coverage applies only to the extent permitted by law. See in Chapter 5 Forms and Commentary **Endnote 503** (Additional Insured Coverage in the Construction Context - Anti-Indemnity Statutes). This change permitted the use of a uniform endorsement throughout the United States in lieu of the tailored state-by-state endorsements that ISO had previously promulgated for states with varying anti-indemnity statutes.

[256] **Coverage Not Broader Than Required by Contract or Agreement.** This change was made to make it clear that additional insured coverage will be no broader than "required" in the underlying contract or agreement. This is to avoid giving an additional insured coverage *broader* than the coverage specified in the contract or agreement. The "required" language stresses the importance of insurance specification drafting.

Questions will abound.

- What was the parties' intent? If the additional insured endorsement is an 07 04 endorsement but the CGL policy required by the contract is an 04 13, will the endorsement be broader than the underlying policy?

- Will the adjuster have to divine the parties' intent? How will the adjuster divine the parties' intent (ask the parties, read the contract)?

- What if the insurance specifications in the contract merely state that a party is to be an additional insured, and does not specify the scope or limits of coverage?

- Even if the contract's additional insured specification specifies coverage for bodily injury and property damage, what if it does not specify additional insured coverage for otherwise covered risks (*e.g.*, fire damage legal liability coverage or medical payments or completed operations coverage?

- Does the absence of a specific requirement mean that such coverage will not be available to the additional insured? (Narrative form insurance specifications generally do not go into the detail of insurance contracts.)

- Are these questions eliminated by a contract provision that the additional insured coverage will be the broader of the minimum required by the contract or that included within the named insured's policy, or a provision in the contract that states that if the additional insured endorsement contains such "no broader" language, that it shall in no way limit the "breadth" of insurance provided to the additional insured?

- Will the court or the insurance adjuster look to the indemnity provision and its qualifications to determine the scope of additional insured coverage intended?

A common example is the following limitation contained in the AIA **A201**-2007 General Conditions indemnity language (see Appendix of Forms, **A201 § 3.18.1** (Indemnification) limiting the contractor's indemnity:

> To the fullest extent permitted by law the Contractor shall indemnify, defend and hold harmless Owner … but only to the caused by the negligent acts or omissions of the Contractor, a 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 language creates a "limited" form indemnity, since it does not involve the contractor's assumption of the owner's tort liability. Is it the intent of the parties to limit the additional insured coverage by this limitation to the indemnity? The Texas Anti-Indemnity Act, TEX. INSURANCE CODE Chapter 151 has the following significant express exceptions to the Act's elimination of broad-form indemnity: (1) bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (§ 151.103); (2) claims arising from single-family residential construction (§ 151.105(10)(A)); and (3) claims arising from construction projects insured through CIPs, controlled insured programs (§ 151.105(1)).

257 **Dollar Limit Required by Contract or Agreement, Whichever is Less.** This change was made to limit the dollar limits of coverage afforded the additional insured to the lesser of the policy limits or the limit required in the underlying contract or agreement that specified additional insured coverage. For example, if the contract requires the contractor to maintain CGL limits of $1,000,000 per occurrence, but the contractor obtains coverage for $2,000,000 per occurrence, the additional insured owner in insured only to the extent of $1,000,000.

More questions abound.

- What constitutes "the amount of insurance … required by the contract"?

- What happens in cases where the named insured/indemnitor's indemnity is not capped by a specific dollar amount, but the insurance specification provides for a specific dollar amount of coverage, and the named insured actually has greater limits? (In such case, the dollar amount of the additional insured coverage is limited to the amount specified for the liability policy, but the additional insured/indemnitee can claim against the named insured/indemnitor for amounts greater than the contract specified CGL limit. The named insured/indemnitor can then make a claim against its CGL policy for the limits within its actual policy. But what if the named insured/indemnitor does not pursue its claim on its CGL policy as it has no assets?) A court addressing a manuscripted additional insured endorsement held the limits for the additional insured were capped at the amount specified in the contract as the dollar coverage amount. *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140 (N.Y. App. Div. [1st Dept.] 2008).

- What if the contract calls for coverage to be provided in an amount "**of at least**" or "**shall be no less than**" a stated amount? See *Mobil Oil Corp. v. Maryland Cas. Co.*, 681 N.E.2d 552 (1997) - court held that the additional insured's coverage under the CGL policy and excess layer policies was not limited by contract language that the insured was required to procure "at least $250,000" of coverage, but extended to the full face value of the policies. Other cases construing similar language are cited at footnote 8 to *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. [Tex.] 1991] in which the court found that an underlying contract's "with limits of not less than" a specified amount did not limit the additional insured's coverage to the contractually specified "not less than amount" and also held the primary insurer was not entitled to subrogate as to its insured against the excess insurer for a claim settled by the primary insurer above the "not less than amount" but below the actual limits of the primary coverage.

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

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

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

[259] **What – "Caused in Whole or In Part by Your Acts or Omissions.** See in Chapter 5 Forms and Commentary at **Endnote 714** (Caused by Your Acts or Omissions) for a discussion of the origins of this coverage language and its meaning.

[260] **Scheduled Additional Insureds.** If you desire that a person or persons or classes of persons be covered as additional insureds, you need to list them in the endorsement's Schedule (*e.g.*, name the primary additional insured; list as additional insureds the additional insured's "officers, directors, employees, and its successors and assigns"; list the project manager as an additional insured; list the primary additional insured's lender as an additional insured).

[261] **ISO CG 20 11 - "Arising Out of"; "Ownership, Maintenance"; or "Use" of Premises.**

Arising Out of "Use. Coverage also appears to be broad as it covers the additional insured's liability for Injuries arising out of its "… use of that part of the premises leased to (the named insured, tenant)." It applies clearly to the landlord's vicarious liability for acts of the tenant (*i.e.*, the "**use**" of the premises).

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

Vicarious Liability Only or Landlord's Negligence. Does the ISO additional insured endorsements insure the additional insured for anything more than the vicarious liability? This question has been addressed in the context of the "arising out of" language in additional insured endorsements issued in construction matters.

Certainly to the extent a landlord has vicarious liability for the acts or omissions of its tenant, the ISO additional insured endorsement extends protection to the landlord. For example, the court in *Harbor Ins. Co. v. Lewis*, 562 F. Supp. 800, 803 (E.D. Pa. 1983) noted

> In the insurance industry, additional insured provisions have a well-established meaning. They are intended to protect parties who are not named insureds from exposure to vicarious liability for acts of the named insured. These provisions are employed in countless situations in the industry, including such simple circumstances as those involving landlord and tenant relations, where the landlord asks or requires the tenant to procure insurance for the landlord for liability resulting from the tenant's activities.

This concept was addressed by Menapace, Platto, Diemand, and Grasso in THE HANDBOOK ON ADDITIONAL INSUREDS p. 60 (ABA 2012) as follows:

> As a result of the intended limitation of coverage to vicarious liability, insurers expect to cover exposure under an additional insured provision for acts or omissions of the named insured but do not expect to have any additional coverage exposure for any independent acts or omissions of the additional insured. For this reason insurers charge a minimal premium to include additional

> insured coverage in a policy…. The majority of states, however, have broadly interpreted additional insured policy wordings to provide coverage far greater than the expected vicarious liability exposure.

And, *Id.* at 64:

> The vast majority of states do not interpret the "arising out of" wording to restrict coverage to vicarious liability. These states do not look to the intent; instead, they interpret the wording utilizing traditional contract rules of interpretation. Pursuant to the traditional contract rules of interpretation, these states find that the plain meaning of the "arising out of" is very broad or, alternatively, that it is ambiguous and, hence, requires an interpretation in favor of broad coverage for the additional insured.

[262] **ISO CG 20 11 - Arising Out of "the Premises".** This endorsement provides a blank line for the description of the "**Premises**." Care must be exercised in completing this blank. This endorsement has a major potential coverage issue. It extends coverage to the additional insured landlord for liability for bodily injury and property damage "arising out of" ownership, maintenance or use of "that part of the premises leased" to the tenant. A coverage issue may occur if the bodily injury or property damage occurs outside of the "premises" as such term is defined in the lease (for example, in the common areas maintained by the landlord or in the alley behind the project). The most common factually litigated scenario regarding this endorsement involves injuries occurring "outside" the "part" of the premises "shown in the schedule" leased to the tenant.

This issue can also take on the nuance of whether coverage is affected if the schedule designates more or less than the "part of the premises" leased to the named insured. In *General Accident, Fire and Life Assurance Corp.* v. *Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the additional insured endorsement did not cover a claim brought by the tenant's (which as the named insured) injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that this type of endorsement designates the covered location where the injury must occur, and does not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility.

Cases Finding Coverage. Some courts have found that the reference to "**premises**" is not a geographic limitation of the additional insured's coverage. Such courts have construed the endorsement's use of "arising out of" the premises as meaning that the injury or damage does not have to actually occur in the premises. These courts have applied the following rationale.

Means of Access. In *Ambrosio v. Newburgh Enlarged City School District*, 774 N.Y.S.2d 153 (App. Div.2d Dep't 2004) the court found additional insured coverage of the landlord (a school) for an injured invitee of a one-day tenant (a kennel club). The invitee was injured on a raised sidewalk outside the front entrance to the school while on the invitee was on her way from a hospitality room in the school to the dog show on the school's grounds. The court found that the school district [the landlord] was entitled to coverage because

> [a]lthough the sidewalk where the injured plaintiff fell was not specifically named in the endorsement as leased premises, its use was incidental to the covered premises as a means of getting from the rooms within the School to the fields where the dog show was being held.

"But For" Test. Some courts follow the "but for" test, additional insured coverage exists, if the accident would not have occurred but for the tenant's use of the leased premises. In *Travelers Prop. Cas. Co. of Am. v. Farmers Exchange*, 240 P.3d 521, 523-24 (Colo. Ct. App. 2010) the court held that the "but for" test was not met as to an injury in a restaurant's parking lot. The court found

> [Visiting the restaurant] was not integrally related to her injury at the time of the accident. Her visit to the restaurant did not expose her to any increased risk of falling in the parking lot. It was not necessary for her to visit the restaurant in order to come in contact with the ice hazard….she could have visited another store, and never visited the restaurant, yet still have walked into the parking lot, encountered the ice hazard, and fallen. Moreover, the customer could have avoided the ice by taking a different path from the restaurant to her car. Thus, her visit to tenant's premises was not the "but-for" cause of injury…. While it may be true that she would not have visited the shopping center if she had not gone to eat at the restaurant, that circumstance alone is insufficient to trigger coverage…. The facts presented here do not indicate an unbroken causal chain between customer's use of the restaurant and her injury. Her fall did not occur inside the restaurant or immediately outside it. Nor was there any allegation that the restaurant contributed to the icy conditions in the parking lot. Maintenance of the common areas was the sole responsibility of [the landlord].

The court in *IMT Ins. v. West Bend Mutual Ins. Co.*, 2007 WL 4191933 (Ia. Ct. App. 2007) upheld coverage for the additional insured landlord under the "but for" test for injuries to a fitness club patron that occurred on the sidewalk leading from the parking lot to the club. The court found that the injuries

> appear to have arisen from the operation and use of the leased premises, since they would not have been sustained "but for" her plan to enter the club.

Also see *Liberty Village Associates v. West America Ins. Co.*, 308 N. J. Super. 393 (N.J. App. App. Div. 1998).

"Nexus" Test. Other courts have found coverage if a substantial nexus exists between the location of the injury outside of the premises and the leased premises. The court in *Franklin Mut. Ins. Co. v. Security Indem. Ins. Co.*, 275 N.J. Super. 335 (N.J. App. Div. 1994) found additional insured coverage for the landlord on tenant's liability policy as to an injury outside of the premises. The court stated

> The key phrase "arising out of the ... use" must be interpreted or construed in a broad and comprehensive sense to mean "originating from the use of" or "growing out of the use of" the [leased premises]. Thus, there need be shown only a substantial nexus between the occurrence and the use of the leased premises in order for the coverage to attach. The inquiry, therefore, is whether the occurrence which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the leased premises and, thus, a risk against which they may reasonably expect those insured under the policy would be protected.

Cases Finding No Coverage. However, some courts have placed a literal meaning on the "premises" and have required the injury to occur in the premises leased to a tenant.

Sidewalk in Common Area. In *Gillis v. Demarkles*, 8 Mass. L. Rep. 271 (Super. Ct. 1998) the court found that the additional insured coverage of a landlord on the tenant's policy did not insure the landlord for an injury to a tenant's customer occurring on the sidewalk in the shopping center's common area. The court found that the injury did not arise out of the "use" of the leased premise, and held

> This clear language, reasonably interpreted, limits [the insurer's] coverage of [the landlord] to occurrences that took place on the leased premises. Any other interpretation is either unreasonably broad, arbitrary, or ambiguous. If, as [the landlord] contends, this provision gives coverage to accidents that occur outside the leased premises as long as the accident arose out of the business use of the premises, then there is no geographic limit to this provision; the insurer would just as surely be liable for a customer's fall that occurred at the far end of the parking lot, or across the street near her parked car, or on her way home. If one were to attempt to avoid this overbreadth by setting geographic limits, one would need either to be arbitrary (the common area outside the store) or ambiguous (the are immediately outside the front door).

The court also considered other factors. The court noted

> an objectively reasonable insured would reasonably have understood that there were sound business reasons for the Endorsement to limit coverage for the landlord to acts occurring within the leased premises, and reasonably would have understood the language of that Endorsement to fulfill those business reasons. It makes good sense, especially in the context of a shopping center, for there to be clear lines as to who is insuring what risk, so that all foreseeable risks are covered by insurance and premiums are not needlessly increased by redundant coverage. It also make good sense for the entity responsible for the maintenance of a property also to be responsible for insuring against risks resulting from the absence of proper maintenance of that property. It is not surprising that [the landlord] and [the tenant] followed these basic principles in allocating insurance for the shopping center: [the landlord] maintained and insured the common areas, [the tenant] to add it as an additional insured on its Policy to guard against vicarious liability, which [the tenant] could do at no additional cost. These clear lines are lost if one interprets the Additional Insured Endorsement to cover risks beyond the geographic scope of the leased premises. Such an interpretation would mean either that [the landlord] and [the tenant] both purchased insurance to cover some of the same risk …. In short, clear lines of insurance coverage make good business sense and only one interpretation permits these lines to be drawn clearly. Both of these businesses reasonably should have understood that.

The court in *Holmes v. Kimco Realty Corp.*, 598 F.3d 115 (3d Cir. 2010) offered the following analysis:

> While a Lowe's customer will undoubtedly park as close as possible to that store, he could park anywhere in the lot…. There is not one "defined route" from the lot to the store. [Citation omitted.] Therefore, while a reasonable invitee to the Shopping Center would expect safe passage from the parking lot to any of the stores benefitting from the lot, the invitee would not reasonably expect one tenant to be responsible for maintaining the entire lot…. While … Lowe's and the other tenants are located in stand-alone buildings instead of interconnected stores, this fact does not negate the shared nature of the parking lot.
>
> It is true both that Lowe's derives a benefit from the parking lot and that the imposition of a duty would incentivize Lowe's to prevent dangerous conditions. But countervailing policy considerations weigh more heavily against imposition of a duty. To oblige tenants to maintain common areas would result in substantially increased costs with little added benefit. Landlords already have great incentive to keep the parking areas of their shopping centers free of snow, ice, and other hazards. A well-maintained parking lot induces shoppers to patronize the center and motivates tenants to pay their common area maintenance fees. Given the landlord's snow removal program here, the risk of not imposing a duty on Lowe's is minimal. Moreover, the imposition of a duty on the tenants would result in duplicative effort and interference with the landlord's maintenance program. It is not hard to imagine the confusion, and perhaps danger, that could ensue if snow plows and salt trucks hired by the landlord, Lowe's, Bally's Total Fitness, and Mattress Giant all attempted to maintain the parking lot at the same time. The thought of the same occurring in a shopping center with twenty or more tenants highlights the absurdity of such a shared duty.
>
> Imposition of a duty on tenants in a multi-tenant facility also would lead to uncertainty with respect to the areas of the parking lot for which each tenant is responsible. This uncertainty would encourage "shotgun" litigation… where the customer sued every store at which he had browsed or purchased an item prior to his fall.

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

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

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

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

Parking Lot. A similar conclusion was reached in *Minges Creek* v. *Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006). This case arose out of injury to a customer of a card shop who slipped in the icy parking lot of the mall in which the shop was located. The customer sued both the card shop and the mall. The lease provided that the shop was required to maintain liability insurance "with respect to the leased premises and the business operated by the tenant" and to "name landlord (i.e., the mall owner), any other parties in interest designated by landlord, and tenant as insured." The additional insured endorsement to the tenant's CGL policy provided coverage to the additional insured landlord "with respect to liability arising out of premises owned or used by you (the tenant)." The court held that the landlord was not insured against the liability by tenant's additional insured endorsement. The court viewed the lease and the additional insurance endorsement as "**inextricably intertwined**" and stated that they "should be interpreted in context with each other." The court concluded that the card shop was required by its lease to provide insured status for the mall only with respect to the "leased premises"–the limited square footage set out in the lease, 6,796 square feet of interior space as shown in the mall's site plan attached to the lease. The court found that although the parking lot was provided for the "use" of the card shop and other tenants, it was not part of the "premises" used by the card shop. The court found that the context of the lease agreement "requires that the definition of premises in the policy be coextensive with the card shop's obligation to name (the mall owner) as an additional insured." Also see *USF&G* v. *Drazic*, 877 S.W.2d 140 (Mo. 1994)-additional insured not covered for injuries to named insured tenant's employee who slipped and was injured on an icy parking lot.

Damages Originating in Other Tenant's Premises. *Associated Wholesale Grocers v. Americold Corp.*, 261 Kan. 806, 827-829 (Kan. 1997) (holding that a landlord was not insured under a tenant's additional insured endorsement for damages occurring on the tenant's premises caused by smoke from a fire on another tenant's premises.

263 **Cease to be a Tenant in the Premises.** It is likely that this exclusion does not exclude liabilities incurred by a holdover tenant, even one holding over as a tenant at sufferance or a tenant at will.

264 **Exclusion of "Structural Alteration", "New Construction" or "Demolition Operations".** The exclusionary terms "new construction," "demolition operations" and "structural alterations" are not defined in the ISO CGL policy. "**Maintenance**" may involve one or all of these activities. To the extent "maintenance" does not involve one of these three excluded activities, this endorsement likely insures against the injury occurring "in that part of the premises leased to the [tenant]". The court in *Hartford Cas. Ins. Co. v. Ribellino Family Ltd. P'ship*, 2005 WL 1006016 (E.D.N.Y. 2005) addressed determining coverage as follows:

> with respect to liability arising out of ... maintenance ... of that part of the land or premises leased to [the tenant] but not with respect to "[s]tructural alterations, new construction or demolition operations … the applicability of the policy depends on whether the work on the roof is most appropriately categorized as "maintenance" (in which case it would be covered) or "structural alterations, new construction or demolition operations" (in which case it would not be covered)…
>
> In considering the question of whether work done on a building should be considered a "structural alteration" or merely repair or maintenance, New York state courts have held that "[a] structural change or alteration is such a change as affects a vital and substantial portion of the premises, as changes its characteristic appearance, the fundamental purpose of its erection, or the uses contemplated, or, a change of such a nature as affects the very realty itself-extraordinary in scope and effect, or unusual in expenditure." … Therefore, "what will constitute a structural alteration necessarily depends upon the facts of each case and requires that the nature and extent of the proposed repair or alteration be examined in the context of and in relationship to the structure itself."

Similarly, in *Century Indem. Co. v. Hanover Ins. Co.*, 2007 WL 2742718 (D. Utah 2007) the court held that "the exclusion requires an alteration that affects a vital and substantial portion of a thing, that changes its characteristic appearance, the fundamental purpose of its erection, and the uses contemplated," that "is extraordinary in scope of expenditure," and that denotes a "substantial" "change or substitution."

[265] **Primary Liability vs. Horizontal Exhaustion.** Neither the recommended insurance spec nor the new ISO endorsement resolves the horizontal exhaustion issue which is beyond the scope of this paper. See **Endnote 455** (Primary and Noncontributing) for further discussion of the term "**primary and noncontributing**".

[266] **ISO Blanket Additional Insured Endorsements.** ISO has two forms of blanket additional insured endorsements for contractors and subcontractors: the **ISO CG 20 33 04 13** Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement With You and the **ISO CG 20 38 04 13** Additional Insured – Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement. The **ISO CG 20 38** (unlike the ISO CG 20 33) provides that the following persons are additional insureds protected by the endorsement: "Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1 above". Paragraph 1 provides that the following person is an additional insured: "Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy". FCL would have been protected if its subcontractor had its sub-subcontractor's CGL policy endorsed with an **ISO CG 20 38** instead of with an **ISO CG 20 33**! See in Chapter 5 Forms and Commentary, **ISO CG 20 33 04 13** Additional Insured – Owners, Lessees Or Contractors – Automatic Status When Required in Construction Contract With You; and **ISO CG 20 38 04 13** Additional Insured – Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement.

[267] **Fifth Circuit.** *In re Deepwater Horizon*, 728 F.3d 491, 500 (5th Cir. 2013) certified questions to the Texas Supreme Court, including the following question:

> Whether *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008) compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?

This certified question came after the Fifth Circuit withdrew its prior opinion 710 F.3d 338 (5th Cir. 2013) where it held that BP was an additional insured covered by $750,000,000 in primary and umbrella policies.

[268] **Inexorably Linked.** *Id.* at 9. The additional insured provision in the drilling contract obligated Transocean to acquire various types and minimum limits of insurance, including CGL, workers' compensation, and employer's liability insurance. The additional-insured provision states

> [BP], its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers, and agents shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this contract. (Emphasis added.)

The court held that "It is immediately apparent from the plain language of this provision that BP's status as an insured is **inexorably linked**, at least in some respect, to the extent of Transocean's indemnity obligations. What is in dispute is the intended breadth of the limiting language in the emphasized portion of the provision." *Id.* at 10. (emphasis added.)

[269] **The $750,000,000 Comma.** BP asserted that the court's interpretation was unreasonable because there is a comma before, but not after, the phrase "except Workers' Compensation" and further contended that a comma cannot be inserted where it does not exist (after "Workers' Compensation") when it would alter the plain meaning of the contract. See 37 No. 2 INS. LITIGATION RPTR. 2 *The $750 Million Comma? Texas Supreme Court Rules BP Is Not Entitled to Coverage for the Gulf Oil Spill as Additional Insured Under Policies Issued to Transocean* (Feb. 2015).

[270] **Separate and Independent.** The drilling contract provides

> [w]ithout limiting the indemnity obligation or liabilities of [Transocean] or its insurer, at all times during the term of this contract, [Transocean] shall maintain insurance covering the operations to be performed under this contract as set forth in Exhibit C.

The court held "But simply because the duties to indemnify and maintain insurance may be separate and independent does not prevent them from also being congruent; that is, a contract may reasonably be construed as extending the insured's additional-insured status only to the extent of the risk the insured agreed to assume." *Id.* at 12.

[271] **ISO CGL Policy.** ISO CG 00 01 04 13. See this form attached in Chapter 5 Forms and Commentary.

SECTION I—COVERAGES
COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. 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.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "**occurrence**" …; (and)

(2) The "bodily injury" or "property damage" occurs during the policy period; ….

2. Exclusions. This insurance does not apply to: …

a. Expected or Intended Injury. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. ….

b. Contractual Liability. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "Insured Contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement….

j. Damage to Property. "Property damage" to: …

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it. Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard"….

l. Damage To Your Work. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor. (emphasis added.)

[272] **What is an "Accident" in New Mexico?**. In *O'Rourke v. New Amsterdam Cas. Co.,* 362 P.2d 790 (N.M. 1961), the New Mexico Supreme Court held that a sudden, unpredictable rain in Albuquerque in October, a normally dry month, was an "accident", within a roofing company's liability policy, and the insurer was liable for rain damage to an owner's house, the roof of which had not been completed. The court of appeals in *Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869, 877 (N. M. Ct. App. 2015) noted

> Fifty years ago, our Supreme Court construed the ordinary meaning of the term "accident" in the context whether an accident insurance policy provided coverage where the insured driver died in a car wreck caused by his driving over the speed limit. See *Scott v. New Empire Ins. Co.*, 965-NMSC-034, ¶¶ 4-14, 75 N.M. 81, 400 P.2d 953. The insurance company argued that the car wreck was not an accident, and therefore not covered by the policy, "because the deceased was speeding over a relatively unknown, dangerous road at night and should have foreseen the consequences of his intentional acts." Id. ¶ 5. Our Supreme Court disagreed, concluding that the ordinary meaning of "accident" encompassed unintended consequences resulting from conduct that was "heedless, perhaps, but certainly not voluntarily self-inflicted[.]" *Id.* ¶ 14; *see King v. Travelers Ins. Co.*, 1973-NMSC-013, ¶¶ 7-13, 84 N.M. 550, 505 P.2d 1226 (concluding that property damage resulting from "defective installation" of a water line was an "accident" under the insurance policy because it resulted from negligence.

[273] **What is an "Accident"?.** There are multiple judicial views of this question. See the National Summary Chart (current as of February 2015) appearing in Wielinski, Patrick J., INSURANCE FOR DEFECTIVE CONSTRUCTION (IRMI 4th Ed. 2015) in the slides accompanying this article.

Intent Irrelevant; Faulty Workmanship *Per Se* Not an "Occurrence". Some courts find that faulty workmanship *per se* cannot trigger a covered "occurrence." *DCB Const. Co., Inc. v. Travelers Indem. Co. of Illinois*, 225 F.Supp.2d 1230 (D. Colo. 2002) - no accident where contractor had to tear down walls and rebuild them because they did not meet specifications for sound transmission; *Monticello Ins. Co. v. Wil-Freds Const., Inc.*, 661 N.E.2d 451 (Ill. 2d Dist. 1996); *State Farm Fire and Cas. Co. v. Tillerson*, 334 Ill. App.3d 404, 777 N.E.2d 986 (Ill. 5th Dist. 2002) - construction defects not an "occurrence" as they were ordinary consequence of contractor's improper work; *Pursell Const., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 71 (Iowa 1999) – in a case of first impression for Iowa, the court held "In short, defective workmanship, standing alone, is not an occurrence under a CGL policy." *Hawkeye-Security Ins. Co. v. Vector Const. Co.*, 460 N.W.2d 329 (1990); *ACS Const. Co., Inc. of Mississippi v. CGU*, 332 F.3d 885, 889 (5th Cir. [Miss.] 2003) - "The faulty workmanship of the waterproofing membrane resulting in the leaks does not constitute an 'occurrence' under the policy."; *Cincinnati Ins. Co. v. Venetian Terrazzo, Inc.*, 198 F. Supp.2d 1074 (E.D. Mo. 2001) - alleged negligence in pouring concrete subfloor did not constitute an accident or an "occurrence" and therefore insurer had no duty to defend; *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 2004 WL 1775571 (S.C. 2004) - premature deterioration of roads as a result of faulty workmanship was not caused by an "occurrence"; *ProDent, Inc. v. Zurich U.S.*, 33 Fed. Appx. 32 (3rd Cir. 2002) - negligence in installing copper pipes instead of PVC called for by drawings was not an "occurrence" within meaning of policy.

Faulty Workmanship is a "Business Risk" Not Covered by CGL Policy. Some courts ground their decision of no occurrence on the rationale that CGL insurance is not intended to protect an insured from having to repair or replace improperly performed work. These courts hold that such losses are an "expectation" loss, and to hold otherwise would be to encourage poor workmanship. These courts do not base their opinion on the terms of the policy but on "public policy". For example, this rationale is set out in Henderson, *Insurance Protection for Products Liability &*

Completed Operations—What Every Lawyer Should Know, 50 NEB. L. REV. 415, 441 (1971) where the commentator states that CGL coverage is "for tort liability for physical damage to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." See the following Minnesota court decisions following this "tort vs. contract" rationale in interpreting the Broad Form Property Damage Endorsement to the pre-1986 CGL policy form: *Bor-Son Building Corp. v. Employers Commercial Union Ins. Co. of America*, 323 N.W.2d 58 (Minn. 1982) and *Knutson Construction Co. v. St. Paul Fire & Marine Ins. Co.*, 396 N.W.2d 229 (Minn. 1986). Henderson's article is addressing the coverage language of even the earlier pre-1966 version. Unfortunately, some court decisions have cited this article and the "tort vs. contract" rationale as the coverage test in construing post-1986 policies without recognizing the changes reflected in the 1986 revision. *See, e.g., Data Specialties, Inc. v. Transcontinental Ins. Co.*, 125 F.3d 909 (5th Cir. 1997) – court found no coverage as insured's obligation to repair arose out of a contract obligation, not a tort; *Silk v. Flat Top Const., Inc.*, 453 S.E.2d 356 (Va. 1994) – construction manager's liability for failing to properly supervise and inspect work resulting in cost overruns is a result of breach of contract not tort.

The Illogical Performance Bond Comparison. Some courts falling into this line of reasoning compare use of CGL policies for this purpose as an attempt to substitute a CGL policy for a performance bond. These courts overlook the fact that property damage may be covered by both a CGL policy and a performance bond, but for different purposes. *Essex Ins. Co. v. Holder*, 261 S.W.3d 456 (Ark. 2007) - faulty workmanship is not an accident; instead it is a foreseeable occurrence and performance bonds exist in the market place to insure the contractor against claims for the cost of repair or replacement of faulty work; *Oak Crest Const. Co. v. Austin Mut. Ins. Co.*, 137 Or. App. 475, 905 P.2d 848 (Or. 1995) aff'd 329 Or. 620, 998 P.2d 1254 (Or. 2000); *U. S. Fidelity & Guar. Corp. v. Advance Roofing & Supply Co., Inc.*, 163 Ariz. 476, 788 P.2d 1227 (Ariz. Ct. App. Div. 1 1989) – no coverage existed for contractor that installed negligent roofs as poor workmanship did not amount to an occurrence and to hold otherwise would be tantamount to converting the CGL policy into a performance bond. However, although there is an overlap in coverage between performance bonds and CGL insurance, neither is a substitute for the other. A performance bond does not extend to cover "bodily injury" like a CGL policy; and a performance bond covers many other risks than failure of the contractor or, if given by subcontractors, the subcontractors' breaches of contract, except to the extent of a CGL's coverage of a subcontractor's damage to the work or the project.

Coverage Depends on Actor's Intent. The majority of courts focus on the intent of the actor. However, since most action involves a degree of intent, focus on an actor's intent to act runs the risk of holding that an "accident" could not occur as the actor intended his action, even though he did not intend to cause the damage that resulted. Even when the focus is on the consequence of an insured's act, as opposed to the act itself, there is a wide divergence in court decisions as to whether a covered loss has occurred. *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 679 A.2d 540, 58 A.L.R.5th 883 (1996) – court states that Maryland follows the majority position that whether a loss arises from an accident is to be determined from the standpoint of the insured's subjective intent. The court in *Indiana Ins. Co. v. Hydra Corp.*, 245 Ill. App.3d, 185 Ill. Dec. 775, 615 N.E.2d 70, 73 (2d Dist. 1993) defined an "occurrence" with a focus on whether the damages were intended or expected by the insured. The court defined "occurrence" as "an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden or unexpected event of an inflictive or unfortunate character." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 607 A.2d 1255, 1263, 8 A.L.R. 5th 937 (1992); *Economy Lumber Co. v. Insurance Co. of North America*, 157 Cal. App. 3d 641, 204 Cal. Rptr. 135 (1st Dist. 1984) - damage caused by the application of defective siding was an occurrence; however, if more siding applied after knowing of the damage it caused, then damage is not unforeseeable and no "occurrence". *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720 (5th Cir. 1999) - suit which included allegations that insured excavation subcontractor negligently damaged work of paving subcontractor through use of substandard fill asserted "accident" within definition ascribed to that term by Texas Supreme Court and thus "occurrence" within meaning of commercial general liability policy.

The Standard CGL Policy - Exclusion 2.a. The concept of excluding from coverage expected or intended damages is specifically addressed in the standard policy at Paragraph 2.a Exclusion – Expected or Intended Injury. Paragraph **2.a** is the result of ISO's modifying the standard policy form in 1986 to remove the following language from the definition of an "occurrence": "which results in 'bodily injury' or 'property damage' neither expected nor intended from the standpoint of the insured." and by creating a new exclusion from coverage for "expected or intended injuries", set out in the standard policy above at Paragraph 2.a.

Seven Approaches to Determining if Damages are Excluded as Expected or Covered as Unforeseeable Damages. The Tennessee Supreme Court noted the following seven approaches that courts have taken to determine whether the injury or damage incurred is excluded from coverage as an expected or intended injury. *Tennessee Farmers Mut. Ins. Co. v. Evans*, 814 S.W.2d 49, 54-55 (Tenn. 1991). The court stated:

> [1] One approach has been to decide whether there was an intent to do "some" harm, which disregards the question of whether the insured wanted to cause the particular harm that resulted. … [2] A second approach has been to focus on whether the insured intended to commit the act and also intended to commit some type of harm. … [S]ome jurisdictions have indicated that the insured's intent in this regard may be actual or inferred from the nature of the act and the accompanying reasonable foreseeability of harm. … [3] A third approach is to hold that an exclusionary provision … applies where an intentional act by an insured person results in injuries or damages that are a natural and probable result of the act. … [4] A fourth method has been to construe the policy language so that there can be no recovery if the ultimate result is substantially certain to be a consequence of the insured's actions. … [5] A fifth view has been to hold that the insured must have intended that the act cause the type of injury that actually occurred and, in addition, intended to harm the person who actually sustained the injury. … [6] A sixth method of analysis has become known as the "damn fool" doctrine, which simply means that coverage is not provided for acts which are simply too ill-conceived to warrant allowing the insured to transfer the risk of such conduct to an insurer. … [7] A seventh view, a combination of some of those mentioned previously, is that the insured must have intended the act and also to have caused some kind of injury in order for the intentional injury exclusion to apply, but once it is found that harm was intended, it is immaterial that the actual harm

> caused is of a different character or magnitude from that intended by the insured. (*Approach numbering and underlining added by author*.)

(1) The "Specific Intent Rule" - No Coverage if There is an Intent to Do Some Harm. The approach results in a broad reading of the exclusion and thus results in very limited coverage for the insured. This approach is followed by very few courts. Keeton, INSURANCE LAW 520 (1988). See discussion at 31 A.L.R.4th 957 *Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured* § 5(a) *Construction of "intended" – View that insured must have intended act and to cause some kind of bodily injury or property damage – generally* (1984).

(2) No Coverage if Act Is Intentional and There is an Expectation of Resulting Damage. Some courts have employed an "expectation" of injury standard, and in so doing have imported a "foreseeability" test. *Calvert Ins. Co. v. Western Ins. Co.*, 874 F.2d 396, 399 (7th Cir. 1989) - "Injury is 'expected' where the damages are not accomplished by design or plan, i.e., not 'intended,' but are 'of such a nature that they should have been reasonably anticipated (expected) by the insured.'" (emphasis in original). *Taylor-Moreley-Simmon, Inc. v. Michigan Mut. Ins. Co.*, 645 F. Supp. 596, 599-600 (E. D. Mo. 1986), judgm't aff'd, 822 F.2d 1093 (8th Cir. 1987)

> [A]n accident includes that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen… . The alleged breaches of warranty raised in the [plaintiff's] petition do not remove the conduct at issue here from the "accident" category for purposes of this lawsuit.

Smith v. Hughes Aircraft Co. Corp., 783 F.Supp. 1222, 1235-37 (D. Ariz. 1991), aff'd in relevant part, rev'd in part and remanded, 22 F.3d 1432 (9th Cir. 1993) - "Because the insured's intent is measured subjectively, it follows that the insured's expectations should be measured similarly.") *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wash. 2d 50, 882 P.2d 703 (Wash. 1994), as amended (1994) and as clarified on denial of reconsideration (Wash. 1995) - subjective standard applied in determining whether personal injury or property damage arising from contamination of groundwater resulting from leak of toxic materials from waste pit was "occurrence," covered by liability policies, which defined occurrence as accident or happening or event or continuous or repeated exposure to conditions which unexpectedly and unintentionally resulted in personal injury or property damage. Keeton, INSURANCE LAW 520 (1988). See discussion at 31 A.L.R.4th 957 *Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured* § 5(a) *Construction of "intended" – View that insured must have intended act and to cause some kind of bodily injury or property damage – generally* (1984). Other courts have recognized the fallacy of this as the test. *Armstrong World Industries, Inc. v. Aetna Cas. & Surety Co.*, 45 Cal. App. 4th 1, 52 Cal. Rptr.2d 690 (1st Dist. 1996):

> In our view, imposing a "should have known" standard on insureds would defeat the essential purpose of insurance agreements. What is expected or intended is different from that which was reasonably foreseeable or what should have been known. An insurance policy exclusion from manufacturing activities which carry a risk of causing environmental harm, although not known or intended to cause harm in the insureds business conduct, would create an exclusion swallowing the entire purpose of the insurance protection for unintended consequences. Insurance is purchased and premiums are paid to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry. The insured may be negligent indeed in failing to take precautions or to foresee the possibility of harm, yet insurance coverage protects the insured from his own lack of due care. If coverage is lost for damage which a prudent person should have foreseen, there would be no point to purchasing a policy of liability insurance.

(3) The "Natural and Probable Consequences" Test. Other courts have stated the standard as whether the damages are a result of the natural and ordinary consequence of the insured's action and thus not covered. *See discussion at* 31 A.L.R.4th 957 *Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured* § 5(d) *Construction of "intended" – View that classic tort doctrine of looking to natural and probable consequences of insured's act determines intent – generally* (1984). *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973) – court found that an "occurrence" did not exist as the damage was a natural result of voluntary and intentional acts by the insured, even if the insured was unaware or did not intend the resulting damages. The court found that the insured, a contractor, acted intentionally when it removed soil from the property pursuant to a contract with a tenant. *Armstrong v. Security Ins. Group*, 292 Ala. 27, 288 So.2d 134 (Ala. 1973); *Casualty Reciprocal Exchange v. Thomas*, 647 P.2d 1361 (Kan. 1982); *Northwestern Nat. Casualty Co. v. Phalen*, 597 P.2d 720 (Mont. 1979); *Vittum v. New Hampshire Ins. Co.*, 369 A.2d 184 (N.H. 1977). *See discussion at* 31 A.L.R.4th 957 Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured § 5(d) Construction of "intended" – View that classic tort doctrine of looking to natural and probable consequences of insured's act determines intent – generally (1984). This approach has been criticized by commentators. See Holmes, APPLEMAN ON INSURANCE, 2d, § 116.4 at 148 (1996) - "[Minority rule that the natural and ordinary consequences of a negligent act do not constitute an accident] is, of course, nonsense."); and § 117.3 at 247 "This judicial holding seriously restricts or limits the liability insurer's liability so as to render the liability policy valueless or even meaningless."; and § 117.3 at 259 "[T]hese opinions. . . essentially annul a large amount of liability coverage." The Fifth Circuit in *Federated Mut. Ins. Co. v. Grapevine Excavation*, 197 F.3d 720 (5th Cir. 1999) addressed the Texas law approach of distinguishing between excluded intentional conduct and covered voluntary conduct as follows:

> We perceive a clearly reconcilable dichotomy, not a tension, resulting from the distinction between the *Maupin* and *Orkin* line of cases; in the former, the damage-causing acts of the tortfeasor are either actually or legally deemed to be intentionally harmful; in the latter, the acts that are performed intentionally are not intended to cause harm but do so as the result of negligent performance of those acts. In the instant case, both types of tortious acts frequently occur in the performance of a contract; the difference lies in the way that the obligor performs. An obligor who intends his performance to result in damage—or, one who commits an act that is legally deemed to constitute an intentional tort—is a *Maupin*

> tortfeasor. On the other hand, an obligor that intends his performance to be correct, but who negligently falls short of the appropriate standard and causes unintentional damage, is an *Orkin* tortfeasor. Had the only allegations against GEI [the insured] accused it of knowingly and willfully choosing and using the substandard material that damaged the paving, and doing so to cut corners or gain unearned profit, GEI would be a *Maupin* tortfeasor. As [the contractor's] allegations against GEI include negligence, however, GEI is an *Orkin* tortfeasor.

In *Grapevine Excavation* the insured contractor subcontracted to provide excavation, backfill and compaction for a retailer's parking lot. Due to the contractor's use of fill materials that failed to meet the retailer's compaction specifications, its subcontractor's paving failed and the contractor cured the construction defect by overlaying another coat of blacktop. The court found that the damages suffered by the contractor were the result of a covered accident.

(4) No Coverage if Ultimate Result is a Substantially Certain Consequence of the Act.. Courts adopting this view employ a more objective test as to intent. *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979) – court held no coverage for damage to a property's owner's basement due to the insured's operations where the court determined the insured "knew or should have known after the first instance of flooding that further flooding was 'substantially probable."

(5) No Coverage if Insured Intended Act that Caused Type of Injury that Actually Occurred and Intended to Injure Person that Was Actually Injured. Few courts have adopted this stringent test as the sole basis of finding an exclusion from coverage. See discussion at 31 A.L.R.4th 957 Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured § 5(f) Construction of "intended" – View that insured must have had specific intent to cause type of injuries suffered (1984).

(6) The "Damn Fool Doctrine". This approach is to exclude coverage for damage caused by actions too ill-conceived to permit coverage. Discussing this doctrine, Professor Keeton states:

> All of these situations involve 'calculated' decisions by insureds. There are many instances in which an insured's course of conduct was intentional, but the consequences which resulted, though highly expectable, were clearly not intended or desired by the insured. When one attempts to predict whether a court will negate the insurer's decision to reject coverage under a liability insurance policy in such cases, an analytical approach that is worth considering is whether the insured's actions fall into the category of incredibly foolish conduct. Keeton, INSURANCE LAW 539-541 (1988).

(7) No Coverage if Insured Intended Some Harm, Even if the Damage is Not the Harm Intended. In this approach the insured must have intended the act and also to have caused some kind of injury in order for the intentional injury exclusion to apply, but once it is found that harm was intended, it is immaterial that the actual harm caused is of a different character or magnitude from that intended by the insured. *Lockhart v. Allstate Ins. Co*., 579 P.2d 1120 (Az. 1978); *Butler v. Behaeghe*, 548 P.2d 934 (Colo. 1976); *Hartford Fire Ins. Co. v. Spreen*, 343 So.2d 649 (Fla. App. 1977); *Colonial Penn Ins. Co. v. Hart*, 291 S.E.2d 410 (Ga. 1982); *Aetna Cas. & Sur. Co. v. Freyer*, 411 N.E.2d 1157 (Ill. 1980); *Hanover Ins. Co. v. Newcomer*, 585 S.W.2d 285 (Mo. App. 1979); *Oakes v. State Farm Fire & Cas. Co.*, 137 N.J. Super. 365, 349 A.2d 102 (N.J. 1975).

274 ***Lamar Homes*.** The court analyzed the issue as follows:

> We begin with the question whether defective construction or faulty workmanship that damages only the work of the insured is an "occurrence." As previously mentioned, "occurrence" is defined, in part, as an accident, but accident is not otherwise defined in the policy. Terms that are not defined in a policy are given their generally accepted or commonly understood meaning.
>
> The insurance carrier submits that the damages alleged here for repairs to the home are direct economic damages flowing from Lamar's contractual undertaking and are conclusively presumed to have been foreseen by Lamar. [The homeowners alleged that Lamar was negligent in designing and constructing their home's foundation and that, as a result, the home's sheetrock and stone veneer cracked.] Thus, the carrier concludes that faulty workmanship is not an accident because injury to the general contractor's work is the expected and foreseeable consequence. … [Texas law], however, did not adopt foreseeability as the boundary between accidental and intentional conduct. Insurance is typically priced and purchased on the basis of foreseeable risks, and reading [Texas law] as the carrier urges would undermine the basis for most insurance coverage. Moreover, the carrier's argument includes a false assumption—that the failure to perform under a contract is always intentional (or stated differently "that an accident can never exist apart from a tort claim"). …
>
> An accident is generally understood to be a fortuitous, unexpected, and unintended event. … [A] claim does not involve an accident or occurrence when either direct allegations purport that the insured intended the injury (which is presumed in cases of intentional tort) or circumstances confirm that the resulting damage was the natural and expected result of the insured's actions, that is, was highly probable whether the insured was negligent or not. Applying our prior decisions, the Fifth Circuit has concluded that the terms "accident" and "occurrence" include damage that is the "unexpected, unforeseen or undesigned happening or consequence" of an insured's negligent behavior, including "claims for damage caused by an insured's defective performance or faulty workmanship." The federal district court here [question certified by the Fifth Circuit under appeal from the federal district court that ruled against the insured] distinguishes [prior Fifth Circuit case law finding poor workmanship meets the occurrence element] by drawing the distinction between faulty workmanship that damages the insured's work or product and faulty workmanship that damages a third party's property. … The CGL policy, however, does not define an "occurrence" in terms of the ownership or character of the property damaged by the act or event. Rather, the policy asks whether the injury was intended or fortuitous, that is, whether the injury was an accident. … We … see no basis in the definition of "occurrence" for the district court's distinction.

> The determination of whether an insured's faulty workmanship was intended or accidental is dependent on the facts and circumstances of the particular case. For purposes of the duty to defend, those facts and circumstances must generally be gleaned from the plaintiffs' complaint. Here, the complaint alleges an "occurrence" because it asserts that Lamar's defective construction was a product of its negligence. No one alleges that Lamar intended or expected its work or its subcontractors' work to damage the DiMares' home. (citations omitted.)

275 **Exposure.** *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980).

276 **Manifestation.** *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 723 A.2d 1138 (R.I. 1999); *Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 121 (1st Cir. 1982).

277 **Continuous.** *Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 913 P.2d 878, 880, 904 (1995) distinguishing *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (1990).

278 **Injury-In-Fact. Texas:** *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). The court specifically abrogated the holdings in the following cases: *Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co.*, 202 S.W.3d 823 (Tex. App.—Dallas 2006, pet. filed); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313 (Tex. App.—San Antonio 2002, pet. denied); *Closner v. State Farm Lloyds*, 64 S.W.3d 51 (Tex. App.—San Antonio 2001, no pet.); *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905 (Tex. App.—Austin 1997, writ denied); *Cullen/Frost Bank of Dallas, N.A. v. Commonwealth Lloyd's Ins. Co*., 852 S.W.2d 252 (Tex. App.—Dallas 193), writ denied, 889 S.W.2d 266 (Tex. 1994)(*per curiam*); and *Dorchester Dev. Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex. App.—Dallas 1987, no writ).

Other States: Hawaii - *Sentinel Ins. Co. v. First Ins. Co. of Haw.*, 875 P.2d 894 (1994). *Transcon. Ins. Co. v. W. G. Samuels Co.*, 370 F.3d 755 (8th Cir.); *Mut. Fire, Marine & Inland Ins. Co. v. Safeco Ins. Co.*. 473 So.2d 1012 (Ala. 1985); *Hoang v. Assurance Co. of Am.*, 149 P.3d 798 (Colo. 2007); *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481 (2001); *Gelman Scis., Inc. v. Fid. & Cas. Co. of N.Y.*, 572 N.W.2d 617 (1998) reh'g granted on other grounds, 576 N.W.2d 168 (1998), overruled on other grounds by *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776 (2003); *N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994); *Energy North Natural Gas*, 848 Ala.2d at 719-23; *Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28 (N.D. 1995); *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (1996); *Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.*, 486 S.E.2d 89 (1997); *Transcon Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 760 P.2d 337 (1988).

279 ***Wilshire Insurance.*** Wilshire insured RJT under two consecutive CGL policies running from June 2004 through June 2006. In 1999, RJT repaired the foundation of Ashbaugh's home after the home was damaged by an accidental discharge of plumbing water. In 2007 Ashbaugh sued RJT for negligently performing the foundation repair. Ashbaugh alleged that late in 2005 cracks in the walls and ceilings suddenly appeared in his home, damage which he attributed to the foundation being out of level.

280 **Fifth Circuit.** The Fifth Circuit certified the following two questions to the Texas Supreme Court:

> 1. Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion.
>
> 2. If the answer to question one is "Yes" and the contractual liability exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for "liability that would exist in the absence of contract. 690 F.3d 628, 633 (5th Cir. 2012).

281 ***Gilbert.*** The supreme court distinguished *Ewing* from the facts addressed in *Gilbert Texas Constr. LP v. Underwriters at Lloyd's, London*, 327 S.W.3d 118 (Tex. 2010). In *Gilbert* the insured entered into a contract with the Dallas Area Rapid Transit Authority ("DART") to construct a commuter railway system. During construction, heavy rains damaged neighboring buildings owned by RT Realty ("RTR"). RTR sued Gilbert, under a third-party beneficiary claim as to the Gilbert's contractual undertaking under Gilbert's contract with DART. The contract obligated Gilbert to protect all existing improvements at or near the work site and on adjacent property of third parties and to repair any damage to them. In *Gilbert* the Texas Supreme Court held the contractual liability exclusion applied to deny coverage for Gilbert. Gilbert by its contract assumed a liability, which the court was unwilling to allow recourse to its CGL insurance to insure it against its breach of contract. The court stated:

> Independent of its contractual obligations, Gilbert owed RTR the duty to comply with law and to conduct its operations with ordinary care so as not to damage RTR's property, and absent its immunity it could be liable for damages it caused by breaching its duty. In its contract with DART, however, Gilbert undertook a legal obligation to protect improvements and utilities on property adjacent to the construction site, and to repair or pay for damage to any such property "resulting from a failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work." (emphasis added). The latter obligation—to exercise reasonable care in performing its work—mirrors Gilbert's duty to RTR under general law principles. The obligation to repair or pay for damage to RTR's property "resulting from a failure to comply with the requirements of this contract" extends beyond Gilbert's obligations under general law and incorporates contractual standards to which Gilbert obligated itself. The trial court granted summary judgment on all RTR's theories of

liability other than breach of contract, so Gilbert's only potential liability remaining in the lawsuit was liability in excess of what it had under general law principles. Thus, RTR's breach of contract claim was founded on an obligation or liability contractually assumed by Gilbert within the meaning of the policy exclusion. *Id.* at 127.

282 **Coverage Excluded if Excluded under any Exclusion.** *Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869, 879 (N. M. Ct. App. 2015):

> We conclude that, even if the insured contract exception renders the contractual liability exclusion inapplicable in this case, it does not render other separate and independent policy exclusions inapplicable, such as the "your work" exclusion, which we have held applies in this case to preclude coverage with regard to the May 2009 tender. *See, e.g., Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir. 1998) (concluding that the contractual exclusion and its exceptions do not override another exclusion – the operations exclusion – because "the exclusions are separate and independent" and northing in the policy indicates that one exception to one exclusion "somehow trumps" the other exclusions)….

283 **"That Particular Part".** That the phrase "that particular part" is intended to limit the breadth of the exclusion from coverage is illustrated by the following analysis by the Missouri Supreme Court in *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 80 (Mo. 1998) when it was called on to decide whether this exclusion resulted in excluding coverage for all fire loss damages to a house or merely to the portion of the work from which the fire originated:

> Houses and buildings can be divided into so many parts that attempting to determine which part or parts are the subject of the insured's operations can produce several reasonable conclusions. For example, the "particular part of the real property on which [the insured] is performing operations" could mean, as Columbia Mutual contends, "the entire area of the real property that Schauf is scheduled to work." Under this interpretation, any damage the insured causes to property in the area which he was contracted to work would be excluded from coverage.
> Another possible definition of the instant exclusion is that the "particular part of real property on which [the insured] is performing operations" is only the part of the property that is the subject of the insured's work at the time of the damage. Under this interpretation, only the damage the insured causes to the particular part of the property that is actually the object of the insured's work where the damage occurs is excluded from coverage; any other damage would not be subject to the exclusion….
> In accordance with the relevant maxims of construction and the language and purpose of the instant exclusion, this Court upholds that the instant exclusion denies coverage for property damage to the particular part of real property that is the subject of the insured's work at the time of the damage, if the damage arises out of those operations.
> Applying the holding to the facts of this case compels the conclusion that the exclusion applies to any damage to the kitchen cabinets. When the damage in this case occurred, Schauf was cleaning from his spray equipment the lacquer he had applied to the kitchen cabinets. Because cleaning the lacquer was the last step in the job of lacquering the kitchen cabinets, the kitchen cabinets were the particular part of the real property that was the subject of Schauf's operations at the time of the damage. Consequently, the damage to the kitchen cabinets is excluded from coverage.

284 **"Are Performing Operations".** A second limitation on exclusion **2.j(5)** is for damage to "real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage arises out of those operations." This language is interpreted to exclude damages involving "works in progress", in other words the exclusion does not apply to "completed operations." The "arises out of operations" has caused confusion for some courts in interpreting the scope of the exclusion. However, the vast majority of courts have concluded that this exclusion is limited to barring coverage for property damage occurring during on-going operations. *See e.g., Mid-Continent Casualty Co. v. JHP Development, Inc.*, 557 F.3d 207, 215 (5th Cir. [Tex.] 2009).

285 **Negligent Misrepresentation as an Occurrence.** *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp. 2d 1157, 1199 (D. N.M. 2012); and see H. Brennenstuhl, Annot., *Negligent Misrepresentation as "Accident" or "Occurrence" Warranting Insurance Coverage*, 58 A.L.R. 483 (5th ed. 1998).

286 **New Mexico.** *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp. 2d 1157, 1200 (D. N.M. 2012):

> Here, the construction which Gandy Dancer and BNSF Railway performed is the property damage that Mercer LLC alleges. BNSF Railway made no arguments regarding the application of exclusion of j(5) to coverage of the negligent misrepresentation allegations. Because the damages, from the removal of materials and the construction, constitute property damage arising out of the work of the insured and its contractors, the Court finds that provision j(5) excludes these allegations from coverage.

287 **Exclusion 2. j(6) for "Property Damage" to That Particular Part.** *Mid-Continent Casualty Co. v. Krolczyk*, 408 S.W.3d 896 (Tex. App. – Hou. [1st Dist.] 2013, pet. denied) - in a "duty to defend" issue case, a court construed a HOA's pleadings in a suit against a subdivision developer that the developer built a "totally inadequate" road as not excluding coverage of the developer under 2.j(6). The court found the HOA's pleadings had alleged that the asphalt laid on the surface of the road cracked, but no allegations were made that the surface work was defective. Accordingly, only the defectively performed work (*e.g.*, the road base) would not be covered by the CGL insurance, while the non-defectively performed work would be covered, such as the paving and repaving work.; also see *E & R Rubalcava Const., Inc. v. Burlington Ins. Co.*, 147 F.

Supp.2d 523 (N. D. Tex. 2000) "[T]he *business risk* exclusion [2.j(6)] … only applies to the cost of repair of the foundation work itself, not to the cost of repair of any other damage to the homes in issue."; and *Dorchester Development Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex. App.—Dallas 1987).

However, some courts have interpreted the exclusion to apply to the whole project. *See, e.g., E. H. Spencer & Company, LLC v. Essex Insurance Co.*, 2009 WL 2231222 (Mass. Super.) following the rationale in *Jet Line Servs., Inc. v. American Employers Ins. Co.*, 494 Mass 706 (Mass. 1989) where court stated "[w]here the insured was retained to perform work on an entire unit of property, and not just a portion of it, the applicability of the exclusion to damage of the entire unit is more apparent than in cases in which the insured was retained to work on only a part of the unit."

288 **Exclusion 2.j(6) for "Property Damage" to "That Particular Part".** *American States Ins. Co. v. Powers*, 262 F. Supp.2d 1245, 1251-52 (D. Kan. 2003):

> Thus, when exclusion j(6) is read together with the "product-completed operations hazard" provision, the result is that exclusion j(6) does not apply to claims arising from 'defective work that is discovered after the contractor has completed its work.' The application of exclusion j(6), then, turns on whether Mr. Powers' work on the building was incomplete (in which case the exclusion would apply) or complete (in which case the exclusion would not apply). There is no evidence before the court suggesting that Mr. Powers' work on the building was incomplete at the time the Stouts discovered the allegedly defective work. Rather, the uncontroverted facts demonstrate that Mr. Powers completed the building on May 30, 2000 and that sometime thereafter the Stouts realized that the building allegedly did not meet the contract specifications, did not meet various building codes pertaining to structural design, and was not constructed in a workmanlike manner. While the work performed by Mr. Powers may have needed significant correction, repair or replacement, such work is nonetheless treated as "complete" for purposes of the policy. Thus, because Mr. Powers' work was complete at the time of the damage, the property damage falls within the 'property-completed operations hazard' exception to exclusion j(6) and, accordingly, exclusion j(6) does not apply here.

289 **PCOH.** *Pursell Const., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 69 (Iowa 1999). Note that the Iowa Supreme Court found in a case of first impression in Iowa that defective workmanship was not an "occurrence" to begin with and thus did not reach a decision as to whether an exclusion applied.

290 **Covered Damages.** The Fifth Circuit in *Wilshire Insurance Co. v. RJT Construction Co.*, 581 F.3d 222, 226 (5th Cir. [Tex.] 2009) found that Exclusion 2.l precluded coverage only for the cost of repairing its insured's own work, the defective foundation, but did not exclude coverage of the damages caused to the balance of the home. The court noted that in *Travelers Insurance Co. v. Volentine*, 578 S.W.2d 501, 503 (Tex. Civ. App.—Texarkana 1979, no writ) the insured, an automobile mechanic, performed faulty work on an engine's valves which resulted in the destruction of the entire engine; the Texas court found that the exclusion 2.l precluded only the cost of replacing the valves themselves, but not the extent those other parts [of the engine] were damaged or destroyed. *Travelers* at 504.

291 **Rationale for the "Business Risk" Exclusions.** Hendrick and Weizel, *The New Commercial General Liability Forms—An Introduction and Critique*, 36 F.I.C.C., 319, 322 (Summer 1986). "**Business Risks**" are "[those risks] which are the normal, frequent, or predictable consequences of doing business, and which business management can or should control and manage. CGL insurance is not meant to be a safety net for every business error or omission."

292 **Subcontractor Exception.** For an example of sustaining coverage under the "subcontractor exception", see *Mid-Continent Casualty Co. v. Castagna*, 410 S.W.3d 445 (Tex. App.-Dallas 2013, pet. denied) finding that the foundation work that cracked over several policy periods was constructed by the contractor's subcontractors.

293 **Pulte's Second Tender.** The first tender to the insurer was to defend and indemnify Pulte from the following complaint of Pulte's customers:

> Pulte tendered its second demand for a defense to ILM, which included a copy of the fifth amended complaint and lists of alleged defects concerning the homes owned by Macrall, Sokol, and Williamson. Macrall's defect list stated that "[a]ll windows and sliding glass are hard to open and close. The sliding glass door leaks; lots of dirt all the time; wind comes through whistling" and "[t]here are cracks [in the stucco] above [the] sliding glass door" and "cracks [in the stucco] by [the] front windows." ILM continued to deny that it had any duty to defend Pulte in the lawsuit.

294 **Pulte's First Tender.** The first tender to the insurer was to defend and indemnify Pulte from the following complaint of Pulte's customers:

> The fifth amended complaint alleged that Pulte
>
> > "us[ed] substandard and inadequate windows that are approved for use in horse trailers and mobile homes and are not for use in residential construction, causing leaks, improper insulation and an inability to fasten them to the wooden frame surrounding them because they have a flange that is designed for horse trailers and mobile homes; ... us[ed] windows that are oversized for their structural integrity, causing warping and an inability to shut and operate the

windows; ... fail[ed] to use sufficient fasteners to hold the windows in place, causing them to warp, twist and not operate; [and] us[ed] substandard and inadequate windows that leak[.]" *Id.* At 872.

295 **"Your Work Exclusion".** The court held

> However, Pulte does not point to any facts alleged to have existed in May 2009 that tended to show that the defective or defectively installed windows and sliding glass doors caused damage to other property, other than the fact that the windows "leak[ed]." Therefore, we conclude that the facts presented in the May 2009 tender did not trigger ILM's duty to defend because the "your work" exclusion precluded coverage under those facts. *Id.* At 879.

296 **CIP.** A controlled-insurance program ("**CIP**"), sometimes called a "**wrap-up**" insurance program, is used to provide liability insurance coverage for on-site construction participants from a single insurer. Construction participants must agree to be "enrolled" ("**enrolled parties**") in the consolidated insurance program and agree to substitute the CIP coverage in lieu of the party's own insurance coverage. The CIP is "**sponsored**" (administered) either by the owner ("**OCIP**") or the general contractor (a "**CCIP**"). The sponsor is responsible for the program's insurance premium cost, which is reflected one way or another in the construction contract's contract sum (*e.g.*, in the Case Study, the liability program was a CCIP and the premium cost is passed through to the owner pursuant to the "cost plus" feature of the A133. In order to implement a CIP, the sponsor must be assured that the all liability risk inducing parties are to the maximum extent possible enrolled parties (subcontractors of all tiers) and that they comply with the program (*e.g.*, the safety program, loss controls, payroll reporting, claims reporting), and that program cost funding is secure to assure payment of deductible losses and premiums. CIPs may be project-specific programs, multiple project programs or rolling programs. (The Case Study program was a rolling CCIP). The Case Study CCIP had a **CIP Manual** setting out a "coordinated master insurance, safety and claim management program for the Contractor and all Enrolled Subcontractors working on the Project." The CIP Manual addressed the following: (1) coverages provided; (2) obligations of an enrolled party; (3) identification of types of subcontractors that are not program participants ("**non-enrolled subcontractors or non-enrolled project parties**"); (4) obligations of non-enrolled subcontractors or non-enrolled project parties, including insurance specifications for insurance to be maintained; (5) details as to the project safety program; (6) if workers comp coverage is to be offered, insurance calculation worksheets facilitating calculation of the subcontractor's estimated insurance premium using its estimated payroll and payroll reporting forms, and experience rating data; (7) provisions, including insurance specifications, to be included by an enrolled subcontractor in lower tier subcontracts; (8) claims reporting procedures; (9) bid procedures to assure the sponsor that the enrolled subcontractor deducted from its bid the cost of insurance for coverages within the CIP; and (10) insurance specifications for insurance to be carried by the enrolled subcontractor for risks not covered by the CIP.

297 **Advantages.** The following are the usual advantages to be achieved in a CIP: (1) cost savings through bulk purchase and reduction in enrolled parties' contract prices by substitution of the CIP for the enrolled parties' insurance program (to the extent of the CIP's coverages); (2) coordinated coverage for the project though the use of a single project-specific insurance policy; (3) elimination of overlapping insurance coverages of the same risk or party to be protected (*e.g.*, additional insureds); (4) enhanced loss control and safety; (5) higher limits; (6) completed operations coverage dedicated to the project through project-specific policies; and (7) reduced risk of nonrenewal or cancellation.

298 **Implementation Considerations.** The following program implementation considerations are noted in the ABA CONSTRUCTION INSURANCE GUIDE at p. 333:

> There are other considerations to bear in mind, of course: (1) CIP programs typically entail high deductibles that, though usually capped at a fixed percentage of payroll, can result in program costs that exceed contractor credits; (2) CIP policies often have premiums that can go up (or down) depending on loss frequency and audited payroll, presenting a potential financial risk to the sponsor; (3) significant collateral can be required; (4) particularly for larger projects, the CIP model requires experienced administration for successful implementation, and this has a cost impact as well; (5) project–specific coverage is usually at least as robust as individual policies but there are exceptions, and it can be less favorable than some larger contractors' own practice policies, which may not be available if a CIP is used; and (6) realizing cost savings requires that participants fully disclose their insurance costs and that they have sophisticated understanding of that cost.

299 **The Business of Insurance as a State Matter.** Unlike other financial services, the regulation of insurance has been left to the states. As early as 1868, the United States Supreme Court proclaimed that each state has the power to regulate the insurance industry's activities within that state. *See Paul v Virginia*, 75 U.S. 168 (1868). Congress has also noted the state's role, 15 U.S.C. § 1011 (the McCarran-Ferguson Act: "[T]he continued regulation and taxation by the several States of the business of insurance is in the public interest.") and § 1012(b) "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance … unless the Act specifically relates to the business of Insurance."). In *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946) the United States Supreme Court acknowledged that Congress intended to defer insurance regulation to the states.

300 **State Approval of Insurance Forms.** The goal in state regulation of insurers, including requiring state approval of insurer's forms to be used in the state is to assure consumer faith in the insurance business; providing public oversight of insurance form language, public notice of approved issuers, and premiums paid for real risk coverage. *See* Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 477 (1960-61). The National Association of Insurance Commissioners ("**NAIC**") - a voluntary association of commissioners from each state-has assured much uniformity in insurance regulation among the states. NAIC has formulated model codes governing insurance companies, brokers, agents, and adjusters. These codes form a template for state

legislation, *e.g.*, the NAIC has promulgated the Unauthorized Insurance Process Act and the Non-admitted Insurance Act, which most states have adopted with local variations.

301 **Authorized and Unauthorized Business of Insurance; What is Not the Business of Insurance.** The following is a brief discussion of Texas statutes. Similar legislation exists in most states. The Texas Insurance Code provides for civil and criminal penalties and the contractual rights of those who issue unauthorized insurance in Texas. An insurer may find itself subject to the "unauthorized practice of insurance" if it commits acts considered to be the "business of insurance" in the state of Texas. TEX. INS. CODE § 101.102(a) a "person, including an insurer, may not directly or indirectly do an act that constitutes the business of insurance under this chapter except as authorized by statute." Insurers selling insurance within the state must be "admitted" and subject themselves to regulation by the state as to rates, forms, capital requirements, as well as other requirements. TEX. INS. CODE §§ 31.002, 37.001. The Insurance Code contains a lengthy definition of what acts constitutes the "business of insurance" (*e.g.*, "making or proposing to make, as an insurer, an insurance contract" TEX. INS. CODE § 101.105(b)(1)). The Insurance Code lists several actions *not* constituting the "business of insurance", including the following:

> (1) the lawful transaction of surplus lines insurance under Chapter 981; …
> (4) a transaction:
> (A) that involves an insurance contract independently procured by the insured from an insurance company not authorized to do business in this state through negotiations occurring entirely outside this state;
> (B) that is reported; and
> (C) on which premium tax is paid in accordance with Chapter 226;

302 **When a Surplus Lines Agent May Cause to be Issued a Surplus Lines Policy**. In Texas, the agent procuring the surplus lines insurance must possess a surplus lines licensed issued by the Texas Department of Insurance. TEX. INS. CODE § 981.202. Texas permits surplus lines insurance only when potential insureds have difficulty obtaining coverage from an admitted carrier. To ensure that the surplus lines insurance is only procured in this situation, a surplus lines agent must (1) make a "diligent effort" to obtain coverage from an insurer authorized to write and actually writing that kind and class of insurance in Teas, and (2) only procure insurance in an amount that exceeds the amount of insurance obtainable from authorized issuers. TEX. INS. CODE §§ 981.004(1), and (b). Further, the agent must make a "reasonable effort" to ascertain a surplus lines carrier's financing condition before placing the insurance and may not knowingly place the insurance with a "financially unsound" insurer. TEX. INS. CODE §§ 981.211.

303 **Excess Policies Do Not Follow Form.** Excess policies may have their own exclusions excluding high risk coverages of the primary policy. *Mid-Continent Cas. Co. v. Circle S Feed Store*, 754 F.3d 1175 (10th Cir. 2014). The court found that under New Mexico law the insurer, which issued both primary and excess policies to the insured, excluded from the excess policies under an oil industries limitation endorsement coverage for the insured's negligence that caused subsidence to neighboring property due to the insured's solution mining. The court found that the large cavity created under the neighboring property was an "occurrence" insured by the insurer's primary policy and not excluded as an intention injury.

304 **Exclusion 2.p.** See in Chapter 5 Forms and Commentary, ISO CG 00 01 04 03 Commercial General Liability Coverage Form **Exclusion 2.p**.

305 **ISO CG 04 37.** See in Chapter 5 Forms and Commentary, ISO CG 04 37 04 13 Electronic Data Liability endorsement.

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

307 **ISO CG 21 39.** See in Chapter 5 Forms and Commentary, ISO CG 21 39 10 93 Contractual Liability Limitation.

308 **ISO CG 24 26.** See in Chapter 5 Forms and Commentary, ISO CG 24 26 04 13 Amendment of Insured Contract Definition.

309 **Exclusion 2.l.** See in Chapter 5 Forms and Commentary, Exclusion 2.1 in ISO CG 00 01 04 13 Commercial General Liability Coverage Form.

310 **ISO CG 22 94.** See in Chapter 5 Forms and Commentary, ISO CG 22 94 10 11 Exclusion – Damage to Work Performed by Subcontractors.

[311] **ISO CG 22 95.** See in Chapter 5 Forms and Commentary, ISO CG 22 95 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations.

[312] **ISO CG 21 42.** See in Chapter 5 Forms and Commentary, ISO CG 21 42 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations).

[313] **ISO CG 21 43.** See in Chapter 5 Forms and Commentary, ISO CG 21 43 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations Excepted).

[314] **Negligence Exclusions.** The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000) emphasizes why it is important to obtain and read a copy of the additional insured endorsement and not to rely either upon a statement in the certificate of insurance that "'x' is an additional insured for liabilities arising out of the work of 'y'" or upon a general statement in the contract that "x" is to be listed as an additional insured on "y's" commercial general liability policy. The court in this case held that the additional insured endorsement meant exactly what it said "the negligence of the additional insured is excluded" and that the certificate of insurance stating that "x" was an additional insured and the contractual provision in the contract between "x" and "y" that "x" be listed as an additional insured did not clearly provide for coverage of the additional insured's negligence. The additional insured endorsement provided "It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities arising out of their operations performed by or for the named insured, but excluding any negligent acts committed by such additional insureds".

[315] **Exclusions and Limitations on Coverage of Additional Insured's Negligence.** See in Chapter 5 Forms and Commentary, Samples of Manuscripted Endorsements for a discussion of Manuscript Endorsement #s 1 and 2.

[316] **Exclusion 2.e(1).** See in Chapter 5 Forms and Commentary, Exclusion 2.e(1) in ISO CG 00 01 04 13 Commercial General Liability Coverage Form.

[317] **Important to Confirm Classification Scope of Work Covered.** See *Pekin Ins. Co. v. American Country Ins. Co.*, 213 Ill. App.3d 543, 572 N.E.2d 1112 (Ill. 1991), where the court held that an insurer was not liable to an additional insured, a general contractor, for coverage of injuries suffered by an employee of the Named Insured, a roofing subcontractor, even though the Named Insured subcontractor provided the additional insured with a certificate of insurance reflecting that the additional insured was covered by the Named Insured's liability insurance as to a particular project. The insurance policy was endorsed to expressly exclude coverage to the subcontractor for bodily injury arising out of the subcontractor's roofing work!

[318] **Escape Clauses.** The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E .D. Tex. 1994) illustrates the risk inherent in not reading the insurance policy of the party obligated to name the prospective additional insured as an additional insured. The court found that a fact issue existed defeating a summary judgment motion as to whether the proposed additional insured had accepted the defendant's insurance policy which contained an additional insured provision that included the plaintiff, but which provision was worded so as to exclude coverage in cases where the proposed additional insured was already insured (a so-called "**Escape Clause**"). The Named Insured's policy contained the following Escape Clause: "Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise." The party providing the insurance provided insurance naming the proposed additional insured as an additional insured and therefore did not violate the covenant to name the plaintiff as an additional insured, but the additional insured provision contained an Escape Clause. Timely review and objection may need to occur to defeat this waiver argument!

[319] **A "Misnomer".** *Hertz Corp. v. Robineau*, 6 S.W.3d 332 1336 (Tex. App. - Austin 1999, no writ), J. Woodfin Jones, Justice:

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

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

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

[322] **Deductibles, SIRs and Self Insurance.** 4 BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 11:11 *Deductibles and self-insured retentions* (2014); Windt, 3 INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS § 11:31 *Self-insured retention* (6th ed. 2014); Hermanson and Toren, *A Fact of Life - Retained Limits, Deductibles, and Self-Insurance* 55 No. 5 DRI FOR THE DEFENSE 64 (May, 2013); Hamilton and Murphy, *SIRs and Deductibles - Evolving Policies and Their Impact on Carrier Duties*, 78 DEFENSE COUNSEL

JOURNAL 411 (Oct. 2011); CONTRACTUAL RISK TRANSFERS *Considerations for General Insurance Provisions* **XIV.B.5** *Deductibles and Retentions*, and **XIV.B.6** *Self-Insurance* (International Risk Management, Inc. 2017).

[323] **Deductibles v. SIRs.** Turner, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 4:6 *Deductibles and Self-Insured Retentions* (2d ed. 2014).

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

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

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

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

[328] **Conflict of Interest Between Insured and its Insurer Where Settlement Rights Granted SIR Insured to Insurer.** As noted in *Roehl Transport, Inc. v. Liberty Mut. Ins. Co.*, 784 N.W.2d 542, 554 (Wis. 2010) "the insurance company might offer an unnecessarily high settlement within the deductible to avoid the expense of diligent investigation and adjustment. Or it might expend insufficient effort to investigate a claim unless and until the insurance company's own money is at risk when the value of the claim approaches or exceeds the deductible."

[329] **Self-Insurance is Not "Other Insurance" to Contribute as Primary Insurance.** Also, another question is sometimes raised concerning self-insurance. In a case where a loss is covered by another party's insurance, which insurance provides that it is primary coverage, and the self-insurer also is liable, is the self-insured required to share in the loss payment by the insurer? This question is sometimes stated, is self-insurance "other insurance"? If multiple policies cover a loss, the "other insurance" provisions of each the policies will dictate how the loss is allocated among the policies' proceeds. If both policies state they are primary, then the policies need to be consulted. The standard CGL policy states that its coverage is primary with respect to "other insurance" unless the other insurance is also primary, in which case the policy will pay a share of the loss. See discussion of "other insurance" at **Endnote 455** (Primary and Noncontributing) at the end of this article. The majority rule, and the rule in Texas, is that self-insurance is not "other insurance" within the other insurance provision of a primary policy. See Holloway, Annot., Self-Insurance against Liability as Other Insurance with Meaning of Insurance Policy, 46 A.L.R. 4th 707 (1986). *Allstate Ins. Co. v. Zellars*, 462 S.W.2d 550, 552 (Tex. 1970); *Hertz Corp. v. Robineau*, 6 S.W.3d 332, 335 (Tex. App. - Austin 1999, no writ).

[330] **Insurable Interest.** Generally, to be eligible for insured status under a property policy, the insured must have an insurable interest in the insured property. The assumption by a tenant of liability for damage to leased premises is recognized as creating an insurable interest in the tenant. Leases for single tenant buildings sometime require the tenant to insure the improvements and to name the owner-lessor as an additional insured. Unlike the standard mortgagee coverage, other additional insurable interests endorsements do not provide coverage despite the acts of the insured, whether the first named insured (e.g., tenant) or the additional insured or loss payee (*e.g.*, landlord). Under current ISO commercial property forms, intentional concealment or misrepresentation of a material fact by any insured voids coverage for the additional insured. In November 2008 ISO issued its form CP 12 19 Additional Insured – Building Owner endorsement to designate a building owner as a "Named Insured" for damage to the building on a tenant's property policy covering the building. It is the "insureds" who receive the loss payment under a property policy. Thus, it is unnecessary to specify that the building owner also be designated as a loss payee when it is designated as an insured.

[331] **Mortgageholder Rights.** See ISO Building and Personal Property Coverage Form, **Par. F.2** Mortgageholders setting out the rights of a mortgageholder which is scheduled on the Declarations Page of the ISO property policy in Chapter 5 Forms and Commentary.

[332] **ISO CP 12 18 Loss Payable Provisions.** See ISO CP 12 18 Loss Payable Provisions form in Chapter 5 Forms and Commentary.

[333] **Property Insurance – "Causes of Loss".** See **Endnote 474** (*Property Insurance – "Causes of Loss"*) in Chapter 5 Forms and Commentary.

[334] **Declarations Page with Schedule of Forms.** See the ISO Commercial Property Coverage Part Declarations Page with Schedule of Forms in Chapter 5 Forms and Commentary.

[335] **Common Policy Conditions.** See the ISO Common Policy Conditions in Chapter 5 Forms and Commentary. Condition A of this form provides for the policy to be cancelled by the "**first Named Insured**" and by the insurer upon notice to the "first Named Insured".

[336] **Building and Personal Property Coverage Form.** See the ISO Building and Personal Property Coverage Form Chapter 5 Forms and Commentary.

[337] **Coverages.** Section A provides for (1) Covered Property; (2) Property Not Covered; (3) Covered Causes of Loss; (4) Additional Coverages as to (a) Debris Removal, (b) Preservation of Property, (c) Fire Department Service Charge, (de) Pollutant Clean-up And Removal, (e) Increased Cost of Construction, and (f) Electronic Data; (5) Coverage Extensions as to (a) Newly Acquired Or Constructed Property, (b) Personal Effects and Property Of Others; (c) Valuable Papers and Records (Other Than Electronic Data), (d) Property Off-premises, (e) Outdoor Property, (f) Non-owned Detached Trailers, (g) Business Personal Property Temporarily in Portable Storage Units.

[338] **Loss Conditions.** The property policy at **Section E** sets out certain conditions to payment including (6) Vacancy.

[339] **Additional Conditions.** The property policy provides in **Section F** for certain additional conditions applicable to payment including (1) Coinsurance and (2) Mortgageholders/

[340] **Optional Coverages.** The property policy addresses at **Section G** selected valuation methods if selected on the Declarations Page: (1) Agreed Value; (2) Inflation Guard; and (3) Replacement Cost; and (4) Extension of Replacement Cost To Personal Property Of Others.

[341] **Business Income Insurance.** See the ISO Business Income (And Extra Expense) Coverage Form Chapter 5 Forms and Commentary.

[342] **Leasehold Interest Coverage Form.** See the ISO Leasehold Interest Coverage Form Chapter 5 Forms and Commentary.

[343] **Leasehold Interest Coverage Form - Coverages.** This endorsement is to insure the Tenant for its "**Covered Leasehold Interest**" lost due to the cancellation of its lease resulting from physical loss of or damage to property at the premises caused by a Covered Cause of Loss in the amount of the "**net leasehold interest**" shown in the Leasehold Interest Coverage Schedule for the following as designated on the Declarations Page: (a) Tenants' Lease Interest; (b) Bonus Payments; (c) Improvements and Betterments; and (d) Prepaid Rent.

[344] **Commercial Property Conditions.** See the ISO Commercial Property Conditions Chapter 5 Forms and Commentary addressing among other matters authorizing pre-loss waiver by landlord or tenant, and authorizing post-loss waiver by landlord of tenant.

[345] **Endorsements.** See the following Endorsements to the ISO Commercial Property Chapter 5 Forms and Commentary as follows: Ordinance or Law Coverage; Debris Removal Additional Insurance; Loss Payable Provisions; Scheduled Building Property Tenant's Property; Unscheduled Building Property Tenant's Policy; Additional Insured – Building Owner.

[346] **Replacement Cost.** See Building and Personal Property Coverage Form, **Par. G.3** Optional Coverages – Replacement Cost and Declarations Page Chapter 5 Forms and Commentary.

[347] **ACV.** See Building and Personal Property Coverage Form, **Par. G.1** Agreed Value – Replacement Cost and Declarations Page Chapter 5 Forms and Commentary.

[348] **Inflation Guard.** See Building and Personal Property Coverage Form, **Par. G.2** Optional Coverages – Inflation Guard Cost and Declarations Page Chapter 5 Forms and Commentary.

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

[350] **Builder's Risk Policies.** See Chapter 5 Forms and Commentary **Endnote 509** (No Standard Builder's Risk Policy) and **Endnote 515** (Typical Exclusions) for further discussion of builder's risk policies and a list of common exclusions.

[351] **Actual Cash Value or Replacement Cost.** See Chapter 5 Forms and Commentary **Endnote 475** (Valuation Terminology - Replacement Cost or Actual Cash Value).

CHAPTER 4. WAIVER OF SUBROGATION

[352] **Subrogation.** See dictionarycom http://dictionary.reference.com. The word "subrogation" is a participle form of "*subrogare*" to nominate (someone) as a substitute.

[353] **Three Approaches in Determining Whether to Permit Subrogation.** See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11. INSURANCE LAW, Keeton and Widiss, §4.4(b); and Robert Vanneman Spake, Jr., *The Roof Is on Fire: When, Absent an Agreement Otherwise, May A Landlord's Insurer Pursue A Subrogation Claim Against a Negligent Tenant?*, 63 WASH & LEE L. REV. 1743, 1751 (2006).

[354] **Majority Rule – Implied Waiver of Subrogation.** *Walker v. Vanderpool*, 225 Va. 266., 271 (Va. 1983), cited with approval in *Loverde v. Bldg. Mgmt., Inc.*, 2006 WL 1994576 (Va. Circ. Ct. 2006). In *Loverde* this same result obtained even though an express waiver of subrogation was struck from the construction contract.

[355] **Majority Rule – The "No-Subrogation Rule".** The court in *Sutton v. Johdahl*, 532 P.2d 478, 482 (Okla. Civ. App. 1975) created a legal fiction that a tenant is the implied co-insured of its landlord. Robert Vanneman Spake, Jr., *The Roof Is on Fire: When, Absent an Agreement Otherwise, May A Landlord's Insurer Pursue A Subrogation Claim Against a Negligent Tenant?,* 63 WASH & LEE L. REV. 1743, 1752 fn. 31 (2006). The *Sutton* court concluded that an insurer cannot pursue subrogation claim against the tenant, even if the tenant negligently damaged the insured property causing the loss. This conclusion is known as the "*Sutton Rule*". Other rationale for this approach is that it comports with the parties' reasonable expectations and discourages duplicate or overlapping coverages and payment of multiple premiums to insure the same risk. Also see Aleatra P. Williams, *Insurers' Rights of Subrogation Against Tenants: The Begotten Union Between Equity and Her Beloved*, 55 DRAKE L. REV. 541, 548 (2007).

[356] **Minority Rule – The "Pro-Subrogation Rule" - Texas.** *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956); FRIEDMAN ON LEASES (5th ed. 2011), § 9.12 No Implication of Co-Insured Status Unless Explicitly and Unambiguously Stated Otherwise in the Lease. Robert Vanneman Spake, Jr., *The Roof Is on Fire: When, Absent an Agreement Otherwise, May A Landlord's Insurer Pursue A Subrogation Claim Against a Negligent Tenant?*, 63 WASH & LEE L. REV. 1743, 1752 fn. 34 (2006).

[357] **Middle Approach.** Robert Vanneman Spake, Jr., *The Roof Is on Fire: When, Absent an Agreement Otherwise, Ma A Landlord's Insurer Pursue A Subrogation Claim Against a Negligent Tenant?*, 63 WASH & LEE L. REV. 1743, 1752 fn. 31 (2006) citing *Rausch v. Allstate Ins.. Co.*, 882 A.2d 801, 814-15 (Md. 2005) adopting a "middle approach" employing a case-by-case analysis. This approach allows subrogation against a negligent tenant in some cases and denies it in others.

[358] **Waiver of Subrogation – Typical Construction Scenario.** *St. Paul Fire & Marine Ins. Co. v. Turner Constr. Co.*, 2009 WL 738768, at 1 (3rd Cir. 2009).

[359] **ISO Property Policy Waiver of Subrogation.** See Chapter 5 Forms and Commentary, Form ISO CP 00 90 07 88, Par. I. Transfer of Rights of Recovery Against Others to Us "But you may waive your rights against another party in writing 1. Prior to a loss to your covered property or income. 2. After a loss … if c. Your tenant."

[360] **Harmonizing the Return of Premises Covenant with the Waiver of Recovery Provision.** See Chapter 1 Risk Management, **IC1b** – Absence of Contractual Risk Allocation – the Common Law and Statutory Allocation Schemes – Activities and Locations – Leases and Leased Premises. See the State Bar of Texas Retail Lease, Section D.4 *Release of Claims / Subrogation* in Form 2 in Chapter 5 Forms and Commentary. Section D.4 *Release of Claims / Subrogation* is a mutual release by Landlord and Tenant of the other party for

> FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER … THAT ARE COVERED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. … **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

CHAPTER 5: FORMS AND COMMENTARY

I. LEASES, CONSTRUCTION DOCUMENTS, SALES DOCUMENTS

A. Leases

1. Lease – Narrative Insurance Specifications

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

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

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

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

365 **No Advance Notice of Non-Renewal.** Insurers will not agree to give other insureds advance notice of non-renewal of a policy.

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

367 **Checklist Style Insurance Specifications.** See Chapter 5 Forms and Commentary, **IIA4** (First Generation Space Office Lease – Checklist-Style Insurance Specifications as an Exhibit); also see Chapter 3 Insurance **IIC** (Drafting: Specific Specifications Are Better Than General).

2. State Bar of Texas Insurance Forms Manual – Retail Lease and Insurance Addendum

368 **State Bar of Texas Real Estate Forms Manual – Retail Lease.** The following lease form is a Retail Lease prepared by the Real Estate Legal Forms Committee of the State Bar of Texas for use by Texas lawyers. It appears in the TEXAS REAL ESTATE FORMS MANUAL, Chapter 25 Leases along with a Basic Lease, an Office Lease, and an Industrial Lease. The author of this article has added underlining to the Retail Lease in order to highlight certain words, terms and provisions that are discussed in the accompanying footnotes.

369 **"Tenant's Rebuilding Obligation".** See Retail Lease ¶ ***D.5*** – Casualty/Total or Partial Destruction and discussion below at Endnote – Casualty – Total or Partial Destruction – Rebuilding Obligations. See Retail Lease ¶ ***D.4*** – Release of Claims / Subrogation. See discussion in Chapter 4 Waiver of Subrogation of this Article at **IIB4** (Contractual Waiver of Subrogation – Conflicts – Return of Premises Covenant vs. Waiver of Recovery Provision).

370 **"Agent".** The Definitions include a defined term "Agent" setting out a laundry list of other persons that are not parties to the Lease. The purpose for this laundry list is to define the Protected Persons (the person who are protected by the indemnity) as including the Agents of the Landlord and its Lienholder. To some extent it is included to narrow the scope of the Tenant's indemnity to exclude an indemnification of Landlord to the extent the Injury is caused in whole or in part by the gross negligence or willful misconduct of Agents of the Landlord and its Lienholder. See Retail Lease ¶ ***B.1.q***.

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

372 **Tenant's Repair and Restoration Obligations.** Tenant's obligations are set out in two provisions: as to restoration obligations they are set out in the definition of "Tenant's Rebuilding Obligations" in the Basic Information coupled with Tenant's rebuilding covenant in ¶ ***D.5*** Casualty /Total or Partial Destruction.

373 **Manual's Approach to Reciprocal Indemnities in the Lease.** The Texas Real Estate Forms Manual's Basic Lease, Retail Lease and Office Lease contain mutual indemnities. In Retail Lease ¶ ***B.1.q*** Tenant indemnifies Landlord. In Retail Lease ¶ ***C1.f*** Landlord indemnifies Tenant. Each indemnity is a broad form indemnity, indemnifying the Protected Person for all liabilities due to the occurrence of an Injury, even if the cause is the sole or concurrent negligence of the Protected Person. The Tenant's indemnity is for Injuries "occurring in the Premises". The Landlord's indemnity is for Injuries "occurring in the Common Areas". Each indemnity complies with the express negligence and fair notice requirements which are imposed by the court on provisions shifting liability for negligently caused injuries from one liable person to another. Therefore, each indemnity is enforceable as a means of shifting the risk of liability to the Protecting Person for Injuries caused in whole or in part by the sole or concurrent negligence of the Protected Person.

The following is a quoted portion of the commentary in chapter 25 Leases, p. 25-2 of the TEXAS REAL ESTATE FORMS MANUAL (3 ed.) § 25.1:4 Cautions: Risk Allocation:

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

374 **"Occurring".** The "**occurring**" language does not expressly address the time of the occurrence. Injuries can occur after the end of the Term of a lease due to acts or omissions occurring during the Term of a lease. The indemnity does state that the indemnity survives the end of the Term of the Lease, but this may address the survivability of the indemnity as to Injuries occurring during the Term of the Lease. The timing issue is addressed by adding after the words "occurring in any portion of the Premises" the words: "**either before or after the end of the Term**". Note that this trigger language is not the broad form used in the standard ISO liability insurance policy in defining the scope of additional insured coverage for Injuries "**arising out of** that part leased to (the tenant)."

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

376 **"Independent of Tenant's Insurance".** This language is added to address those cases in which the court has sought to interpret the Protecting Person's indemnity in cases of ambiguity by examining the scope of a Protecting Person's insurance covenant and the risks covered thereby to determine the intended breadth of the indemnity to scope and limits of the insurance.

377 **The Texas Workers' Compensation Act.** The Texas Workers' Compensation Act provides that a subscribing employer has no liability to reimburse or hold another person harmless for a judgment or settlement resulting from injury or death of an employee "unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability." Texas Workers' Compensation Act, TEX. LABOR CODE § 417.004, repealing TEX. REV. CIV. STAT. ANN. Art. 8308-4.04, formerly Art. 8306, § 3(d). See next Chapter 2 **IIC3** (Written Contract to Overcome the Worker's Compensation Bar) discussing limits on a negligent employer's or a negligent person's liability absent a contra contractual indemnity.

378 **Not Be Limited by Comparative Negligence Statutes or Worker's Compensation Insurance.** This language notes that the indemnity is intended by the parties not to be limited by the statutory risk allocation schemes set up in the Comparative Negligence and Proportionate Responsibility Statutes and the Workers' Compensation Act. A contractual indemnity by the employer of the injured employee is necessary to overcome the Workers' Compensation Bar so as at least to pass back to the employer the employer's percentage of responsibility which otherwise would be borne by the Protected Person absent the indemnity. The contractual indemnity should also be drafted to pass back to the employer the costs of defense of the employee's claim. In *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983) the Texas Supreme Court held that an employer's negligence could not be considered in a third-party negligence action bought by an employee arising out of an accidental injury covered by workers' compensation insurance. The jury had determined that the accident was attributable as follows: plant owner's negligence (Petrofina) – 43%, employer's negligence (Hydrocarbon Construction) – 42%, and employee's negligence

(Varela) – 15%. The supreme court reversed the trial court's reduction of the damage award from $606,800 to $243,924, or 43% of total damages. The supreme court held that the Workers' Compensation Act is an exception to the Comparative Negligence Statute and disallowed contribution from the employer. The enforceability of a contractual indemnity passing back to the employer a third party's negligence over the "Worker Compensation Bar" has been upheld as the means of passing back to the employer the proportion of the negligently caused injury caused by the employer. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990).

379 **"In Whole or In Part." Comparative Indemnity-Indemnifying for One's Own Share of Injury Caused by the Concurrent Negligence of the Protected Person and the Protecting Person**. The "***in whole ... by ... Landlord***" language expressly addresses the issue as to whether the Protecting Person's indemnity covers an Injury caused "solely" by the negligence of the Protected Person. The "***in part ... by ... Landlord***" language expressly addresses the issue as to whether the Tenant's (the Protecting Person's) indemnity is only as to Injuries caused solely by the acts or omissions of the Landlord (the Protected Person) or also covers Injuries caused in part by other persons. However, This language may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or comparative negligence. The indemnity provisions do not expressly state that the Protected Person is indemnified for the liability it has due to the negligence of the Protecting Person! Admittedly (by the author) a concept seemingly at odds with the common understanding of the scope of a Protecting Party's indemnity, this wording may result in the Protected Person being indemnified by the Protecting Person for the portion of the liability attributable to the Protected Person's negligence but not for the portion attributable to the Protecting Person's negligence. For example, if an employee of the Tenant is injured in the Premises and suit results. Under the facts of the case, the employee's injuries are the result of the joint negligence of "Landlord" and "Tenant." The injured employee is barred from suing its employer (the Tenant) by the Workers' Comp Bar and thus sues the Landlord. Landlord calls on Tenant to defend Landlord from suit relying on Tenant's indemnity in the Texas Real Estate Form Manual's Retail Lease ¶ ***B.1.q***. Tenant defends. The jury determines that Landlord was 20% negligent and Tenant was 80% negligent. Jury determines damages to the employee are $1,000,000. Landlord seeks indemnity and contribution from Tenant. Tenant pays the 20% allocable to Landlord's 20% share of the award = $200,000. Tenant does not pay the $800,000 attributable to its negligence. Tenant argues that it did not indemnify Landlord for the share of the liability attributable to Tenant's share of the negligence! The Texas Supreme Court in *Ethyl* held that, if indemnity is sought by the Protected Party for the concurrent negligence of the Protecting Party, the indemnity has to so expressly state. The court termed this claim as one for "**contractual comparative indemnity**." The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

> After settling his claim for worker's compensation benefits, Metcalf sued Ethyl who in turn sued Daniel seeking indemnity. The jury found Ethyl negligent in failing to purge the existing lines and in failing to provide Metcalf with a safe place to work. The jury also found Daniel negligent in failing to remove the valve handles. The jury apportioned the negligence 90% to Ethyl and 10% to Daniel. The contract between Ethyl and Daniel contained the following indemnity provision:
>
> > Contractor shall indemnify and hold Owner 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.
>
> … The contract between Daniel and Ethyl speaks to "any loss ... as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor...." Ethyl emphasizes the "any loss" and "as a result of operations" language to argue an intent to cover its own negligence. We do not find such meaning in those words. The indemnity provision in question fails to meet the express negligence test.
>
> 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**. 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. Because the contract in question does not meet that test, Ethyl is relegated to arguing for comparative indemnity under the common law. Common law indemnity shifts the entire burden of loss from one party to another. In Texas, there exists no right to indemnity on a comparative basis under the common law... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein. *Ethyl Corp. v. Daniel Const. Co*., 725 S.W.2d 705, 708 (Tex. 1987).

380 **Texas Anti-Indemnity Act.** With some exceptions, Texas Insurance Code chapter 151 prohibits broad-form and intermediate indemnities in construction contracts and requirements in a construction contract for insurance policies or endorsements that cover broad-form or intermediate indemnities. Under Texas Insurance Code § 151.102, an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of a contract the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. The definition of a "**construction contract**" contained in § 151.102 of the Texas Insurance Code is extremely broad, and includes

> Any contract, subcontract, or agreement … made by an owner … for the design, construction, **alteration**, renovation, remodeling, **repair**, or **maintenance** of … a building, structure, appurtenance, or other improvement to or on … real property."

The following comment is made in the TEXAS REAL ESTATE FORMS MANUAL in Chapter 17 Risk Allocation: Indemnity, Waiver, and Insurance at p. 17-3 (3d ed. 2017):

Whether the definition covers a lease that contemplates leasehold improvements or contains provisions regarding repairs, maintenance, or alterations is, at best, unclear.

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

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

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

[382] **Landlord Repair and Restoration Obligations.** See Endnote above Tenant's Repair and Restoration Obligations; see Chapter 1 Risk Management at C. (Absence of Contractual Risk Allocation – the Common Law and Statutory Allocation Systems) and in Chapter 1 Risk Management at **C.1b(1)(a)** (If Landlord Does Not Retain Control of Portion of Premises – Repairs Gratuitously Made by Landlord; Implied Warranty of Suitability). The Retail Lease allocates the risk of liability damage or destruction of the Property and Premises to the party allocated the Rebuilding Obligation, irrespective of whether the damage or destruction arises in whole or in part from the other party's negligence, and confirms this allocation through the release of claims and waiver of subrogation provision in **¶ D.4** *Release of Claims / Subrogation*. **¶ D.4** provides

> **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

[383] **Landlord's Indemnity.** See analysis of the mutual indemnity by the Tenant above. Landlord's indemnity is for all Injuries occurring in any portion of the Common Areas, even if the Injury is caused in whole or in part by the negligence of the Tenant.

[384] **Ownership of Tenant Improvements.** The Texas Real Estate Form Manual's Retail Lease provides that tenant made alterations "will become the property of Landlord." This statement does not identify the point in time as of when the Landlord "owns" the improvements. If ownership transfers at the point of alteration, does the Tenant have an insurable interest in the improvements?

[385] **"Release of Claims"**. The waiver of subrogation provision (Texas Real Estate Form Retail Lease ¶ ***D.4***) is both a release of claims between the parties as to property damages by "that are covered by the Releasing Party's property insurance or that would have been covered by the required insurance if the party fails to maintain the property coverage required by this lease" and a covenant to notify the insurance issuers of the release and to have the insurance companies endorse, if necessary, the policies so as to prevent invalidation of the policies because of the release. This provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test. The release is written in conspicuous type and meets the requirements of the fair notice test. The Insurance Addendum supplements this contractual waiver of the property insurance carrier's right of subrogation only as to the Tenant's property insurance. **Insurance Addendum to Lease ¶ A.2c** provides that the Tenant's property insurance policies must contain waivers of subrogation of claims against Landlord and Lienholder. The Insurance Addendum does not contain a reciprocal provision requiring that the Landlord's property insurance policies contain a waiver of subrogation claims against Tenant.

[386] **Waiver of Subrogation.** See **Appendix of Forms** Commercial Property Conditions ¶ I. Transfer of Rights of Recovery Against Others To Us – The ISO property policy for leased premises allows the parties to waive the insurer's rights in advance by a waiver of claims in the lease. The ISO property policy also allows the landlord to waive the insurer's subrogation right even after a loss. Most leases, including the leases in the Texas Real Estate Forms Manual, contain a provision addressing the rights between the parties in the event that the property is damaged by the negligence of the other party. The lease, such as the leases in the Texas Real Estate Forms Manual, may provide that the party whose property is damaged waives claims against the other negligent party and that the damaged party will look to the property insurance for recovery. Further the lease may provide that the right of subrogation of the insurer is waived or that the party obtaining the insurance will also obtain an endorsement to the property policy whereby the insurer waives its rights of subrogation to recovery its insurance proceeds against the negligent party. In circumstances where the lease does not contain a waiver of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, ***equitable subrogation***. A majority of courts follow the rule that a lessor's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an ***implied coinsured***. Some of these courts have concluded that the landlord's agreement to procure property insurance covering the building implies an obligation by the landlord to insure the building for the benefit of both the landlord and the tenant. Others of these courts

have reasoned that the tenant has indirectly paid for the insurance, either through rent or through expense pass through. The better practice is to address this risk in the lease. See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11. INSURANCE LAW, Keeton and Widiss, §4.4(b). *Metal Works, Inc. v. North Star Reinsurance Corp. v. Continental Ins. Co.*, 624 N.E.2d 647 (1993); *Cook Paint & Varnish Co.*, 418 F.Supp 56 (N.D. Tex. 1976); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. 1975).

Texas. Texas follows the minority rule. *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956). See FRIEDMAN ON LEASES (5th ed. 2011), § 9.12 No Implication of Co-Insured Status Unless Explicitly and Unambiguously Stated Otherwise in the Lease. The minority jurisdiction rule is based on the common-law presumption that a tenant is liable for the tenant's own negligence and the equitable principle of subrogation.

Waiver of Subrogation Endorsement. Since there is no recognized standard property policy form, it is prudent to examine the property policy in connection with drafting the lease and to condition the lease, if necessary, on obtaining a subrogation waiver from the insurer.

Waiver of Subrogation from Subtenant's Insurers. Landlord may appropriately require subtenants to secure a waiver of subrogation from their insurers.

387 **"Each Other"**. Use of the phrases "**each other**" and the "**releasing party's property insurance**" indicate that the terms "Landlord" and "Tenant" are the named parties to the lease as opposed to the additional persons listed in the mutual indemnities. If so, does the "releasing party" release the other party's "agents, contractors, employees, invitees, licensees, or visitors if the property damage or loss of business or revenues is caused in whole or in part by their negligence? Texas courts strictly construe releases and will not extend them to unnamed persons. In *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971), the court held that a release discharges only those tortfeasors that it specifically names or otherwise specifically indemnifies. The Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) approved the decisions in *McMillen*, and in *Lloyd v. Ray*, 606 S.W.2d 545, 547 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) and *Duke v. Brookshire Grocery Co.*, 568 S.W.2d 470, 472 (Tex. Civ. App.—Texarkana 1978, no writ) holding that the mere naming of a general class of tortfeasors in a release does not discharge the liability of each member of that class. A tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortuous event is not in doubt. *Also see Angus Chemical Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138 (Tex. 1997) where the court held that the release by an injured party of a tortfeasor does not release the tortfeasor's insurer; *Illinois Nat. Ins. Co. v. Pereez*, 794 S.W.2d 373 (Tex. App.—Corpus Christi 1990, writ den'd).

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

389 **Exclusion from Waiver of Claims of Gross Negligence.** The waiver of claims language excludes from the waiver claims arising out the gross negligence of the Released Party. With regard to property insurance, gross negligence or intentional misconduct of a party other than the named insured may not be a defense to coverage, so consideration should be given to making an exception to the exclusion to the extent these risks are covered by the property policy of the Releasing Party.

390 **Casualty - Total or Partial Destruction - Rebuilding Obligations.** The typical lease will assign responsibility for the maintenance of property insurance covering the building and other improvements to one party or the other. Under a long-term lease, especially when a single tenant occupies the entire premises, the lease allocates this obligation to the tenant. In multitenant situations, the lease typically specifies that the landlord is to maintain the property insurance or is silent. In cases where the landlord is to maintain the insurance, the lease may state that the insurance is maintained for the benefit of the landlord, or for the benefit of landlord and tenant, or may be silent on the subject of insurance and/or for whose benefit the insurance is to be maintained.

Manual's Commentary. The following is a quoted portion of the commentary in Chapter 25 Leases, p. 25-2 of the TEXAS REAL ESTATE FORMS MANUAL (3rd ed.) §25.1:4 Cautions: Risk Allocation:

> **Rebuilding Obligations:** The restoration obligations of the parties after a casualty are tied to the description of "Tenant's Rebuilding Obligations" contained in the Basic Terms of the lease. The tenant is expected to restore those leasehold improvements described in "Tenant's Rebuilding Obligations" in addition to replacing its personal property (including inventory, furniture, trade fixtures, and equipment). Because the tenant should carry property insurance to cover its restoration obligations, a detailed description is imperative. See clauses 25-10-8, 25-10-9, and 25-10-10. The landlord's restoration obligations are defined in terms of the portions of the premises that the tenant is not required to rebuild.
>
> For example, the tenant may be receiving the space in shell condition and be responsible for the initial construction of all leasehold improvements. The parties may decide that the tenant will restore all of the leasehold improvements inside the shell if the premises are destroyed. At the other extreme, the tenant may be receiving the premises with existing leasehold improvements, and the parties may decide that the landlord should restore all leasehold improvements after a casualty. Obviously, the possibilities are infinite and depend on the economic underpinnings of the transaction as well as the relative sophistication of the parties. However, the question must be asked at the outset of the transaction so that both parties are clear about the allocation of the risk for restoration and that adequate property insurance is obtained.

[391] **"Fair and Reasonable" Rent Abatement.** Does rent abatement extend to cover the period that the Tenant is performing the Tenant's Rebuilding Obligation? Should the Tenant's Rebuilding Obligations or the Landlord's rebuilding obligation include the improvements to the Tenant's space to restore it to a condition it can open for business (carpet, interior partitioning, lighting, HVAC)?

Insurance Addendum to Lease

[392] **Texas Real Estate Form Manual's Lease - Insurance Addendum.** The Texas Real Estate Form Manual's Lease forms rely on an **Insurance Addendum** to detail the insurance coverages required to be maintained by the parties. The Manual's Insurance Addendum to Lease is an attachment to the lease form. It can be given to the parties' insurance consultants and insurers as a ready checklist of required coverages. The Insurance Addendum specifies the types of insurance to be maintained by landlord and tenant, but utilizes different means to identify the geographic coverages for landlord and tenant for liability insurance coverage and property insurance coverage. The Insurance Addendum identifies the portion of the Building to be covered by Tenant's property insurance as "all items included in the definition of Tenant's Rebuilding Obligations…." Landlord's property insurance is to cover "the Building exclusive of … the rebuilding requirements of all lessees." The Lease and its Insurance Addendum do not similarly state the geographic area to be covered by the Landlord and Tenant's liability insurance, but rely on the geographic coverage terms and definitions of the party's liability policy.

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

Insurance Addendum ¶ A.2a provides that the liability policy is to be endorsed to name the Landlord and its Lienholder as "additional insureds;" Insurance Addendum ¶ A.2b provides that the contractual liability coverage under Coverage A be sufficient to respond to a broad-form indemnity; Insurance Addendum ¶ A.2b provides that the property insurance must contain waivers of subrogation of claims against Landlord and Lienholder; and at Insurance Addendum ¶ A.2c that Tenant is to deliver to Landlord copies of the certificate of insurance and copies of any additional insured and waiver of subrogation endorsements.

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

[393] **Policy Forms.** The Insurance Addendum does not cover in detail the coverages required to be contained in the Tenant's and the Landlord's liability policies other than to provide that each is an occurrence basis policy and is to have the minimum coverage levels specified. The Insurance Addendum relies on Landlord's approval authority in **Insurance Addendum to Lease ¶ A.3** as opposed to specifying in the Insurance Addendum minimum standards to be met in the policy to be furnished by Tenant. See this Chapter **Endnote 447** (Commercial General Liability Insurance (CGL)) and this Chapter **Endnote 473** (Property Insurance).

[394] **Minimum Limits.** See Chapter 3 Insurance **Endnote 257** (Dollar Limit Required by Contract or Agreement, Whichever is Less).

[395] **General Liability Insurance** See this Chapter **Endnote 447** (Commercial General Liability Insurance (CGL)).

[396] **General Aggregate.** See this Chapter Endnote **449** (General Aggregate).

[397] **Business Owner's Policy.** A "**Business Owner's Policy**" or "**BOP**" package policy that provides both property and liability coverage for eligible small businesses. BOPs are written on special coverage forms that are generally very similar to their monoline property and liability form counterparts, but they typically have some unique features that make them especially advantageous for businesses that qualify. Both the American Association of Insurance Services ("**AAIS**") and the Insurance Services Office, Inc. ("**ISO**"), offer BOP programs for use by their member insurers. Also, many insurers have their own BOP programs.

[398] **Designated Location General Aggregate Limit.** See this Chapter Endnote **496** (General Aggregate Per Project).

[399] **Workers Compensation.** See this Chapter Endnote **465** (Workers Compensation Limits Required by Law).

[400] **Employer's Liability Insurance.** See this Chapter Endnote **467** (Employer's Liability Insurance – Bodily Injury by Disease).

[401] **Business Auto Policy.** See this Chapter Endnote **463** (Business Auto Liability).

[402] **Excess Liability Insurance** See this Chapter Endnote **470** (Umbrella and Excess Policies). See Chapter 3 Insurance **IIA6i** (Umbrella and Excess Liability).

[403] **Umbrella Liability Insurance.** See this Chapter **Endnote 470** (Umbrella and Excess Policies).

[404] **Occurrence Basis.** See this Chapter **Endnote 448** (Occurrence Policy vs. Claims Made Policy).

[405] **Causes of Loss – Special Form.** See this Chapter **Endnote 474** (Property Insurance – "Causes of Loss); and see Chapter 3 Insurance IIB3(a) (Coverage under Each Causes of Loss). This provision coupled with the waiver of subrogation provision whereby Tenant waives claims against Landlord in addition to waiving its insurer's subrogation rights protects Landlord against claims by Tenant for damage to the Tenant's property, even if the damage arises out of the Landlord's negligence.

[406] **Replacement Cost.** See this Chapter **Endnote 475** (Valuation Terminology – Replacement Cost or Actual Cash Value)

[407] **Business Income Insurance.** See this Chapter **Endnote 490** (Business Income and Additional Expense).

[408] **Additional Expense Coverage.** See this Chapter **Endnote 490** (Business Income and Additional Expense).

[409] **Equipment Breakdown Insurance.** See this Chapter **Endnote 492** (Boiler and Machinery Coverage).

[410] **Flood Insurance.** See this Chapter **Endnote 483** (Flood).

[411] **Ordinance or Law Coverage.** See this Chapter **Endnote 485** (Ordinance or Law).

[412] **Debris Removal.** See this Chapter **Endnote 488** (Debris Removal).

[413] **Plate Glass.** See this Chapter **Endnote 484** (Glass).

[414] **Signs.** See this Chapter **Endnote 487** (Signs).

[415] **Additional Insureds.** Consideration should be given to listing in the insurance specifications specific companies that are to be scheduled as additional insureds on the Tenant's CGL policy. Also, all parties referenced or identified in the Tenant's indemnity as an Protected Person should also be listed as an additional insured on Tenant's CGL policy. Nobody (except the insurer) wins when a party is an Protected Person but is not scheduled as an additional insured.

Scheduling Additional Insureds. If it is intended that persons in addition to the named Landlord are to be listed as additional insureds, then consideration should be given to specifically naming or listing the most important of these persons in the additional insured endorsement form. *E.g.*, see Schedule blank in **ISO CG 20 10 04 13** Additional Insured – Owners, Lessees or Contractors – Scheduled Persons. Standard additional insured endorsement forms do not extend coverage to the officers, directors and partners of the additional insured.

No Geographic Limitation of Tenant's Additional Insured Endorsement Coverage Specified. Insurance Addendum ¶ 2.a does not specify or limit geographically the area of the Building to which Landlord's protection as additional insured is to extend. This is different from how the parties allocated liabilities by the indemnities. In the Lease's indemnity provisions the parties have carved up responsibility for liability based on geographic areas (Tenant is responsible for all Injuries occurring in the Premises; Landlord is responsible for all Injuries occurring in the Common Areas). This anomaly gives rise to a variance in coverage between a party's indemnity and its required insurance coverage. For example, if an Injury occurs in the Common Areas, Landlord is to indemnify Tenant. However, Landlord has coverage for such liability to the extent it is a protected for that liability pursuant to the additional insured endorsement on Tenant's liability policy. Attached in the **Forms** is the industry standard **ISO CG 20 11** Additional Insured CGL Endorsement designating Landlord as an additional insured on Tenant's CGL policy. The standard form utilizes the term "***premises***" to define the geographic area giving rise to coverage. But as explained in the forgoing article and in the commentary following that form in the Appendix such designation does not limit the Landlord's coverage to Injuries occurring "in" the Premises as such term is defined in the Lease. Coverage is for liabilities "***arising out of***" the premises leased to the Tenant. The definition of the term "premises" is not defined in the Tenant's CGL policy. A majority of courts have construed the insurance coverage broadly against the insurer and extended coverage beyond merely "in" the premises.

Proposed Manuscript Changes to the ISO Endorsements. Should Tenant indemnify Landlord for Injuries occurring in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual's approach is to allocate via indemnity 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. A "fairer" approach is to provide each party with coverage on a primary basis on the other party's CGL policy for injuries occurring in a geographic area (e.g., inside or outside the Premises; in the Common Areas and the Parking Garage) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence. In the author's opinion a fairer allocation of risk can be made based on the degree of causation in addition to where the Injury occurs.

(1) Manuscript Change to the ISO form adding Landlord as an Additional Insured on Tenant's CGL Policy

The additional insured endorsement can be modified to specify that it includes coverage of injuries or damage occurring outside the Premises only if the injury or damage is caused by the sole negligence of the Tenant. The additional insured endorsement can be modified to specify that it excludes coverage for injuries or damage occurring inside the Premises, if the injury or damage is caused:

(a) in whole by the negligent acts or omissions or willful misconduct of the Landlord or

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

Perhaps these changes can be facilitated in part by provision added to the Lease employing the concept adopted by ISO in its 2013 revision that "such additional insured coverage will not be broader than that to which you are required by the contract or agreement to provide such additional insured."

(2) Manuscript Change to the ISO form adding Tenant as an Additional Insured on Landlord's CGL Policy

The additional insured endorsement can be modified to specify that it includes coverage for injuries or damage in the Common Areas or Parking Garage provided the injury or damage is not caused by the sole negligence of the Tenant and provided the Landlord is negligent. The additional insured endorsement can be modified to exclude from coverage liabilities to the extent they arise out of Tenant's acts or omissions in the Premises, if the liability is caused by the contributory negligence of the Tenant and if the Tenant's percentage share of all negligence is 51% or greater.

[416] **Broad Form Indemnity Insurance?** Tenant's indemnity in Retail Lease ¶ ***B.1.q.*** covers all Injuries occurring in the **Premises** "**even if** caused **in whole or in part** by the ordinary negligence of Landlord." Thus Tenant is **indemnifying Landlord for its sole negligence**. ISO issued a new CGL policy amendment form, **CG 24 26 04 13** Amendment of Insured Contract Definition, a copy of which is attached in the **Appendix of Forms**. This amendment form amends the definition of "insured contracts" to limit assumed tort liability to injury or damage "**caused, in whole or in part**" by (the named insured). The CGL policy must be reviewed to determine if this amendment has been added to the policy. An argument exists as to whether this amendment excludes the sole negligence of the Landlord, as it does not expressly state that the additional insured's sole negligence is excluded from the definition of "**insured contract**".

[417] **Landlord's Approval.** This provision does not identify the deadline for seeking Landlord's approval. If approval is deferred past the execution date of the lease, the parties place themselves in the position of arguing over the forms at a time when construction may have commenced on tenant improvements.

[418] **Tenant Not Afforded Policy Review Authority.** There is no provision in the Insurance Addendum providing Tenant with the authority to review and approve the form of Landlord's policies or specifying minimum standards to be addressed in the policies to be furnished by Landlord.

[419] **Tenant Not Designated as an Additional Insured.** The Insurance Addendum to Lease does not require that the Tenant be listed as an additional insured on the CGL policy obtained by the Landlord for the Project as to Injuries occurring in the Common Areas. Tenant should consider requiring that it be listed as an additional insured on the Project's CGL policy as to Tenant's liability for Injuries occurring in the Common Areas. Adding Tenant as an additional insured on the Landlord's CGL policy is in line with the indemnities contained in the Lease. Additionally, adding Tenant as an additional insured is in line with the Tenant's expectations that it is insured by the "Building's" insurance for which it is paying through its Pro Rata Share of Operating Expenses for injuries occurring in the Common Areas and in the Parking Garage. See in the **Forms**, **CG 20 26 04 13** Additional Insured – Designated Person or Organization: a form of additional insured endorsement to Landlord's CGL policy. The ISO endorsement form can be tailored to limit Tenant's protection as an additional insured to Injuries occurring in the Common Areas. The standard ISO form issued does not make that distinction.

[420] **Special Causes of Loss Property Insurance.** See this Chapter **Endnote 474** (Property Insurance – "Causes of Loss").

[421] **Exclusive of Tenant's Rebuilding Requirements.** See this Chapter Retail Lease ¶ ***B.1.k*** Tenants Obligations and ¶ ***C.1.d*** Landlord's Obligations.

3. Supplement to Manual's Risk Management Provisions

[422] **Supplement to Manual's Lease.** This form drafted by the author of this article supplements the Manual's Lease forms. This supplement contains the following provision protective of the Protected Party in the conduct of the defense of an Indemnified Liability:

- the Protected Party (Indemnified Person) is permitted to employ its own counsel in addition to the counsel employed by the Protecting Party (the Indemnifying Person);

- the cost of the Protected Party's (Indemnified Person's) counsel is also an Indemnified Liability;

- the Protected Party (Indemnified Person) is given the right to settle claims in the event that the Protecting Party does not provide a defense to the claim; and

- amounts paid by the Protecting Party under such circumstances is an Indemnified Liability.

Also see in this form's procedures for the Protected Party to determine if the Protecting Party will honor its obligation to provide a defense and, if not, for the Protected Party to employ counsel to defend the claim.

4. First Generation Space Office Lease – Checklist-Style Insurance Specifications as an Exhibit

[423] **First Generation Space Office Lease.** Attached are the waiver of subrogation, indemnification, insurance and casualty provisions of an office lease for a to-be-built office building (aka "**first generation space**") (the "**First Generation Space Office Lease**"). These provisions serve as a road map for the issues that should be addressed in casualty loss provisions in leases, including for other types of leases, such as ground leases, build-to-suit leases, single tenant building leases, and leases of spaces in different type facilities, *e.g.*, retail, warehouse and industrial facilities. The insurance specifications have been crafted to be a standalone exhibit attachment to a lease. Inserted in brackets are variable specifications. One variable shown as a bracketed spec addresses allocation of property insurance on tenant improvements to the tenant. This variable allocation is appropriate for a ground lease where the tenant has constructed the building, a single tenant building where the tenant is responsible for reconstruction, or where the tenant is leasing shell space and is responsible at its sole expense to reconstruct the tenant improvements after a casualty loss.

[424] **Mutual Proportionate Indemnities.** This indemnity is a form of mutual limited indemnity contained in an office lease for a large office building. Each party as an indemnifying person (Protecting Party) indemnifies the other party (Protected Party) for injuries or property damage arising from the act or omission or negligence of the Protecting Party and if the injury or property damage arises from the concurrent negligence of the Protecting Party and the Protected Party, the Protecting Party's indemnity is limited to the percentage of total responsibility of the Protecting Party in contributing to the liability of the Protected Party.

[425] **Casualty Loss Provisions.** The following are questions and topics are addressed in the casualty loss provisions of the First Generation Space Office Lease:

- What constitutes a casualty loss?

- Who decides if the damaged property is to be rebuilt?

- The party responsible to rebuild in the event of a casualty loss.

- Damage to what portions of the property trigger the election to rebuild or terminate the lease (*e.g.*, common areas, parking; damage that materially adversely affects the tenant's use or access)?

- What standard to be applied in determining if the degree of damage triggers an election or if rebuilding is mandatory (*e.g.*, landlord's judgment; landlord's judgment that building cannot be operated economically as an integral unit; "substantial damage"; damage such that it will take greater than one year to rebuild if damage occurs prior to the last two years of the lease term, damage such that it will take greater than 60 days to rebuild if damage occurs during the last two years of the lease term)?

- Relevance of length of time involved in rebuilding (*e.g.*, greater than a year; greater than 60 days if casualty occurs during the last 24 months of the lease term).

- Period during which casualty occurs as triggering elections (*e.g.*, during last 24 months of lease term).

- Standards and process for rebuilding (*e.g.*, issues similar to those addressed in the work letter; who builds which portion of the damaged improvement; who funds each portion rebuilt; how is rebuilding coordinated with other tenants and with landlord's work; insurance; contractor approval).

- How and when is determination/estimation made of the length of time that rebuilding will take (*e.g.*, within 60 days after the date of the casualty)?

- Notice of election is to be given to other party within what period of time (*e.g.*, by landlord within 60 days of the occurrence, by tenant within 65 days of the occurrence if damage occurs during the last two years of lease term)?

- What happens if rebuilding takes longer than the estimated period?

- Effect of force majeure if rebuilding takes longer than estimate period.

- Extension of rebuilding period if the other party's conduct affects rebuilding period (*e.g.*, tenant delays).

- Conditions which must be satisfied in order for party to terminate (*e.g.*, landlord must terminate all of the other leases in the project affected by such casualty in a like manner).

- What happens if no election is made or not made within a time period?

- What happens if insurance proceeds are not sufficient to rebuild or fully rebuild?

- Under what circumstances will rent abate or partially abate?

- If rent is to partially abate, what formula is used to determine the portion abated?

- Do other expenses abate (*e.g.*, CAM, operating expense pass-through, taxes, insurance)?

- Does the rebuilding party's lender have the right to have the insurance proceeds applied to that party's loan? If so, will rebuilding still occur?

[426] **Lender's Concerns.**

a. Right to Insurance Proceeds. One of the primary concerns of the lender is the right to claim insurance proceeds arising from destruction of the mortgaged property. Joshua Stein, *What a Mortgage Lender Needs to Know about Property Insurance: The Basics*, THE REAL ESTATE FINANCE JOURNAL (Winter 2001); and *Benchmark Insurance Requirements for Commercial Real Estate Loans and Why They Say What They Say*, THE REAL ESTATE FINANCE JOURNAL (Winter 2004), each found at www.joshuastein.com. If the mortgagee does not carry its own insurance, but requires the mortgagor to carry insurance for the benefit of both parties, the mortgagee must also verify that its interests are properly reflected in the policy. There is more than one form of endorsement for this purpose and each provides widely different protection.

b. Insurable Interests. Both the mortgagor and mortgagee have insurable interests in mortgaged property. Either mortgagor or mortgagee can purchase a property insurance policy on the mortgaged property. A mortgagor may insure the mortgaged property in an amount equal to the property's value. A mortgagee does not have an insurable interest in the property in excess of its secured debt. *See Sportsmen's Park v. N. Y. Prop. Underwriting Ass'n*, 470 N.Y.S.2d 456, 459 (N.Y. 1983): "The extent of a mortgagee's interest is determined, in the first instance, by the total amount of its lien, including the outstanding principal amount of the debt plus interest, plus any amounts expended to protect its security (*i.e.*, taxes, insurance premiums), all as of the date of the fire." 13 WILLISTON ON CONTRACTS § 37:51 *Mortgagee's Rights under Fire Insurance Policy* (4th ed. 2010). Absent a contractual undertaking to insure the mortgaged property and to insure the interest of the mortgagee, the mortgagor does not have an obligation to do so. However, it is customary in commercial financing to require the mortgagor to carry insurance for the joint interest of both mortgagor and mortgagee. At least three types of mortgagee clauses cover the mortgagee's interest under a hazard insurance policy and the policy's proceeds: the open mortgage clause, the standard mortgage clause, and the assignment of the mortgagor's interest clause. See this Chapter **Endnote 761** (the Standard Mortgage Clause – Standard Commercial Property Policy – ISO Form CP 00 10 – Section **F.2** Additional Conditions Mortgageholders) and **Endnote 746** (ISO CP DS 00 10 00 Commercial Property Coverage Part – Declarations Page – Mortgage Holders) discussing ISO CP 00 10 10 12 Building and Personal Property Coverage Form Section **F.2**, Additional Conditions – Mortgageholders, which is part of the ISO property insurance policy.

Exhibit A to Office Lease – Insurance Specifications - Terminology

Insurance

[427] **ISO.** "**ISO**" refers to Insurance Service Office, Inc., a public company that acts as a source of information about property/casualty insurance risk. ISO provides statistical, actuarial, underwriting, and claims information; policy language; information about specific locations; fraud-identification tools; and technical services for a broad spectrum of commercial and personal lines of insurance. The form policies and endorsements ISO produces are used in whole or in part by many insurers when preparing their form policies. ISO's forms are considered the standard form for most insurance forms and its liability policy and property policy and the endorsements thereto are referred to herein as the "**standard form**". Number designations for ISO's standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1986 *endorsement* forms for use in connection with its commercial general liability policy. "**Endorsement**" is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement's promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction. Each ISO designation is composed of four elements. The following is an example for the additional insured endorsement form appearing in Chapter 5 Forms as **ISO Form CG 20 26 04 13** Additional Insured–Designated Person or Organization (see **Endnote 725**):

CG	20	26	04 13
The "CG" prefix in the endorsement's designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as "GL" in connection with its *comprehensive* general liability forms.	The first set of numbers identifies the "group" to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number "20" refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group–in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled "Additional Insured–Designated Person or Organization."	The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "04 13" or April 2013. November 1985 is the initial date of all ISO forms for the "CG" system. The *coverage* forms have been revised a number of times since then and currently bear an edition date of 04 13. Many of the *endorsement* forms were revised at the same time as the coverage forms and also bear a 04 13 edition date.

[428] **Insurer Ratings.** BEST'S KEY RATING GUIDE published by A.M. Best Company assigns to insurance companies one of three types of rating opinions, a "*Best's Rating*," a "*Financial Performance Rating*" or a "*Qualified Rating.*" In addition Best's assigns all companies to "*Financial Size Categories*." More information concerning Best's and its ratings is available at Best's website, http://www.ambest.com. Insurance specifications in real estate documents will typically specify both the minimum acceptable Best Rating and minimum Financial Size Category for the insurance issuer. For example, "the insurer will be at least a Best's A: VIII."

[429] **Admitted Insurer.** Many good insurer choices are "**authorized**" to do business but are not "**admitted**" in the state. Also, not every state requires an insurer to be licensed (aka admitted) in that state.

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

[431] **Excess Policy.** An "**excess policy**" is an insurance policy covering the insured against certain liabilities or hazards and applying only to loss or damage in excess of a stated amount or specified primary or self-insurance.

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

[433] **Self-Insurance.** See discussion in Chapter 1 Risk Management at **II.A.12**, *Self-Insurance is Not Insurance* at the beginning of this article. "**Self-insurance**" is a system whereby a firm sets aside an amount of its monies to provide for any losses that occur - losses that could ordinarily be covered under an insurance program. The monies that would normally be used for premium payments are added to this special fund for payment of losses incurred. Self-insurance is a means of capturing the cash flow benefits of unpaid loss reserves and also offers the possibility of reducing expenses typically incorporated within a traditional insurance program. It involves a formal decision to retain risk rather than insure it and is distinguished from noninsurance, or retention of risks through deductibles, by a formalized plan or system to pay losses as they occur.

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

Certificates of Insurance

[434] **ACORD Certificates - Not Reasonable To Rely Upon.** See discussion in Chapter 1 Risk Management at **II.A.2**, *Certificates of Insurance Are Not Insurance* at the beginning of this article. An **ACORD 25** Certificate of Liability Insurance and **ACORD 28** Evidence of Commercial Property Insurance should not be relied on as being accurate or as properly defining coverages, exclusions, and deductibles. W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

Sample of Cases Finding Reliance Unreasonable. Alabama. *Alabama Elec. Co-Op Bailey*, 950 So.2d 280, 284 (Ala. 2006).

Illinois. *National Union Fire Ins. Co. v. Glenview Park Dist.*, 594 N.E.2d 1300 (1st Dist. 1992) and judgment aff'd in part, rev'd in part, 632 N.E.2d 1039 (1994) court held the fact that certificate of liability insurance did not contain notation that the additional insured endorsement did not cover the additional insured's negligence did not obligate the insurer to cover the additional insured's negligence; the certificate was issued "for information only"; *Lezak & Levy Wholesale Meats v. Illinois Employers Ins. Co.*, 460 N.E.2d 475 (Ill. 1984) the certificate's disclaimer notice protected the insurer from claims by a meat packing company falling within the exclusion in the cold storage company's liability policy for loss caused by failure of refrigeration equipment.

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

Washington. *Postlewait Construction, Inc. v. Great American Ins. Co.*, 106 Wash.2d 96, 720 P.2d 805 (1986) finding that an erroneous certificate of insurance listing lessor and certificate holder as an insured did not create a cause of action by lessor against insurer for breach of an insurance contract.

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

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

184 F.Supp.2d at 603-04 (footnotes omitted).

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

[436] **Certificates And Binders Are Sometimes Issued Prior To Policy Issuance.** A certificate of insurance is only evidence of insurer's intent to provide insurance and is not a contract to insure. In *Kermanshah Oriental Rugs v. GO*, 47 A.D.3d 438 (N.Y. 2008) the court held that a certificate of insurance was merely evidence of a carrier's intent to provide coverage, but not a contract to insure the designated party; nor was the certificate conclusive proof, standing alone, that a contract for insurance existed; the claim that insurance was never procured remained unchallenged. In *Griffin v. DaVinci Development, LLC*, 845 N.Y.S.2d 97 (N.Y. 2007) the court found no privity of contract with insurer or insurance broker and no right to claim third party beneficiary status by premises owner in a suit against an insurer and contractor's insurance broker for broker having issued multiple certificates of insurance showing owner as an additional insured when in fact no insurance was subsequently issued. Certificates and binders are on many occasions issued prior to the issuance of the policy. This can result in situations where

a subsequently issued policy excludes coverages expected by an additional insured shown in the certificate. In *American Country Ins. v. Kraemer Bros., Inc.*, 699 N.E.2d 1056 (Ill. 1998) a general contractor, which as designated as an additional insured on subcontractor's insurance certificate, was bound by policy exclusions and conditions in a subsequently issued policy and additional insured endorsement limiting coverage to strict liability. The endorsement read: "This endorsement provides no coverage to the Additional Insured for liability arising out of the claimed negligence of the Additional Insured, other than which may be imputed to the Additional Insured by virtue of the conduct of the Named Insured". The court noted "Just because there are fewer strict liability claims than negligence claims does not make the coverage illusory". Even in the case of a renewal, additional insured status may be dropped and reliance on a certificate designating insured status may not be relied upon.

437 **Benefits From Obtaining A Certificate.** Even though it may not be reasonable to rely upon a certificate of insurance which contains disclaimers, there are benefits to having a certificate and potential detriments from a failure to obtain a certificate. Some courts have held that the party to be protected has waived the protecting party's obligation to procure contractually specified insurance by failing to insist upon being furnished the contractually required certificate. There are benefits arising from the standard certificate, even though it contains disclaimers, which will not obtain in the absence of a certificate. Some of the benefits are the following: (1) the standard certificate sets out important information, which in the event of a claim, may provide a quick means of resolution (e.g., agent and insurer contact information, policy numbers); (2) under particular circumstances a court may be willing to disregard the certificate's disclaimers and find coverage for the party to be protected; (3) an erroneous certificate may provide a basis for recovery on the issuing agent's E & O policy or establish a contractual undertaking by the agent to provide the certificated coverage.

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

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

Named Insureds. The Declarations Page of a liability policy names the person or organization who is the insured and such person or organization is the "**named insured**". If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the "**first named insured**".

Automatic Insureds. Additionally, the liability policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy on which an organization is the named insured, may provide that the organization's employees are automatically covered and are "**automatic insureds**". The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; partners and joint venturers in a named insured partnership or joint venture; members and managers of a named insured limited liability company; officers, directors, and stockholders of a named insured corporation or other named insured organization; trustees of a named insured trust; employees and volunteer workers of the named insured business; the named insured's real estate manager; any person having proper temporary custody of a deceased named insured's property; the deceased named insured's legal representative; and newly acquired or formed organizations.

Additional Insureds. An "**additional insured**" is a person other than the named insured who is protected under the terms of the contract. Usually, additional insureds are added by endorsement or referred to in the wording of the definition of "**insured**" in the policy itself. The reason for including another person might be to protect the other person because of the named insured's close relationship with that person or to comply with a contractual obligation that requires the named insured to do so (e.g., owners of property leased by the named insured -landlords). Under a CGL policy many types of persons or organizations may be added by endorsement as an additional insured, upon approval of the insurer. Many liability insurers issue **blanket endorsements** specifying certain parties that are "**automatic additional insureds**" under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. A common error in liability insurance specifications is to specify that a party is to be added to the named insured's policy as an "**additional named insured**".

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

Insured. In a property policy, the insured is the party identified on the Declarations Page as having an **insurable interest** in the covered property and to whom loss payments will be paid if the property is damaged or destroyed.

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

Additional Named Insured. Unlike liability insurance policies, there may be "additional named insureds" on a property policy. The following definition of "**additional named insured**" is found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx. "

> (1) A person or organization, other than the first named insured, identified as an insured in the policy declarations or an addendum to the policy declarations. (2) A person or organization added to a policy after the policy is written with the status

> of named insured. This entity would have the same rights and responsibilities as an entity named as an insured in the policy declarations (other than those rights and responsibilities reserved to the first named insured). In this sense, the term can be contrasted with additional insured, a person or organization added to a policy as an insured but not as a named insured. The term has not acquired a uniformly agreed upon meaning within the insurance industry, and use of the term in the two different senses defined above often produces confusion in requests for additional insured status between contracting parties.

Mortgageholder. Similarly, the standard commercial property policy contains the standard mortgage clause providing that loss payments will be made to the insured and the **mortgageholder** as their interests may appear.

439 **Additional Insureds.** An "**additional insured**" is a person or organization not automatically included as an insured under an insurance policy but for who insured status is arranged, usually by endorsement. A named insured's impetus for providing additional insured status to others may be a desire to protect the other party because of a close relationship with that party (*e.g.*, employees or members of an insured club) or to comply with a contractual agreement requiring the named insured to do so (*e.g.*, customers or owners of property leased by the named insured).

440 **Self-Insured Retentions.** See **Endnote 443** (*Self-Insurance*).

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

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

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

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

Similar language appeared in the ACORD Certificate of Property Insurance. A New York appeals court has held that the presence of an ACORD "endeavor"-type notice of cancellation provision in the certificate does not impose on the insurer a contractual obligation to give the certificate holder notice of cancellation of the policy for the insured's premium non-payment. The court held that the insurer satisfied its contract obligations by complying with the contract's requirement of giving notice to the "first Named Insured" (the insurer's customer). The court pointed to a New York statute which required notice to the first named insured but did not also specify that notice be given to additional insureds. The court dismissed the additional insured/certificate holder's arguments as follows:

> Charles contends that it reasonably relied, to its detriment, upon the certificate of insurance which named it as an additional insured and, therefore, under our decision in [citation omitted], Merchants Mutual was equitably estopped from denying coverage. Notably, however, the situation presented herein is distinguishable because the Merchants Mutual insurance policy was not in existence at the time of (the employee's) accident. "Where there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel cannot be used to create coverage." (Citations omitted.) Furthermore, Charles argues that the policy was not properly cancelled because it was not notified of such action, as an additional insured…. Even assuming that Merchants Mutual received the policy change request from Weller-Marcil, we disagree with that argument. Since Merchants Mutual strictly complied with the notice of cancellation provisions set forth in … (reference to NY statute omitted) by mailing a timely notice of cancellation to the "first-named insured" (Regels) and "such insured's authorized agent or broker" (Weller-Mercil), the policy was effectively cancelled … (citation omitted), irrespective of its failure to comply with its "courtesy" policy of notifying additional insureds of a cancellation. Charlew's (the additional insured's) argument is further belied by the unambiguous disclaimer contained in the certificate of insurance … (quotation of the ACORD language is omitted.). *Id.* at 753-54.

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

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

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

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

[443] **Producer.** The "Producer" of a certificate of insurance typically is the broker for the named insured of the policies described in the certificate.

[444] **Signed By An "Authorized Representative"?.** ACORD Certificates or Evidences of Insurance are issued by a "**Producer**" and are signed by an "**Authorized Representative**". Neither of these terms is defined on the face of the standard ACORD form. Except for the multiple disclaimers of authority and accuracy, the ACORD Certificate of Insurance and the Evidence of Insurance are silent on the authority of the Authorized Representative to bind the listed Insurers. The ACORD Certificate of Insurance and Evidence of Insurance do not identify whether the Producer is the agent for the Insured, the agent for the Insurer, or a dual agent for both the Insured and the Insurer. Some courts in determining whether an ACORD form may be relied on despite the disclaimers have drawn a distinction on whether the Authorized Representative is a "**broker**"; a "**soliciting agent**"; a "**recording agent**"; a "**dual agent**"; a "**special agent**"; or an "**insurer's agent**". Other courts have held that the insurer is estopped from denying the coverage stated in the certificate or evidence of insurance, if the insurer or a person with apparent authority from the issuer issued the certificate, especially if the certificate does not contain ACORD-type disclaimers. See discussion at 43 AM. JUR.2d Insurance §§ 128 Brokers – Generally; 129 Brokers – Status While and After Procuring Policy. 4 BRUNER AND O'CONNOR ON CONSTRUCTION LAW §11:171 Certificates of Insurance – Generally; COUCH ON INSURANCE §§ 27:20 Act of Soliciting Agent – Insufficient to Justify Reformation; 45:1 Brokers Versus Agents; Definitions and Distinctions; 48:61 Soliciting and Collecting Agents; 48:62 Recording Agents.

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

Certificate Issued by "Recording Agent". The court in *United States Fidelity and Guaranty Co. v. Travis Eckert Agency, Inc.*, 824 S.W.2d 628 (Tex. App. – Austin 1991, writ denied) held that USF&G was bound by an additional insured endorsement issued by its recording agent even though the endorsement form was not an authorized form.

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

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

[446] **Self-Insurance.** See **Endnote 443** (*Self-Insurance*).

Commercial General Liability

[447] **Commercial General Liability Insurance (CGL).** CGL insurance is termed "**third party coverage**" insurance as it covers liabilities incurred by the named insured to third parties and excludes injuries and damage to the insured (*e.g.*, it excludes coverage for damage to property

"owned, occupied or controlled by the named insured." Covered liabilities or damages arise from an "**occurrence**" during the policy period which is not excluded by the Exclusions of the policy.

CGL Insurance provides protection to the insured for amounts the insured is legally obligated to pay that are caused by physical injury, personal injury (libel or slander), advertising injury and property damage as a result of the insured's products, premises, or operations, and can be offered as a package policy with other coverages. CGL policies also provide coverage for the cost to defend and settle claims. Commercial general liability policies typically and the ISO general liability policy form, which is the industry standard, is divided into Sections, Coverages, Exclusions, Definitions and Endorsements. The ISO CG policy is set up in the following parts:

Declarations.
Section I - Coverages
Coverage A. Bodily Injury and Property Damage Liability. (Note "Bodily Injury" and "Personal Injury" are different terms)
1. Insuring Agreement
2. Exclusions
Coverage B. Personal and Advertising Injury Liability
1. Insuring Agreement
2. Exclusions
Coverage C. Medical Payments
1. Insuring Agreement
2. Exclusions
Supplementary Payments - Coverages A and B
Section II - Who Is An Insured
Section III - Limits of Insurance
Section IV - Commercial General Liability Conditions
Section V - Definitions
Endorsements

The ISO commercial general liability policy categorizes liabilities into three categories: Coverage A for "Bodily Injury" and "Property Damage", Coverage B for "Personal and Advertising Injury Liability" and Coverage C for "Medical Payments." ISO defines each of these terms in the policy as follows: "**Bodily Injury**" is "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." "**Property Damage**" is "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." "**Personal and Advertising Injury**" is injury, including consequential bodily injury, arising out of one or more of the following offenses: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; oral or written publication, in any manner, of material that violates a person's right of privacy; the use of another's advertising idea in the insured's advertisement; infringing upon another's copyright, trade dress or slogan in the insured's advertisement. "**Medical Payments**" is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured's operations.

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

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

[450] **SIR.** See **Endnote 433** (*Self-Insurance*).

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

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

[453] **Contractual Liability Coverage - An Exception To An Exclusion From Coverage.** See **ISO CG 00 01 04 13** Commercial General Liability Coverage Form, Section I – Coverages, Coverage A, Par. 2 Exclusions, Par. **2.b** Contractual Liability. "**Contractual Liability Coverage**" (referred to by this author as "*indemnity insurance*") is contained in the CGL policy as an exception to an exclusion from coverage. The exclusion provides:

> **2. Exclusions.** This insurance does not apply to:
> **b. Contractual Liability**
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This ***exclusion does not apply*** to liability for damages:
> (1) That the insured would have in the absence of the contract or agreement; or
> (2) Assumed in a contract or agreement that is an "***Insured Contract***", provided the "Bodily Injury" or "Property Damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

An "**Insured Contract**" is defined in the standard CGL policy as:

> **9.** "Insured contract" means:
> a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
> b. A sidetrack agreement;
> c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
> d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
> e. An elevator maintenance agreement;
> **f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

See **ISO CG 24 26 04 13** Amendment of Insured Contract Definition, which when added to the standard CGL policy amends definition "**f**" to add the following qualifier at the end of the first clause:

> , provided the "bodily injury" or "property damage" is ***caused, in whole or in part, by*** you or by those acting on your behalf.

Also see **ISO CG 21 39** Contractual Liability Limitation (form attached to this Article), which when added to the standard CGL policy by endorsement deletes "**f**" altogether from the definition of an insured contract; and discussion in Chapter 3 Insurance at **II.A.11** *Exclusions May Be Invisible*.

Coverage For Named Insured As Indemnifying Party. Contractual liability coverage does not make the indemnified person an insured under the policy. *Alex Robertson Co. v. Imperial Casualty & Indemnity Co*., 8 Cal. App. 4th 338, 10 Cal. Rptr. 2d 165 (1992); *Jefferson v. Sinclair Ref.g Co*., 10 N.Y.2d 422, 223 N.Y.S.2d 863, 179 N.E.2d 706 (1961); *Davis Constructors & Engineers, Inc. v. Hartford Accident & Indemnity Co*., 308 F. Supp. 792 (M.D. Ala. 1968); and *Hartford Ins. Group v. Royal - Globe Co*., 21 Ariz. App. 224, 517 P.2d 1117 (1974). Instead it expands coverage for the named insured. *See e.g., Gibson & Associates, Inc. v. Home Ins. Co*., 966 F.Supp. 468, 475-77 (N. D. Tex. 1997).

Named Insured Not Insured For All Contractually Assumed Liabilities. CGL policies place conditions precedent that must be satisfied by an indemnified person prior to providing it defense under the indemnifying person's CGL policy. For example, the ISO CGL standard policy form provides

If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
b. This insurance applies to such liability assumed by the insured;
c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract".

The insured contract provisions of **ISO's CG 00 01** requires as a condition to providing the indemnified person a defense under the contractually assumed liability coverage that the indemnified person and the named insured - indemnifying person are parties to the same suit. An example of a common suit in which this is not the case is suit by an injured employee of the indemnifying party against the indemnified party.

Under the 1996 and later editions of the standard ISO form CGL policy, the cost to defend an indemnified person under the indemnifying person's CGL policy will be provided within the limit of the proceeds available under the policy as opposed to being on top of the limits as a supplementary payment, unless the indemnified person complies with a lengthy list of conditions precedent.

Named Insured Not Insured For All Contractually Assumed Liabilities. Indemnity insurance does not expand the scope of the liability policy beyond the coverage provided, nor does it extend the limits of liability. Coverage is limited by the policy's other exclusions (*e.g.*, pollution liability, insured's breach of contract, and breach of product warranty). Indemnity insurance does not insure the performance of the business aspects of the contract. *Musgrove v. Southland Corp*., 898 F.2d 1041 (5th Cir. 1990). The court held

> Contractual liability has a definite meaning. It is coverage of the insured's contractual assumption of the liability of another party. It typically is in the form of an indemnity agreement.... The assumption by contract of the liability of another is distinct conceptually from the breach of one's contract with another.... Liability on the part of the insured for the former is triggered by contractual performance; for the latter liability is triggered by contractual breach....CITGO (the owner) concedes that LCE (the contractor) made no indemnification agreement applicable to the loss herein; rather, it complains of LCE's breach of contract. LCE's contractual liability insurance is thus not applicable. LCE did not insure its commitment to secure insurance coverage for CITGO. *Id*. at 1044.

Contractually assumed liability coverage under the standard policy covers "**bodily injury**" and "**property damage**" but does not cover "**personal injury or advertising injury**" liability, unless such coverage is endorsed as additional coverage on to the insured's CGL policy. "Personal and Advertising Injury" is defined in Coverage B to standard CGL policies as "injury, including consequential bodily injury, arising out of one or more of the following offenses:

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

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

No Coverage for Indemnified Person's Sole Negligence. Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for the indemnified person's sole negligence. ISO issued in 2004 an endorsement, CG 24 26 06 04 (form attached to this Article), which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnified person. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence.

454 **Separation of Insureds.** A feature of some requests for additional insured status is the stipulation that the indemnifying person's policy, to which the indemnified person is being added as an additional insured, be modified to provide "**cross-liability**" coverage. Cross-liability refers to the loss exposure created when one insured under a policy sues another. Standard general liability policies in use today provide "cross-liability" coverage–without the need for any modification by virtue of the "**separation of insureds**" condition. This condition of the policy states that coverage will apply "separately to each insured against whom claim is made or suit is brought." For this reason, it may be a legitimate precaution to include in contract language a stipulation that liability insurance as required by the contract provide cross-liability coverage, but not a demand for a cross-liability endorsement, which is unnecessary when the standard CGL form is being used. This severability of interests clause, as it is also known, establishes separate coverage for each insured under the policy, except as respects the policy limits. Policies containing this provision do not require a separate endorsement to effect cross-liability coverage, and ISO has no "cross-liability endorsements" in its forms portfolio because they are not needed with ISO policy forms. For this reason, contracts should generally not require cross-liability endorsements.

Most endorsements that go by that name exclude liability of one insured to another. To handle the unlikely, but possible, contingency that a policy does not include a severability of interests clause, it is prudent to specify that the required liability policies provide cross-liability coverage as would by achieved under the standard ISO separation of insureds clause. See **Paragraph 7** Separation of Insureds to Section IV - Commercial General Liability Conditions to **ISO CG 00 01 04 13** Commercial General Liability Coverage Form in Forms in this Chapter

[455] **Primary and Noncontributing.** See **Endnote 712** (*ISO CG 20 10 04 13 Primary and Noncontributory -- The "Other Insurance" Condition*). See the following: (1) Section IV, Paragraph 4.a Other Insurance – Primary Insurance and 4.b – Excess Insurance to the **ISO CG 00 01 04 13** Commercial General Liability Coverage Form for provisions in the standard CGL policy establishing that coverage to the Named Insured under the CGL is provided on a primary basis and co-contributing with other insurance available to the Named Insured but is excess under specified circumstances, including if the Named Insured's other insurance is an additional insured provided on a primary basis; and (2) **ISO CG 20 01 04 13** Primary and Noncontributory – Other Insurance Condition.

The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under someone else's policy rather than having to rely upon on one's own policy. Additional insured indemnified persons must verify that any "other insurance" coverage to which they have access will not interfere with payment by the indemnifying person's policy on a primary and noncontributing basis. This is the interplay of the indemnifying person's CGL policy with the additional insured's own CGL policy. Assuming both the indemnifying person's CGL policy and the additional insured indemnified person's policies are standard form policies, both will declare themselves to be primary insurance unless some modification is effected to eliminate this dual coverage. *Texas Employers Ins. v. Underwriting Members*, 836 F.Supp. 398, 404 (S. D. Tex. 1993). Note that endorsing the indemnifying person's policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. The standard ISO form policy also provides for ***proration*** when other insurance is available to the additional insured. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969). Without more, in such cases the additional insured's desire to have the named insured's policy respond prior to the additional insured's own policy is thwarted.

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

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

(1) Endorse the protecting party's policy to be primary. The above stated approach of endorsing the protecting party's CGL policy to state that it is primary with respect to other insurance maintained by the additional insured (as noted above most standard CGL policies state they are primary).

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

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

(3) Endorse the protected party's policy to be excess. The third approach is for the protected party (the additional insured) to have its own carrier endorse the protected party's CGL policy to state that coverage under the protected party's policy is excess to coverage available to the protected party as an additional insured on another person's policy. This works unless the additional insured endorsement has also been issued on a excess liability basis. Because of this possibility, option (3) is not recommended.

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

> 4. Other Insurance
> b. Excess Insurance. This insurance is excess over: ...
> (2) Any other *primary* insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured *by attachment of an endorsement*.

Note, however, the 1997 language does not apply where additional insured status is not obtained by an endorsement to the protecting party's CGL policy. This provision is not triggered if the additional insured is automatically an additional insured on another insured's CGL policy. In 2013 the "by attachment of an endorsement" language was deleted. The 2013 revision thus ends concern under the standard CGL policy as to whether an additional insured's own CGL policy would be primary and co-contributing with automatic additional insured coverages. Note that the protected party's policy may not contain the 1997 language. If this is the case then the protected party's policy should be endorsed to make it excess over all other coverage available to the protected party in order to achieve the elimination of overlapping coverage and contribution. The following are traps to be avoided by the party seeking protection:

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

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

(2) Do not assume that the protecting party's additional insured endorsement does not have a provision in it stating that the additional insured's coverage is on excess or contributory basis. Even though the protecting party's policy may have standard language to the effect that coverage for insureds is primary and noncontributory for other insurance coverage available to the insured, the additional insured endorsement may have overriding language. The protected party should require in the contract with the protected party that the additional insured coverage to be provided to the protected party will be on a primary, noncontributory basis. Failure of the protecting party to provide such coverage will be a breach of this insurance covenant. Note, some CGL policies provide that they automatically provide primary coverage when required by the contract between the parties (a "**primary-when-required**" provision). For example the following is a "primary-when-required" provision contained in some CGL policies:

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

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

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

[457] **Personal Injury Exclusion to Contractual Liability Coverage.** Unless endorsed, the standard CGL policy excludes from contractual liability coverage indemnification by the insured for "**Personal Injuries**".

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

[459] **Contractual Liability Limitation.** See **ISO CG 21 39** Contractual Liability Limitation (form attached in the Forms to this Chapter), which when added to the standard CGL policy by endorsement deletes paragraph "**f**" (assumption of tort liability of another) altogether from the definition of an insured contract.

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

[461] **Limitation of Coverage to Designated Premises or Project.** See the **ISO CG 21 44** Limitation of Coverage to Designated Premises or Project.

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

Automobile Liability Insurance

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

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

[464] **"Any Auto".** If the insured does not own an auto, the insurer may not agree to cover liability from "any auto", but limit coverage to hired and nonowned autos.

Workers Compensation Insurance

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

"**Workers Compensation**" insurance is the system by which no-fault statutory benefits prescribed by state law are provided by an employer to an employee (or the employee's family) due to a job-related injury (including death) resulting from an accident or occupational disease. 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. Workers compensation coverage is usually written in tandem with an employer's liability coverage policy. A "**Workers Compensation and Employers Liability Policy**" is an insurance policy that provides coverage for an employer's two key exposures arising out of injuries sustained by employees. Part One of the policy covers the employer's statutory liabilities under workers compensation laws, and Part Two of the policy covers liability arising out of employees' work-related injuries that do not fall under the workers compensation statute. In most states, the standard Workers Compensation and Employers Liability Policy published by the National Council on Compensation Insurance ("**NCCI**") is the required policy form.

Employer's Liability Coverage. "**Employer's Liability Coverage**" provides coverage against common law liability of an employer for accidents to employees, as distinguished from liability imposed by a workers compensation law. This is provided by Part 2 of the basic workers compensation policy and pays on behalf of the insured (employer) all sums the insured becomes legally obligated to pay as damages because of bodily injury by accident or disease sustained by any employee of the insured arising out of and in the course of his employment by the insured. Typically triggered by a third party after the insured's employee (who is barred by workers compensation laws from suing his or her employer) sues a third party for bodily injury suffered while performing duties of his or her employment (*e.g.*, contractor's employee injured on the premises of that third party).

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

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

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

Liquor Liability Insurance

469 **Liquor Law Liability.** ("**Dram Shop**"). Liquor law liability (also called dram shop liability) is a common law liability imposed on those selling alcoholic beverages, as well as a statutory liability established in some states. The risk of liquor law liability is excluded from commercial general liability policies. For coverage, a party must specify that the other party obtain a liquor legal liability policy that specifically provides coverage for bodily injury or property damage for which the insured may become legally liable as a result of contributing to a person's intoxication. This type of special lines liability policy only covers insureds "*in the business of*" manufacturing, selling, distributing, serving alcoholic beverages for charge or no charge if a license is required for the activity." *e.g.*, typical taverns, liquor stores and other commercial establishments that serve alcoholic beverages (dram shop) to patrons.

See in the Forms to this Chapter **CG 00 01 04 13** Commercial General Liability Coverage Form Exclusion **2.c** Liquor Liability. Note that **Exclusion 2.c** provides that it excludes coverage for any injury or damage "for which *any insured* may be held liable by reason of causing or contributing to the intoxication of any person." But then qualifies this exclusion by stating that the exclusion applies "only if *you* are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages." In other words, if the named insured is in an alcohol-related business, no insured has coverage for causing or contributing to any person's intoxication. If the *named insured* is not in such a business, the exclusion does not apply to *any insured*.

The standard policy was amended in 2013 to narrow coverage by adding clarifications expanding the exclusion. The 2013 revisions added the "**(a)** and **(b)** exclusions" (see in the Forms CG 00 01 04 13 Commercial General Liability Coverage Form Exclusion **2.c** Liquor Liability "This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in (a) …; or (b) ….) addressing cases that had found certain conduct as falling outside of the exclusion and thus covered under the CGL policy (*e.g.*, *Penn-America Insurance v. Peccadillos*, 27 A.3d 259 (Pa. Super. Ct. 2011) (en banc), petition for allowance of appeal denied by, *Penn–Am. Ins. Co. v. Peccadillos, Inc.*, 34 A.3d 832 (Pa. 2011) - failing to provide transportation to a drunk patron) and *McGuire v. Curry*, 766 N.W.2d 501 (S.D. 2009) - negligent supervision of an employee – underage employee of a race track - that while drunk injured a third party). The 2013 revisions also revised the Liquor Liability Exclusion to provide that a "BYO" establishment is not considered to be in the business of selling, serving or furnishing alcoholic beverages!

Question 1: Is the Liquor Liability Exclusion applicable to a company's annual party if the company provides its employee and the employee's guest with two free drink tickets? The company would argue that it is not "in the business" of providing alcohol and that its CGL policy should cover its host liability. Advice: The better practice is to confirm with the insurer that the event and activity is covered or, if necessary, purchase special events coverage (aka laser coverage).

Question 2: What if the business regularly furnishes free drinks as a draw to marketing events? Advice: Same as Question 1.

Umbrella And Excess Liability Insurance

[470] **Umbrella and Excess Policies.** The following definitions are found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx. "**Umbrella policy**": "A policy designed to provide protection against catastrophic losses. It generally is written over various primary liability policies, such as the business auto policy (BAP), commercial general liability (CGL) policy, watercraft and aircraft liability policies, and employers liability coverage. The umbrella policy serves three purposes: it provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims; it drops down and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and it provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR)."

"**Excess policy**": "A policy issued to provide limits in excess of an underlying liability policy. The underlying liability policy can be, and often is, an umbrella liability policy. An excess liability policy is no broader than the underlying liability policy; its sole purpose is to provide additional limits of insurance."

[471] **Allocation of Limits Between Primary and Excess/Umbrella Policy.** Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.

Property Insurance

[472] **Landlord and Tenant Relationship – Risk of Loss to the Shopping Center and the Leased Premises.** At common law, neither the landlord nor the tenant is obligated to repair the premises after casualty damage unless it caused the damage; the lease continues in effect, and the rent is not reduced or abated. In order to use the premises, the tenant is put to the burden of restoring the premises to useful condition. Absent a tenant's fault in causing damage to the premises or provision in the lease, the tenant's common law obligation is not to commit waste. The tenant is liable to the landlord if the tenant negligently destroys the premises (*e.g.*, a negligently caused fire) absent a provision in the lease to the contrary. *Nagorny v. Gray*, 261 S.W.2d 741 (Tex. Civ. App. - Galveston 1953, no writ). If the lease does not obligate the landlord or the tenant to restore the premises after a casualty loss and the loss is not caused by the negligence of either party, the landlord bears the risk of the decline in value of the property if either it or the tenant does not restore the property.

As opposed to leaving the rebuilding obligation to common law rules, the parties customarily will address this topic in the lease. The lease may provide that the tenant is obligated to return the premises at the expiration of the lease term and make no exception for casualty losses; the lease may allocate the responsibility of rebuilding to landlord or to tenant, or parts to landlord and parts to tenant; and the lease will address funding of the rebuilding obligation by requiring one or the other of the parties to maintain property insurance, including setting out specifications for the property insurance.

[473] **Property Insurance.** ISO commercial property insurance is a form comprised of the following documents combined to make the policy:

- the Declarations Page (**ISO CP DS 00 10**, or a variation);
- the Common Policy Conditions (**IL 00 17**);
- the Building and Personal Property Coverage Form (form attached to this Chapter);
- the Commercial Property Conditions (**CP 00 90**) (form attached to this Chapter);
- optional coverage endorsements: *e.g.*, **ISO 00 30** Business Income (And Extra Expense) Coverage Form, the **ISO CP 04 05** Ordinance or Law Coverage endorsement, or **ISO 04 05** Debris Removal Additional Insurance endorsement;
- one of the 3 Causes of Loss Forms: (CP 10 10, 10 20 or **10 30**); and
- loss payee or additional insured endorsement: *e.g.*, **ISO 12 18** Loss Payable Provisions or **ISO CP 12 19** Additional Insured – Building Owner (form attached to this Chapter).

[474] **Property Insurance – "Causes of Loss".** Outdated terminology requiring that the policy provide "all risks" or "fire and extended coverage" is often used in contracts. "**All risks**" denoted property insurance covering losses arising from any fortuitous cause except those that are specifically excluded and is currently called "**Special Form**" or "**Special Causes of Loss Form**". "**Extended coverage**" refers to an endorsement that was once added to a standard fire policy to cover the perils now insured under ISO's Basic Causes of Loss Form. Since the extended coverage endorsement is no longer used, a better approach to requiring this coverage is to refer to the ISO "**Basic**," "**Broad**," or "**Special**" Causes of Loss Form. Prior property insurance forms used the terms "**risk**" and "**perils**". Pre-"causes of loss" property insurance was written either on a "**named peril**" basis which insured property against loss or damage from causes of loss expressly enumerated in the policy or an "all risks" basis, which insured property against loss or damage from all causes of loss except those which were expressly excluded. "Fire and extended coverage" insurance was a named peril property insurance.

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

Exclusion from Causes of Loss. The following are excluded perils from Causes of Loss coverage, including from Special Causes of Loss:

- Law and Ordinance;

- Earth Movement, Governmental Action;
- Nuclear Hazard;
- Utility Service;
- War and Military Action;
- Water (see below);
- Fungus, Wet Rot, Dry Rot, and Bacteria, Boiler and Machinery Failure;
- Wear and Tear or Lack of Maintenance;
- Continuous Seepage or Leakage Over a Period of 154 Days or More;
- Dishonest Acts;
- Pollutants; and
- Faulty Design or Workmanship.

Also, in special hazard areas certain causes of loss may be excluded from coverage by endorsement with specialty insurance being required to cover the hazard (*e.g.*, windstorm).

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

Windstorm. For an interesting example of how a windstorm exclusion may come into play is illustrated by *Great American Ins. Co. of N.Y. v. Lowry Dev., LLC*, 576 F.3d 251 (5th Cir. 2009). This case involved a builder's risk policy. Although the policy as originally issued did not exclude wind damage, subsequent to its issuance the issuer endorsed the policy with a windstorm exclusion and notified the developer's broker that the original policy was to have excluded wind damage. The developer's broker did not respond and did not notify the developer. The policy was reissued the next policy year and excluded wind damage. Of course, Hurricane Katrina demolished the project. The Fifth Circuit held that the developer's broker was the developer's agent with authority to handle the developer's insurance matters and therefore notice to the broker was notice to the developer.

Flood. See this Chapter **Endnote 483** (*Flood*) for a discussion of flood insurance.

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

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

PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS

Basic Causes of loss Form (CP 10 10)	**Broad Causes of Loss Form (CP 10 20)**
• Fire • Lightning • Explosion • Windstorm or hail • Smoke • Aircraft or vehicles • Riot or civil commotion • Vandalism • Sprinkler leakage • Sinkhole collapse • Volcanic action	Basic causes of loss form perils, plus: • Breakage of glass • Falling objects • Weight of snow, ice, or sleet • Water damage from leaking appliances • Collapse from specified causes **Special Causes of Loss Form (CP 10 30)** • All perils except as excluded • Collapse from specified causes

475 **Valuation Terminology – Replacement Cost or Actual Cash Value.** Whether the policy is a "**Replacement Cost**" policy or an "**Actual Cash Value**" policy, the loss paid will be limited to the policy limits.

"**Replacement Cost**" is the cost of repairing or replacing insured property at time of the occurrence of the loss, without reduction for loss of value through depreciation or age. Recovery is limited to the lesser of (a) the policy limit, (b) the cost to replace the lost or damaged property with other property of comparable material and quality and used for the same purpose, or (c) the amount actually spent to repair or replace the damaged or lost property. The policy proceeds are not paid until the property is actually repaired or replaced, and only if replacement occurs as soon as reasonably possible after the loss or damage. Notice of intent to replace must be given to the insurer within 180 days of loss. Replacement cost coverage does not prohibit recovery if the insured rebuilds at a new location, but the coverage is limited to what it would have

cost to replace the improvements at the original premises. Replacement cost coverage does not cover the added costs of construction due to changes in laws and ordinances except if the policy is endorsed with an Ordinance or Law Coverage Endorsement (See **Endnote 485**). In the past replacement cost coverage was an option provided by endorsement. Now it is an optional coverage built into the ISO form policy. The option coverage is selected by notation on the Declarations Page. See **ISO CP DS 10 00** Declarations Page at Optional Coverages.

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

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

[476] **Valuation Terminology – Agreed Value Endorsement.** An "**agreed value endorsement**" is an optional endorsement used where the named insured and the insurer agree upon the actual cash value or the replacement cost of the covered property before the policy is written and agree that co-insurance will not apply.

[477] **Designation of Landlord as Additional Insured on Tenant's Property Policy.** See this Chapter **Endnote 545** (*Tenant Betterments, Alterations and Improvements*). See **Insurance Spec. B.1.1** where insurance for Tenant Improvements and Betterments is placed on the landlord. Some commentators have questioned whether a tenant has an insurable interest in improvements and betterments installed at the landlord's expense. A similar issue arises if the lease provides that the tenant is to "insure all leasehold improvements" and there are significant leasehold improvements preexisting in the leased premises. Tenant may not have an insurable interest in improvements it did not install and pay for. But see **ISO CP 00 10 10 12** Building and Personal Property Coverage Form stating that coverage is provided the tenant for:

> (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
> (a) Made a part of the building or structure you occupy but do not own; and
> (b) You acquired or made at your expense but cannot legally remove;

[478] **Risk Allocation – Tenant's Property Losses Allocated to Tenant's Property Insurance.** This provision coupled with the waiver of subrogation provision whereby tenant waives claims against landlord in addition to waiving its insurer's subrogation rights protects landlord against claims by tenant for damage to the tenant's property, even if the damage arises out of the landlord's negligence.

[479] **Coinsurance.** "**Coinsurance**" is a property insurance provision that penalizes the insured's loss recovery if the limit of insurance purchased by the insured is not at least equal to a specified percentage (commonly 80%) of the value of the insured property. A business income coverage coinsurance provision penalizes the insured's loss recovery if the business income limit of insurance is not at least equal to a specified percentage of the business income that would have been earned during the 12-month policy period. The coinsurance provision specifies that the insured will recover no more than the following: the amount of the loss multiplied by the ratio of the amount of insurance purchased (the limit of insurance) to the amount of insurance required (the value of the property on the date of loss multiplied by the coinsurance percentage), less the deductible. Coinsurance requirements protect the insurer against an insured's deliberate underinsurance of the Covered Property. To avoid the penalty of coinsurance, the insured is forced to insure at or above this minimum level of value and pay its premium on the insured value. See Declarations Page – If higher than 80% coinsurance is applicable, such higher percentage is to be set out in the space provided on the Declarations Page. See **Endnote 476** for a discussion of "**Agreed Value Basis**" coverage and see Declarations Page setting out space for designating the Agreed Value of the Covered Property.

[480] **Property Insurance – Special Causes of Loss.** See **Endnote 474** for a discussion of Causes of Loss Form property insurance policies, including Special Causes of Loss.

[481] **Designation of Landlord as Additional Insured on Tenant's Property Policy.** A landlord may take on the status of a "**loss payee**" or sometimes an "**additional insured**" on a tenant's property policy.

Loss Payable Clause. A "**Loss Payable Clause**" is an insurance provision authorizing payment in the event of loss to a person or entity (a "loss payee") other than the named insured having an insurable interest in the covered property. See **ISO CP 12 18 06 07** Loss Payable Provisions, **Optional Clause F** Building Owner Loss Payable Clause (form attached to this Article). In November 2008 ISO amended its CP 12 18 Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the **CP 12 19**. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building

owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

Additional Insured. Generally, to be eligible for insured status under a property policy, the insured must have an insurable interest in the insured property. The assumption by a tenant of liability for damage to leased premises is recognized as creating an insurable interest in the tenant. Leases for single tenant buildings sometime require the tenant to insure the improvements and to name the owner-lessor as an additional insured. Unlike the standard mortgagee coverage, other additional insurable interests endorsements do not provide coverage despite the acts of the insured, whether the first named insured (e.g., tenant) or the additional insured or loss payee (*e.g.*, landlord). Under current ISO commercial property forms, intentional concealment or misrepresentation of a material fact by any insured voids coverage for the additional insured. In November 2008 ISO issued its form **CP 12 19** Additional Insured – Building Owner endorsement to designate a building owner as a "Named Insured" for damage to the building on a tenant's property policy covering the building. It is the "insureds" who receive the loss payment under a property policy. Thus, it is unnecessary to specify that the building owner also be designated as a loss payee when it is designated as an insured.

ATIMA. The phrase "**as their interests may appear**" (an "**ATIMA**" clause) often is added in a property additional insured endorsement. This is done in order to limit the additional insured's recovery rights to covered property with respect to which the additional insured has an interest. Without these limiting words, if the policy covers multiple properties, the insurer could include the additional insured on all policy proceeds checks. Under the **CP 12 19** the building owner is an additional insured with respect to the coverage provided for direct physical damage to the building and covered loss is adjusted with and payable to both the tenant, as the "**First Named Insured**" (the insured whose name is listed first in the Declarations), and to the building owner, as additional insured. The **ISO CP 12 19** Building Owner Additional Insured Endorsement (form attached to this Chapter) does not provide for notice of cancellation to be given to the landlord/additional insured. Further, the cancellation provision in the ISO Common Policy Conditions (form attached to this Article) states that notice of cancellation is given only to the first Named Insured. Thus, the tenant's property policy provides notice of cancellation will only be given to the tenant.

Caveat: To assure notice of cancellation by the insurer, the landlord must obtain a notification endorsement to the policy. Additionally, note that the notification endorsement likely will not address notification as to cancellations by the tenant and will need to be manuscripted to include notice to the landlord of tenant cancellations. In *Scottsdale Ins. Co. v. Mason Park Partners, LP,* 2007 WL 2710735 (5th Cir. – Tex. 2007) the landlord learned the hard way that it needed to follow up and obtain a corrected additional insured endorsement on the tenant's property policy. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". In addition to issuing the additional insured endorsement to the property policy, the landlord should also have obtained an endorsement to the property policy requiring notice of cancellation be given to it of policy cancellation. The standard property policy only requires notice of cancellation be sent to the first named insured.

[482] **Antennas.** See **ISO CP 00 10 10 12** Building and Personal Property Coverage Form, Paragraph **A.2.q(2)** Property Not Covered. Antennas (including satellite dishes) and their lead-in wiring, masts or towers are excluded from coverage under the ISO property policy, except as provided in a limited manner in the Coverage Extensions (fire, lightning, explosion, riot, civil commotion and aircraft). Coverage may be increased and extended by an **ISO CP 14 50** endorsement.

[483] **Flood.** Flood losses are commonly excluded from property insurance policies. Flood losses are losses caused by rising waters, back up of storm sewers and storm surges. The Flood Disaster Protection Act of 1973 mandated that federally regulated lending institutions could not "make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified ... as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968 without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. The National Flood Insurance Program ("**NFIP**") created by the 1968 act was amended by the Biggert-Watters Flood Insurance Reform Act of 2012, and extended by the Homeowner Flood Insurance Affordability Act of 2014, Pub. L. No. 112-89, 128 Stat. 1020. NFIP is codified at 42 U.S.C.A. § 4012a *et seq*. Coverage can be obtained for these losses through flood insurance, a difference in conditions policy, or as an endorsement to a property policy.

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

[485] **Ordinance or Law Coverage.** Ordinance or Law Coverage is available by endorsement to a standard property policy to insure against loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Many communities have building ordinances that require that a building that has been damaged to a specified extent (typically, 50 percent) be demolished and rebuilt in accordance with current building codes rather than simply repaired. Unendorsed, standard property insurance forms do not cover the loss of the undamaged portion of the building, the cost of demolishing that undamaged portion of the building, or the increased cost of rebuilding the entire structure in accordance with current building codes. Ordinance or law coverage may be purchased using **ISO CP 04 05** to cover the cost above the limit available under the ISO property insurance for cost of construction incurred to comply with an ordinance or law. The base form ISO property insurance limits such coverage to the lesser of $10,000 or 5% of the policy limits.

[486] **Terrorism.** Before September 11, 2001 ("9-11") most property damage policies included coverage for terrorism. After 9-11 most were rewritten to exclude or significantly limit coverage for future acts of terrorism. After 9-11 it became apparent that insurers were not willing to take on the potential of high levels of terrorism risk. The Terrorism Risk Protection Act of 2002 ("**TRIA**") was enacted to provide a safety net for

businesses to obtain terrorism insurance at reasonable prices. Thus, the backstop, as a government-supported pool to cover the most catastrophic losses, facilitated the development of the market for terrorism insurance. The Terrorism Risk Insurance Program Reauthorization Act of 2007 ("**TRIPRA**") extend the TRIA program through December 31, 2014 with some significant changes. Among other changes TRIPRA revised the definition of a "**certified act of terrorism**." TRIPRA was modified and renewed through December 31, 2020 by the Terrorism Risk Insurance Program Reauthorization Act of 2014, Pub. L. No. 114-1 (Jan. 12, 2015). The new act provides for the increase The Treasury Department still has to develop rules for the new law. Under TRIPRA an insured loss is one resulting from an "Act of Terrorism" that is covered by primary or excess property insurance. An "**Act of Terrorism**", which must be certified as such by the Secretary of the Treasury in consultation with the Secretary of Homeland Security and U.S. Attorney General is:

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

No act can be certified as an Act of Terrorism (i) if it is committed in the course of a war, or (ii) if property insurance losses resulting from the act do not exceed $5 million in the aggregate. Excluded are chemical, nuclear, biological, and radiological events unless and until a study of the availability of insurance coverage for losses caused by terrorist attacks involving such materials is completed and recommendations regarding actions to expand the coverage to include these events are made. To date there has not been a certified Act of Terrorism and no insurance proceeds have been paid out under this program.

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

[488] **Debris Removal.** See the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form **¶A.4.a** Coverage – Additional Coverages – Debris Removal. The ISO Commercial Property Policy provides coverage for debris removal as "additional coverage" and is limited to 25% of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the **ISO CP 04 15 10 12** Debris Removal Additional Limit of Insurance endorsement.

[489] **Waiver of Claims; Waiver of Subrogation.** See discussion in Chapter 4 Waiver of Subrogation.

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

"**Business Income Rental Value**" is included under both forms of business income forms (**ISO CP 00 32** and **CP 00 30**) if the attached declaration so provides. Rental value protects the landlord against loss of rents during reconstruction and abatement of rentals if the abatement results from a loss under a named cause of loss in the property insurance.

ISO has recently promulgated an additional insured endorsement form. This endorsement to the tenant's property policy adds the person identified in the endorsement (the landlord) as an insured for loss of "**rental value**" and thus meets lease requirements that the tenant obtain coverage for loss of the additional insured's rental income. The **ISO CP 15 03** provides that notice of insurer cancellation will be provided by the insurer to the additional insured, landlord.

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

[492] **Boiler and Machinery Coverage.** Boiler and machinery coverage is added by endorsement or by a separate policy. Property insurance typically excludes damages due to explosion of pressure vessels and sudden and accidental, mechanical or electrical breakdown of machinery. Boiler and machinery coverage includes damages arising out of pressure vessels, hot water heaters, air conditioning and heating equipment, and

electrical switchgear. If a separate policy is to be written to cover boiler and machinery caused damages, then there needs to be added to both the primary policy and the boiler and machinery policy an **ISO CP 12 72** Joint or Disputed Loss Agreement.

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

494 **Other Insurance.** For example, the following specification is to be added if there is a hazardous waste hauler:

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

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

Construction Liability Insurance

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

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

This endorsement, effective 12:01 A.M. 03/31/2015
Forms a part of Policy GL ____
Issued to (_____)
By AMERICAN HOME ASSURANCE COMPANY
COMPLETED OPERATIONS EXTENSION
CONTROLLED INSURANCE PROGRAM (MULTIPLE PROJECTS)
This Endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
SCHEDULE:
All (_____) Projects with construction values $15,000,000 and above.

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

All terms and conditions remain unchanged.

496 **General Aggregate Per Premises or Project.** See in the Forms to this Chapter the **ISO CG 25 04 05 09** Designated Location(s) General Aggregate Limit.

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

498 **Owner's and Contractor's Protective Liability Policy.** ("**OCP Policy**"). An OCP Policy covers bodily injury and property damage liability arising out of an independent contractor's operations for another party. Although the contractor purchases the policy, the Named Insured

is the party for whom it is performing operations. The OCP Policy also responds to liability arising out of the acts or omissions of the insured in connection with the general supervision of the contractor's operations.

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

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

> **Commercial General Liability**
> CG 71 57 09 10
> **Additional Insured – Owners, Lessees Or Contractors Automatic Status When Required In Construction Contract Primary And Non-Contributory**
>
> **A. Section II - Who is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when ***you and such person or organization have agreed*** in a written contract that such person or organization be added as an additional insured on your policy. (Bold italics emphasis added.)

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

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

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

[501] **Additional Insureds – ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** The July 2004 version of this CGL endorsement, ISO CG 20 10 07 04, which is the revision immediately preceding the most recent version of April 2013, "includes as an additional insured the person or organization shown in the Schedule, but only with respect to liability *caused in whole or in part by* [*the Named Insured's*] *acts or omissions*; or the acts or omission of those acting on [the Named Insured's]

behalf in the performance of *on-going* operations." The July 2004 endorsement revision (1) carries forward the major change introduced by the October 2001 revision to this endorsement, the CG 20 10 10 01, that eliminated from the scope of additional insured coverage liabilities arising out of *completed operations*; and (2) changes from the previously used language "*arising out of the* [Named Insured's ongoing operations]" to the "*caused in whole or in part by* [the named insured's acts or omissions acts or omissions]", thus eliminating coverage for the additional insured's sole negligence.

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

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

The "**Texas Anti-Indemnity Act**", Chapter 151 of the Texas Insurance Code provides as to indemnification:

> §151.102 Agreement Void and Unenforceable. Except as provided by Section 151.103, a provision in a construction contract … is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.
>
> §151.103 Exception for Employee Claim. Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

Also note that Chapter 151 of the Texas Insurance Code provides as to additional insured coverage:

> §151.104 Unenforceable Additional Insurance Provision.
> (a) Except as provided in Subsection (b), a provision in a construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provision within in an insurance policy providing additional insured coverage, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter for an indemnity agreement to indemnify, hold harmless, or defend.
> (b) This section does not apply to a provision in an insurance policy, or an endorsement to an insurance policy, issued under a consolidated insurance program to the extent that the provision or endorsement lists, adds, or deletes named insureds to the policy.

[504] **Contractual Liability Limitation.** See **ISO CG 21 39** Contractual Liability Limitation, which when added to the standard CGL policy by endorsement deletes paragraph "**f**" (assumption of tort liability of another) altogether from the definition of an insured contract.

[505] **Amendment of Insured Contract Definition.** See in **Endnote 453** (Contractual Liability Coverage - An Exception To An Exclusion From Coverage) for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy. See the **ISO CG 24 26** Amendment of Insured Contract Definition (form attached to this Article) amending the definition of "insured contract" in the CGL Policy to limit Contractual Liability Coverage to tort liability assumed by the Named Insured to bodily injury and property damage caused in whole or in part by the Named Insured.

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

Builder's Risk Insurance

507 **Commercial Property Insurance vs. Builder's Risk Insurance.** Commercial property insurance is generally used to cover completed buildings and builder's risk insurance is used to cover buildings under construction or extensive renovations of an existing building. Builder's risk insurance is tailored to the risks of construction. The following circumstances are more likely to be specifically addressed and perhaps resulting insured in a builder's risk policy than in the "under construction" provisions of a commercial property insurance policy: (1) Buildings under construction are at a greater risk of damage or destruction, especially from weather; (2) The value of the improvements varies as it is constructed; (3) Materials may be stored off-site or be in transit; (4) Ownership of the building (and the improvements to components, e.g., suites, condominiums, or materials may be in different parties at different points during the policy period; (5) The types of losses an owner incurs may be different if the building is destroyed prior to completion, e.g., liquidated damages and late delivery penalties under construction contracts and leases; and (6) The policy period depends on completion and is not fixed to a specific calendar period as is the case of a policy year for commercial property insurance policies.

508 **Who Purchases the Builder's Risk Insurance.** Typically, the policy is purchased by the party that can obtain the best rate. Because the owner or tenant is ultimately liable for the cost of construction in the case of construction by the owner or landlord, or to the extent of the tenant improvement allowance, or otherwise, and in the case where the owner is liable for the construction loan, the owner or tenant, as the case may be, wants certainty that the coverage is adequate and that it will settle any losses with the insurance carrier. Also, the contractor is also motivated to have broad coverage in place and will wish to participate in settlement discussions.

509 **No Standard Builder's Risk Policy.** There is no standard builder's risk policy, unlike liability insurance there is a commonly recognized standard ISO CGL policy. ISO has a builder's risk policy, but builder's risk policies are considered to be Inland Marine policies and there is a wide divergence in builder's risk coverages insurer to insurer. "**Inland Marine**" policies are policies that are customized to the loss sought to be insured, and are designed to provide coverage for special exposures typically associated with the type property at which they are directed and the special valuation methods needed to address the exposure. Construction is recognized as a special exposure. A commonly used Inland Marine policy for builder's risk coverage is the Commercial Inland Marine Conditions (Form CM 00 01 09 04).

Common Errors and Problems:

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

Review of Policy Delayed Until After Construction Commencement. Like the other insurance products discussed in this article, the actual builder's risk insurance policy may not, and likely will not, be issued or available prior to commencement of construction! The actual policy in many cases is not issued and delivered for weeks or months after work has begun. As noted above in the discussion of the perils of reliance on an ACORD Certificate of Property Insurance, an ACORD Evidence of Insurance or even an ACORD Binder, the policy itself is the contract of insurance and contains extensive terms and conditions that should be reviewed and approved prior to commencement of work. A great level of "distress" can occur, if an assumed coverage in fact is not included in the policy, despite the best written insurance specifications, and a loss occurs before issuance of the policy. If construction will commence before issuance and delivery of the policy, one avenue may be to have the insurer deliver a specimen policy and specimen endorsements.

Coverage Amount. Failure of the policy amount to reflect the full loss exposure is a common error. The contractor's contract sum is a guide in setting the coverage amount. In projects involving remodeling (especially if the structure is a historic structure) or improvement to an existing building, limiting the coverage amount to the contractor's contract sum could lead to a significant uninsured loss. Builder's risk policies will not insure the building envelope unless specifically added. When added, some builder's risk policies insure the envelope only on an actual cash value, or depreciated, basis.

Coverage for Architect's Fees, Owner Supplied Materials, Debris Removal, Full Limit Coverage of Flood and Earthquakes, and Elimination of Ordinance or Law Exclusions. Many commonly expected coverages are available only through policy endorsement and are not part of the issuer's standard policy form, such as coverage for the owner's additional architect's fees arising out of an insured loss; coverage for owner supplied materials; amending the Ordinance or Law exclusion to cover costs of demolition of the intact portion of a building when a law, ordinance or regulation requires that the entire structure be torn down; endorsement to include full collapse coverage, including collapse resulting from design error; and verification that sublimits (*e.g.*, sublimits for flood and earthquake coverage) are adequate or eliminated.

Delay Damages. See BRUNER AND O'CONNOR ON CONSTRUCTION LAW §§ 11:116 Builder's risk soft cost coverage; Delayed completion and force majeure insurance. Builder's risk policies typically do not cover damages caused by delays arising out of a covered loss. These "soft costs" can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes. Another endorsement that may be available to insure against a financial distress risk is a delayed completion and force majeure endorsement. This endorsement supplements the risk of covered loss to cover consequential damage losses due to completion delays and force majeure events not otherwise covered. This endorsement extends coverage for losses due to strikes and labor disputes, changes in law (*e.g.*, building codes, emission standards), acts of God, adverse weather conditions and off-site physical damage to materials or equipment.

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

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

[512] **Builder's Risk – Insureds.** The owner and all contractors and major subcontractors should be named as named insureds under a builder's risk policy because at any given point of construction prior to completion all of these parties could have ownership of or an investment in the completed portion of the building and the materials, supplies, and other property installed or intended to be installed in the improvements under construction. *Employers' Fire Ins. Co. v. Behunin*, 275 F.Supp. 399 (Colo. 1967); *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32 (Tex. 1974); *LeMaster Steel Erectors, Inc. v. Reliance Ins. Co.*, 546 N.E.2d 313 (Ind. 1989); and *Tri-State Ins. Co. v. Commercial Group W., LLC*, 698 N.W.2d 483 (N.D. 2005). Because an insured party cannot be sued by the insurer to recover the insurer's losses absent fraud by the insured party or other special circumstances, being named as insured parties has the added benefit of protecting the general contractor and the subcontractors for property damage caused by their own negligence. Phrases like "as their interests may appear" should not be included either in contractual specifications, insurance certificates or the policy, as this qualification has been the source of subrogation claims by insurers against an insured under builder's risk policies in cases where there has not been an express waiver of subrogation. *Paul Tishman Co., Inc. v. Carney & Del Guidice, Inc.*, 320 N.Y.S.2d 396 (1971), aff'd 359 N.Y.S.2d 561 (N.Y. 1974); *Turner Constr. v. John B. Kelly Co.*, 442 F.Supp. 551 (Penn. 1976) subrogation against named insured subcontractor permitted even though policy contained a waiver of subrogation endorsement. *But see St. Paul Fire & Marine Ins. Co. v. F. D. Sprinkler, Inc.*, No. 119 021/06, N.Y. Sup. Ct. (Aug. 2009) where the court rejected the insurer's argument that ATIMA language limited the insurable interest of the sprinkler subcontractor to its work as opposed to the consequential damages to 21 floors of the building which arose out of an accidental discharge from a sprinkler head located in a temporary bathroom on the 21st floor.

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

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

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

[514] **Special Form.** See this Chapter **Endnote 474** (Property Insurance – "Causes of Loss") and **Endnote 475** (Valuation Terminology – Replacement Cost or Actual Cash Value). Builder's risk insurance may be written on either a named peril or "**all risks**" basis. Most builder's risk policies are provided on an "all risk" basis. Of course, no policy truly covers all risks of loss. Like other insurance policies, builder's risk policies are subject to a variety of conditions, limitations, exclusions, and deductibles. This form does, however, cover all causes of loss not excluded in the policy. This has the advantage of transferring to the insurance company the burden to prove that a cause of loss was specifically excluded by the policy in order for them to deny coverage. The exclusions in an "all risks" builder's risk policy can be numerous. See the list of typical exclusions in the next Endnote.

[515] **Typical Exclusions.** An unendorsed builder's risk policy includes a long list of excluded causes of loss, potentially but not limited to:

Exclusions Regarding Causes of Loss:

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

Exclusions Regarding Types of Property:

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

516 **Completed Value Basis.** Builder's risk is most commonly issued on a "**completed value**" (also called a "**non-reporting form**") as opposed to a "**reporting**" form. A completed value form policy is issued for a specific construction project with the coverage limits and premium based on the expected value of the project as completed. The insured under a completed value basis form does not run the risk of under or misreporting and the associated contractual penalties that are involved with a reporting form basis policy. A completed value basis policy limit is based on the anticipated completed value of the project. Its premium is roughly 50% of the normal builder's risk rate in recognition of the fact that the average value exposed to loss during the project is approximately one-half of the completed value of the project. Under a completed value form coverage is automatically increased as construction occurs. A "reporting form" will not cover the increased value unless notice of the increase is reported to the insurance carrier.

517 **Non-Reporting Form.** A "**reporting form**" policy is a single policy covering multiple projects. It is generally less costly than multiple completed value form policies. A reporting form allows a developer to administer one insurance form as opposed to multiple completed value forms. The insured adds projects to a reporting form as it undertakes new projects. Under a reporting form, the insured is required to file

periodic reports of the value of the covered projects. A reporting form increases the insured amount as the value of construction increases. A report is filed with the insurance company, usually on a monthly basis, updating values. Coverage and limit issues can arise if the reports are inaccurate, late or nonexistent. See *American Dream Homes, Inc. v. Insurance Co. of America*, 693 A.2d 517 (N.J. Super. Ct. App. Div. 1997) - the court upheld the insurer's denial of coverage of a project as to which the contractor late filed its monthly report.

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

[519] **Minimum Sublimit.** The coverage of a builder's risk policy may be extended to cover various risks with each risk carrying a "sublimit" (limit less than the policy amount) or no sublimit. The insureds should consider eliminating as many sublimits as financially and practicably possible.

[520] **Agreed Value.** See **Endnote 475** (Valuation Terminology - Agreed Value Endorsement). This endorsement eliminates the co-insurance provision.

[521] **Collapse Additional Coverage Endorsement.** Many policies exclude collapse and require a Collapses Additional Coverage Endorsement to extend coverage to this cause of loss. Collapse coverage can be written to covers the damage or loss from collapse of the structure caused by certain causes of loss, including weight of rain, defective materials or methods of construction. Collapse coverage almost always excludes the cost of correcting defective workmanship or work which was faultily designed and settling, cracking, shrinking or bulging of the structure. See the following cases for discussions of this cause of loss and coverage issues: *Malbco Holdings, LLC. v. Amco Ins. Co.*, 629 F.Supp. 2d 1195 (D. Or. 2009); *Hennessy v. Mutual of Enumclaw Ins. Co.*, 206 P.3d 1184 (Or. Ct. App. 2009)and *130 Slade Condominium Ass'n, Inc. v. Millers Capital Ins. Co.*, 2008 WL 2331048 (D. Md. 2008).

[522] **Debris Removal.** See this Chapter Forms **ISO CP 00 10 10 12** Building and Personal Property Coverage Form Paragraph **A.4.a** Coverage – Additional Coverages – Debris Removal. The ISO Commercial Property Policy provides coverage for debris removal as "additional coverage" and is limited to 25% of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the **ISO CP 04 15 10 12** Debris Removal Additional Limit of Insurance endorsement.

[523] **Existing Structures.** The circumstances may dictate extending coverage to existing structures in addition to the improvements being constructed, *e.g.*, cases where a portion of the improvements are being renovated.

[524] **Expediting Expense.** Expediting expense covering the additional expenses necessarily incurred to complete construction on schedule after the occurrence of a covered cause of loss.

[525] **Flood.** See this Chapter **Endnote 483** (Flood). "Flood" covering damage or loss caused by an overflow from a stream or other body of water, surface water, waves, and tidal waves. This coverage may be required if the property is in a flood plain.

[526] **Freezing.** Coverage for loss caused by leaks from plumbing, heating, air conditioning systems, or appliances (other than fire protective systems) caused by freezing.

[527] **Landscaping.** Landscaping Endorsement covering damage to or loss of trees, shrubs, plants and lawns from a covered cause of loss.

[528] **Loss of Rents.** Loss of Rents Endorsement covering the loss of rents caused by delay of completion.

[529] **Testing.** "Testing" sometimes called "**Hot and Cold Testing**" or "**Mechanical Breakdown**" Coverage covering the damage or loss from start up or performance testing of boilers or other pressure vessels, air conditioning systems, and mechanical or electrical devices.

[530] **Occupancy Pre-Completion Clause.** If the property will be occupied, or arguably occupied (*e.g.*, a tenant building out its premises), the builder's risk policy should be reviewed to confirm that pre-completion occupancy is permitted and under what conditions. It may be necessary, to have the policy endorsed to permit pre-completion occupancy.

[531] **Ordinance or Law.** See **Endnote 485** (Ordinance or Law Coverage).

[532] **Preservation of Property.** Coverage of the cost of removing covered property from the premises to preserve it from loss from a covered cause of loss.

[533] **Replacement Cost.** See **Endnote 475** (Valuation Terminology - Replacement Cost or Actual Cash Value). Replacement Cost Endorsement to include contractor's "overhead and profit" covering the cost to repair, replace, or rebuild the damaged property, without consideration for depreciation or obsolescence, plus reasonable overhead costs including profit (subject to the policy limit).

[534] **Scaffolding and Construction Forms.** Scaffolding and construction forms coverage covering damage to and loss of scaffolding and construction forms from a covered cause of loss.

[535] **Sidewalks, Curbs, Gutters, Streets, or Parking Lots.** Endorsement covering damage to Sidewalks, Curbs, Gutters, Streets, or Parking Lots from a covered cause of loss.

[536] **Site Preparation Costs.** Coverage of "site preparation costs" such as excavation, grading, and backfilling arising from a covered loss.

[537] **Soft Costs Coverage Added to Builder's Risk Policy.** See this Chapter **Endnote 509** (No Standard Builder's Risk Policy) for a discussion of delay damages and builder's risk policy endorsements. Builder's risk policies typically do not cover damages caused by delays arising out of a covered loss. These "soft costs" can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. These are time element exposures, similar in many respects to business interruption exposures on a completed project, in that the extent of the loss is impacted by the length of the delay. Soft cost coverage responds to additional expenses made necessary by the delay in completion. Lenders may require the inclusion of interest on the construction loan, property taxes, architectural and engineering supervisory costs, costs to renegotiate leases, brokerage commissions, and legal and accounting costs. Coverage is widely variable and it is incumbent upon the insured to describe what is needed. A thorough understanding of the project, contract documents, financing terms, materials and supply agreements, leasing agreements and construction regulations is needed. Coverage is provided on an actual loss sustained basis (*i.e.*, the insured can recover only for the actual loss of income or the actual additional expenses incurred regardless of the limit of coverage purchased). The period of indemnity usually begins a specified number of days after the date when construction is actually completed. The maximum time period commonly ranges up to 12 months. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes. The following is a manuscripted soft cost endorsement to a builder's risk policy:

ADDITIONAL EXPENSE – SOFT COST COVERAGE

This endorsement modifies insurance under the following:

BUILDERS' RISK COVERAGE FORM

A. The following is added to Additional Coverages:
We cover your additional expenses as indicated below which result from a delay in the completion of the Project beyond the date it would have been completed had no loss occurred. The delay must be due to direct physical loss to Covered Property and be caused by or result from a Covered Cause of Loss. We will pay covered expenses when they are incurred.

Coverage and Limits of Insurance

Rents and Rental Value Coverage. We will pay the actual "loss" of net rental income which results from delay beyond the projected completion date. But we will not pay more than the reduction in rental income less charges and expenses which do not necessarily continue.
Additional Advertising and Promotional Expenses. We will pay the necessary additional advertising and promotional expenses which you incur you incur as a result of a delay in the completion date of the Project.
Additional Insurance Expense. We will pay the necessary additional insurance expense for extending or renewing coverage which you incur as a result of a delay in the completion date of the Project.
Additional Interest Expense. We will pay the cost of necessary additional interest on money you borrow to finance construction or repair which you incur you incur as a result of a delay in the completion date of the Project. This expense may arise from obligations to the interim financier or from cancellation of the permanent financing arrangements, including loan closing costs and remarketing of bonds.
Additional Leasing/Commission Expenses. We will pay the necessary additional costs of renegotiating and pre-leasing of the Project, including costs of additional commissions incurred upon renegotiating leases that result from the renegotiation of leases which you incur as a result of a delay in the completion date of the Project.
Additional Legal and Accounting Fees. We will pay the necessary additional legal and accounting fees you incur as a result of a delay in the completion date of the Project.
Additional License, Building Inspection and Permit Fees. We will pay the necessary additional license, building inspection and permit fees which you incur as a result of a delay in the completion date of the Project.
Additional Real Estate Taxes/Ground Rents or Other Assessments. We will pay the necessary additional real estate taxes, ground rents or other assessments which you incur you incur as a result of a delay in the completion date of the Project.
Additional Professional Fees. We will pay the necessary additional architectural, engineering, and other professional fees which you incur you incur as a result of a delay in the completion date of the Project.
Additional Project Administration Expense/General Overhead. We will pay the necessary additional project administration expenses which you incur you incur as a result of a delay in the completion date of the Project.

The most we will pay for "loss" for all coverages provided by this endorsement is $_____ in any one occurrence.

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

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

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

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

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

539 **Policy Period.** A commercial property policy is usually effective for one year. Builder's risk policy coverage generally begins at a stated inception date, and generally ends on the earlies to occur of the following: (1) the interest of the insured in the property ends, (2) the ultimate user accepts the property, (3) the property is put to its intended use or occupancy of any portion of the property by the ultimate user, (4) a fixed number of days after the project is completed, (5) the expiration date of the policy, (6) cancellation of the policy, or (7) abandonment of construction. A phased project will require an endorsement to permit a certain level of occupancy before the entire project is completed.

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

[541] **Other Insurance.** The key exposures not listed above are workers compensation and professional liability. Contractor's professional liability exposures arise out of the provision of shop drawings, "value engineering", failure to achieve LEED goals, design/build work, or construction management.

Tenant's Property Insurance

[542] **Property Insurance - Causes of Loss.** See **Endnote 474** (Property Insurance - Causes of Loss) for an explanation of the coverages of the three forms of ISO Causes of Loss forms.

[543] **Valuation Terminology – Replacement Cost.** See **Endnote 475** (Valuation Terminology - Replacement Cost or Actual Cash Value) for a definition of "Replacement Cost" coverage. Note the different approaches taken by the "at least 80% of full insurable value" in the narrative form of insurance specifications in Section A of Insurance Specifications in Narrative Format to the "100% of replacement cost" approach taken in the Lease -Exhibit A Insurance Specifications at **Spec. 3.B § 1.1** *Policies to be Provided by Landlord*. The approach taken in the chart form insurance specifications is the result of a key tenant's requirements to assure adequate insurance proceeds are available to rebuild the leased structure.

[544] **Property Covered by Property Insurance.** Commercial property insurance covers "**Buildings**" and "**Business Personal Property**".

"**Buildings**" means a building or structure and includes completed additions, fixtures, permanently installed machinery and equipment; and personal property owned by the named insured and used to maintain or service the Building (for example, fire extinguishers and floor coverings). The term "Buildings" does not cover land, water or lawns; foundations, machinery or boilers, if the foundations are below the lowest basement floor, or the surface of the ground, if there is no basement; bridges, roadways, walks, patios or other paved surfaces; bulkheads, pilings, piers, wharves or docks, underground pipes, flues or drains; retaining walls not part of the building; or costs of excavations, grading, backfilling or filling.

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

[545] **Tenant Betterments, Alterations and Improvements.** See **Endnote 477** and **481** (Designation of Landlord as Additional Insured on Tenant's Property Policy), **Endnote 478** - *Risk Allocation – Tenant's Property Losses Allocated to Tenant's Property Insurance*. See Staltz, *Insuring Tenant Alterations*, PROBATE & PROPERTY 45 (Jan./Feb. 2006) articulating the rationale supporting this allocation; Millea and Geyen, *Insurance Coverage For Tenant Improvements*, http://www.mondaq.com/unitedstates/article.asp?articleid=125396. Also see Nusbaum, *The "Three-Legged Stool": The Interplay Of Property Insurance, Mutual Waivers And Waivers Of Subrogation In Commercial Leases* (Feb. 3, 2011) http://www.mondaq.com/unitedstates/article.asp?articleid=121948 and Hannan, *Using Property Insurance, Mutual Waiver, and Waiver of Subrogation Clauses in Commercial Leases (with Model Clauses)*, THE PRACTICAL REAL ESTATE LAWYER (Mar. 2001), at p. 23.

See the **ISO CP 00 10 10 12** Building And Commercial Property Coverage Form **¶ A.1.b(6)** specifying that a tenant's "***use interest*** as tenant in improvements and betterments" are part of the Covered Property of tenant's ISO property insurance policy. A landlord's ownership interest in tenant improvements and betterments are part of the Landlord's Covered Property. ¶A.1.a(5). See in this Chapter the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form stating that coverage is provided the tenant for:

> (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
> (a) Made a part of the building or structure you occupy but do not own; and
> (b) You acquired or made at your expense but cannot legally remove;

Some commentators have questioned whether a tenant has an insurable interest in Improvements and betterments installed at the landlord's expense. A similar issue arises if the lease provides that the tenant is to "insure all leasehold improvements" and there are significant leasehold improvements preexisting in the leased premises. Tenant may not have an insurable interest in improvements it did not install and pay for.

Not all property policies are worded the same as the ISO property insurance policy. (1) A tenant's property policy may state that it covers tenant's personal property and be silent as to its use interest in tenant improvements that are owned by the landlord pursuant to a lease provision that transfers ownership of tenant alterations and improvements to the landlord. In cases of policy silence as to tenant improvements as to which tenant only has a "use interest", the insurer may deny coverage. A New York court held for the tenant under such circumstances in *Sigola Mf.*,

Inc. v. Dairyland Ins. Co., 124 A.D.2d 654 (N. Y. App. Div. 1986). (2) A landlord's property policy may explicitly state that improvements and betterments are covered under the landlord's policy only if they are located within property occupied by the landlord and not within a tenant's premises. (3) Even if both landlord's and tenant's policies state that they cover tenant improvements (the landlord's ownership interest and the tenant's use interest), the policies may provide that they do not cover except on an excess basis the property if there is "other insurance". The language in such "other insurance" provisions vary, but they typically require that in the event of a loss, any other applicable policy must respond first. The court in *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co*, 602 F.3d 677 (5th Cir. 2010) held that in such case both the tenant's insurer and the landlord's insurer must share the cost.

546 **Waiver of Claims; Waiver of Subrogation.** See discussion in Chapter 4 **Waiver of Subrogation**. The tenant has an interest in setting out insurance specifications for the landlord's insurance. Tenants should insist that the landlord's property policy contain a waiver of subrogation. Tenants should also carve out of their indemnity risks covered by the insurance contractually required to be carried by their landlord. This issue was raised in *Travelers Indemnity Co. of Ill. a/s/o Partnership 1995 LLP v. F 7 S London Pub., Inc.*, 270 F. Supp. 330 (E.D. N.Y. 2003). In this case the landlord's insurer sued the tenant on its broad form indemnity for a fire loss to the shopping center. The court held that although the tenant had broadly indemnified the landlord, since the cause of the fire was not determined, the court looked to the lease's fire damage provision and held that it controlled with the result that the loss was borne by landlord and its insurer. This litigation could have been avoided had the lease expressly excluded from the tenant's indemnity fire damage covered by the landlord's property policy.

B. Construction Documents

1. AIA A201-2017 General Conditions of the Contract for Construction

547 **2017 AIA Changes - AIA Document A201 and A101 Exhibit A Insurance and Bonds.**

1. AIA 2017 – 10 Year Revision Cycle. Every 10 years the core set of AIA Contract Documents are reviewed and updated based on industry trends and court decisions. In April 2017, AIA released 11 revised AIA forms and contracts and 18 forms and agreements will be released in late 2017. Once the 2017 documents are released, the 2007 editions of the documents can continue to be used for up to 18 months.

2. Exhibit A Insurance and Bonds. One of the key changes in the AIA Contract Documents was the revision of the insurance provisions set out in the AIA A201 and the adoption of new AIA Document 101 – 2017 Exhibit A Insurance and Bonds. This Insurance Bonds Exhibit is intended to be used in conjunction with the review A201 – 2017 and is Exhibit A to the 2017 versions of the A101, A102 and A103. The modifications are sweeping, both in form and in substance. From a form standpoint, the documents look very different. In prior versions, the "guts" of the insurance requirements were contained in the very lengthy and complicated provisions of Article 11 of the A201. Article 11 has been "skinnied down", and the meat of the required insurance program has now been relocated and substantially rewritten in the new Exhibit A. That exhibit takes a different approach to insurance specifications. While it contains some of the boilerplate formerly of Article 11, it also contains a "**check-the-box**" feature for certain types of coverage requirements and limits. The more significant aspects of this new approach are set out below.

3. Builder's Risk Insurance. The Owner's obligation to procure Builders' Risk Insurance ("**BRI**"), unless placed on the Contractor, is revised to specify the following:

a. All Risks. BRI is to be written on an "all-risks" completed value or equivalent policy form.

b. Replacement Costs. The total value of the project on a replacement cost basis is to be covered

c. Through Correction Work. BRI is to be maintained until Substantial Completion, then continued until the expiration of the period for correction of the Work,

d. All Parties as Insureds. The Owner, Contractor, Subcontractors (and further tiers) would be all covered by the insurance.

e. Prohibition of Elimination of Key Coverages. The insurance cannot exclude the risks of, among others, fire, vandalism, collapse, flood, or losses caused by professional error or defective workmanship. (See Subsections of § A.2.3.)

f. Existing Structure to be Covered along with Additions and Remodeling. In the case of additions or remodeling projects, coverage is required for the already-existing structure. (§ A.2.3.3.)

g. Check the Box for Additional Optional Coverages. The parties are to check boxes for the varying types of additional coverage (i.e., business interruption, expediting costs) (§ A.2.4)

h. Sublimits to be Specified. The parties are to specifically identify the submits required for each. (§A.2.3.1.2.)

i. Owner's Settlement Authority. Section 11.5 of A201 now clarifies that the Owner has the sole responsibility to adjust and settle a BRI claim. In doing so, it acts as a fiduciary and the distribution of proceeds must be handled accordingly. Prior to such settlement, the Owner is required to "notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds." The Contractor has 14 days to object, and in the absence of timely objection, the Contractor is forever bound by the settlement and allocation. If

timely objection is made, the Owner may proceed to settle, but the allocation may be subject to the dispute resolution procedures of A201's Article 15. Another important change is that, if the Owner fails to procure the required insurance, it is liable to the Contractor under Section 11.2.2 "for all reasonable costs and damages attributable thereto."

2. Commercial General Liability. Various types of coverage which the parties agree to be the Contractor's responsibility are separately and succinctly described in Article A.3 (Contractor's Insurance and Bonds). There is a blank to fill in to insert the limits of each, and a check-the-box listing for certain types of insurance. The one requiring the most focus is Commercial General Liability ("**CGL**"). While there are few changes in the basic types of CGL coverage, the following items are notable.

a. Through Correction Work. CGL coverage is required to remain in place through the period for corrective work.

b. Completed Operations. CGL is required to cover the Contractor's completed operations.

c. Prohibited Exclusions. Numerous exclusions that have historically been commonplace in typical CGL policies are prohibited. For example, Section A.3.2.2.2 lists eleven different CGL exclusions or restrictions on coverages that, if left as is, would require procurement of a CGL policy that does not contain such exclusions or restrictions (e.g., the Insured v. Insured exclusion and the subcontractor exception to the Your Work exclusion).

d. Insurance to Cover Contractor's Indemnity. The Contractor is required to procure insurance to cover its indemnity obligations under A201's Section 3.18.1. Note, however, that the 2017 revisions did not change Section 3.18.1.

[548] **AIA Indemnity Language.** This provision is contained in the AIA A201 General Conditions is the pattern language used in AIA construction contract forms. This language creates a "**limited form indemnity**", since it does not provided for the Contractor's assumption of the Owner's tort liability, but is an indemnity for liabilities to the extent caused by the negligent acts or omissions of the Contractor. The indemnity language limits the indemnity with:

Insured Contract Provision:

> **but only to the extent** caused by the **negligent acts or omissions of the Contractor**".

Questions:

- Does the "**only to the extent**" language contemplate indemnity of the Owner in cases where the injury is concurrently caused by the negligence of the Contractor and someone else?
- Even if concurrently caused by the Owner?
- Or, does this language contemplate indemnity of the Owner where the injury is only caused by the Contractor and not by the Contractor and anybody else?
- The third party claim could be the product of the negligence in part of the Contractor and the negligence of the Owner. In such case does this language result in the Contractor indemnifying the Owner both for the share of liability caused by the Contractor and for the share of liability caused by the Owner?
- Note the indemnification of the Owner as to a concurrently caused injury or property damage applies:

Insured Contract Provision:

> regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

But also notice that there is no express reference in this language to indemnifying the Owner for the portion of the concurrently caused injury or property damage caused in part by the negligence of the Owner.

- The Texas Anti-Indemnity Act, TEX. INSURANCE CODE Chapter 151 has the following significant express exceptions to the Act's elimination of broad-form indemnity: (1) bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (§ 151.103); (2) claims arising from single-family residential construction (§ 151.105(10)(A)); and (3) claims arising from construction projects insured through CIPs, controlled insured programs (§ 151.105(1)). The AIA form is not tailored to Texas addresses the prospect of statutory prohibitions on indemnity with

Insured Contract Provision:

"to the fullest extent permitted by law"

Questions:

Does this language extend the scope of the indemnity to indemnify the Owner for injuries to the Contractor's employees concurrently caused in part by the negligence of the Owner as would be permitted by the Texas Anti-Indemnity Act?

- Further, is it the intent of the parties to limit the additional insured coverage of the Owner by the limitation in the AIA indemnity language? Note the AIA forms contemplate that the details of insurance, including the scope of the additional insured coverage, are to be set out in detailed insurance specifications.

The AIA indemnity language is not conspicuous.

2. AIA A101-2017 Exhibit A Insurance and Bonds

549 **Owner's Settlement Authority.** Section 11.5 of A201 now clarifies that the Owner has the sole responsibility to adjust and settle a BRI claim. In doing so, it acts as a fiduciary and the distribution of proceeds must be handled accordingly. Prior to such settlement, the Owner is required to "notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds." The Contractor has 14 days to object, and in the absence of timely objection, the Contractor is forever bound by the settlement and allocation. If timely objection is made, the Owner may proceed to settle, but the allocation may be subject to the dispute resolution procedures of A201's Article 15. Another important change is that, if the Owner fails to procure the required insurance, it is liable to the Contractor under Section 11.2.2 "for all reasonable costs and damages attributable thereto."

550 **AIA Adopts the Checklist Style for Insurance Specifications.** In prior versions, the "guts" of the insurance requirements were contained in the very lengthy and complicated provisions of Article 11 of the A201. Often, the user-unfriendly nature of Article 11 caused many contracting parties to delete Article 11 altogether and replace it with their own custom insurance program exhibit. The 2017 changes reformat the documents to reflect this ever-growing practice. Article 11 has been "skinnied down" significantly, and the crux of the required insurance program has now been relocated (and substantially rewritten) in the new Exhibit A. That exhibit takes a different approach that should prove to be more user-friendly and more adaptable to the uniqueness of any given project. While it contains some of the boilerplate formerly of Article 11, it also presents an easily understandable check-the-box feature for certain types of coverage requirements and limits.

551 **Builder's Risk Insurance.** See this Chapter **Endnote 507** *et seq.*. Builder's risk insurance ("**BRI**") is to be written on an "all-risks" completed value or equivalent policy form.

552 **BRI – Replacement Costs.** The total value of the project on a replacement cost basis is to be covered. See **Endnote 510** (Replacement Cost).

553 **BRI - All Parties as Insureds.** The Owner, Contractor, Subcontractors (and further tiers) would be all covered by the insurance.

554 **BRI - Prohibition of Elimination of Key Coverages.** The insurance cannot exclude the risks of, among others, fire, vandalism, collapse, flood, or losses caused by professional error or defective workmanship. (See Subsections of § A.2.3.) Owners (and contractors) will need to review their existing policies or ones they are contemplating because such policies may exclude some of these risk.

555 **BRI – Construction Defects Coverage.** This requirement for additional coverage of "ensuing loss or resulting damage from error, omission or deficiency in construction methods, designs, specifications, workmanship or materials" may result in a shift in how construction defect claims are handled. Currently, if the owner's property is damaged during the course of the project, the owner would likely make a liability claim against the contractor, who in turn could seek coverage under its CGL policy and claims against its subcontractors (who in turn would seek coverage under their CGL policy). CGL insurers often deny coverage contending that construction defects do not constitute an insured "occurrence" and, if they are an occurrence, fall within an exclusion for "**your work**," that is, the work of the contractor or design professional. This may not be as dramatic a shift in approach in Texas due to Texas courts interpretation of "**occurrences**" and the "your work" exclusion from CGL coverage. See discussion of Texas courts' holdings on CGL coverage of construction defects in Chapter 3 Insurance (Commercial General Liability Insurance Coverage of Construction Defects!) Further, BRI coverage is generally limited in time to the construction term plus one year after substantial completion. Thus, this new AIA insurance requirement does not address coverage for latent defects that are discovered long after construction is complete.

556 **BRI - Sublimits to be Specified.** The parties are to specifically identify the submits required for each. (§A.2.3.1.2.)

[557] **BRI - Duration of BRI.** BRI is to be maintained until Substantial Completion, then continued until the expiration of the period for correction of the Work.

[558] **BRI - Existing Structure to be Covered along with Additions and Remodeling.** In the case of additions or remodeling projects, coverage is required for the already-existing structure. (§ A.2.3.3.)

[559] **BRI - Check the Box for Additional Optional Coverages.** The parties are to check boxes for the varying types of additional coverage (*i.e.*, business interruption, expediting costs) (§ A.2.4) This section of the new AIA form may help educate the parties about these other insurance products that may be appropriate for some projects.

[560] **Proof of Insurance.** For all policies, Article A.3.1 requires the contractor to provide certificates of insurance to the owner prior to commencement of the work, upon any renewal or replacement of the policy, and upon the owner's written request.. The certificate is required to show that the owner is an additional insured on the contractor's CGL and any excess or umbrella liability policies.

[561] **SIR and Deductible Allocations.** Note that although the AIA form requires the contractor to disclose whether it has SIRs or deductibles on the insurance required by it to be covered, the form does not address which party is to pay the deductible or SIR on the contractor's liability policies.

[562] **Additional Insured Specifications.** The additional insured requirements are actually greater than what must be shown on the certificate. Kenneth Gorenberg, of Barnes & Thornburg LLP at Lexology (ABA Real Property \ Trust Law (July 25, 2017) https://www.lexology.com/library/detail.aspx?g=8a874f3c-abd1-4f31-9855-536d30aab043 makes the following observations:

> (a) The contractor must make the owner an additional insured under the contractor's CGL policy, both for ongoing and completed operations, in other words both during and after construction. This additional insured coverage under the contractor's CGL policy must be primary and non-contributory to the owner's general liability policies, meaning that the contractor's insurer cannot seek any contribution from the owner's insurer.
>
> (b) Article A.3.1 also provides that the contractor must make its CGL policy include the architect and architect's consultants as additional insureds, but only for ongoing operations, that is during construction, and without necessarily being primary and non-contributory. Thus, the additional insured coverage that the contractor must provide for the architect and architect's consultants can be more limited and can leave the architect and architect's consultants needing to rely on their own insurance policies to some extent.
>
> (c) Article A.3.1 states that, "[t]o the extent commercially available, the additional insured coverage shall be no less than" that provided by three specific forms published by the Insurance Services Office (ISO). Interestingly, the listed ISO forms were published in 2004, and ISO updated each of those forms in 2013. Moreover, ISO publishes dozens of additional insured forms. Further, not all insurance companies use ISO forms. All of these factors may complicate the questions of whether the additional insured coverage obtained by the contractor is "no less than" what would be provided by the specified ISO forms and, if not, whether something more was "commercially available." These questions could be implicated if the contractor's insurance company denies a claim for additional insured coverage on behalf of the owner, architect, or architect's consultant.

[563] **2017 AIA Changes - Liability Insurance.** Various types of coverage which the parties agree to be the Contractor's responsibility are separately and succinctly described in Article A.3 (Contractor's Insurance and Bonds). There is a blank to fill in to insert the limits of each, and a check-the-box listing for certain types of insurance.

[564] **Types of Liability Insurance to be Maintained by Contractor.** Article A.3.2 lists several types of insurance that the contractor must purchase, and there are blanks for the parties to fill in the limits they agree upon to require for each policy. The types of policies required of the contractor are CGL, automobile liability, workers' compensation, and employers' liability. Depending on the nature of the work, the contractor must also purchase insurance for Jones Act and Longshore & Harbor Workers' Compensation Act liabilities, professional liability, pollution liability, maritime liability and aircraft liability. This list may help the parties think about the nature of the work and whether these other types of insurance are appropriate in addition to CGL, auto, workers' compensation and employers' liability.

[565] **Contractor's Liability Insurance – Duration.** Note the new AIA insurance specifications require the parties to address the term of liability insurance to be maintained by the contractor, if beyond the period of construction plus the one year period following substantial completion for work correction.

[566] **2017 AIA Changes – CGL.** The one requiring the most focus is Commercial General Liability ("**CGL**"). While there are few changes in the basic types of CGL coverage, the following items are notable.

a. Through Correction Work. CGL coverage is required to remain in place through the period for corrective work.

b. Completed Operations. CGL is required to cover the Contractor's completed operations.

c. Prohibited Exclusions. Numerous exclusions that have historically been commonplace in typical CGL policies are prohibited. For example, Section A.3.2.2.2 lists eleven different CGL exclusions or restrictions on coverages that, if left as is, would require procurement of a CGL policy that does not contain such exclusions or restrictions (*e.g.*, the Insured v. Insured exclusion and the subcontractor exception to the Your Work exclusion).

d. Insurance to Cover Contractor's Indemnity. The Contractor is required to procure insurance to cover its indemnity obligations under A201's Section 3.18.1. Note, however, that the 2017 revisions did not change Section 3.18.1.

[567] **Insurance to Cover Contractor's Indemnity.** The Contractor is required to procure insurance to cover its indemnity obligations under A201's Section 3.18.1. Note, however, that the 2017 revisions did not change Section 3.18.1.

[568] **Prohibited Exclusions.** Numerous exclusions that have historically been commonplace in typical CGL policies are prohibited. For example, Section A.3.2.2.2 lists eleven different CGL exclusions or restrictions on coverages that, if left as is, would require procurement of a CGL policy that does not contain such exclusions or restrictions (*e.g.*, the Insured v. Insured exclusion and the subcontractor exception to the Your Work exclusion).

[569] **Election for Contractor to Carry the BRI.** If the parties choose to require the contractor rather than the owner to purchase property insurance for the project, they would make that election by checking the box at Article A.3.3.2.1, and they can specify further details about the property insurance, including whether to make the contractor rather than the owner responsible for paying any deductible or self-insured retention.

3. Modified AIA A201-2017 General Conditions § 3.18 Indemnification

[570] **Limited and Intermediate Indemnity – Chapter 151 of Texas Insurance Code – Anti-Indemnity Statute.** See Endnote **142**. See Chapter 2 Indemnity.

4. AIA B103-2017 Architect Agreement – Indemnity

[571] **AIA Architect's Agreement Approach to Risk Management.** See Chapter 3 Indemnity.

5. A Case Study – Construction Project

[572] **The Parties.** ***Owner***: The owner was a financial institution with an insurance department. The project was the construction of a building to which the owner would move its regional banking house. Its lease was scheduled to expire in two years from construction contract execution. The owner did not wish to run the risk that it would be holding over past the expiration of the term of its lease. Additionally, the office space market was becoming tight due to the boom of the Texas economy. ***Contractor***: The contractor was a large national contractor with an established local reputation. ***Architect***: The architects were a large national firm. ***Project manager***: Since the owner was not a recurrent building developer, it hired a project manager to manage the project. The project manager was a fee developer (entitlement facilitator, construction manager, and leasing agent). ***Owner's representative***. The owner also hired an owner's representative to interface with all other participants. *Insurance consultant*: At the recommendation of the project manager, the owner hired an insurance consultant to review the owner's and the contractor's insurance program and make recommendations.

[573] **Site and Project.** The site in earlier days had been a new and used car dealership with auto repair and servicing facilities. Running diagonally across the site was a large subterranean storm sewer which would have to be rerouted. In the surrounding block were a low-rise office building and a daily rental parking lot. The contractor needed to employ a crane would swing across the surrounding streets and the adjoining property low-rise building and the low rise buildings on the other side of the streets.

[574] **Case Study's Construction Documents in Appendix of Forms.** The parties entered into an **A133** - 2009 Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price. Provisions from the contract documents are set out in the **Forms** to this Chapter. See the Endnotes cited in these forms for further discussion and annotations as to the AIA provisions and the manuscript language added to these construction documents in the Case Study.

[575] **The Construction Contract - Cost.** By the time the contract was executed, the parties were able to execute simultaneously the Guaranteed Maximum Price Amendment; know the total dollar amount to be charged to owner for the contractor's fee under **§ 5.1.1** (**Construction Manager's Fee**); enter a stipulated sum in the contract at **§ 6.1.1** (**Cost of the Work**) for contractor's General Conditions cost; and determine the cost of the bonds and insurance which were stipulated as a percentage of the Contract Sum at **§ 6.6.1** (**Miscellaneous Costs - Bonds and Insurance**).

See **Endnote 582** (Builder's Risk Insurance Purchased by Builder) noting that contract negotiations resulted in a fixing of the builder's risk cost as a stipulated percentage of the Cost of the Work.

See **Endnote 593** (Subguard) and **Endnote 588** (Payment and Performance Bonds) noting that contract negotiations resulted in fixing the Subguard and Bonds cost.

See **Endnote 577** (Contractor's CCIP) discussing the insurance consultant's negotiation tactics resulting in fixing the CCIP insurance cost to a specified percentage of the Cost of the Work, which percentage reflected a lower premium allocation to the project.

[576] **Budget Making Process.** Costs were controlled through an extensive budget and cost verification process.

[577] **Contractor's CCIP.** The Guaranteed Maximum Price included an allocation of a portion of the contractor's insurance program costs under its "master rolling" Contractor Controlled Insurance Program ("**CCIP**"). The contractor sought to specify the portion of its liability coverage limits to be available to the project and to limit its liability to Owner to these specified limits. This allocation was reviewed by the insurance consultant. In the absence of an insurance consultant, the contractor's allocations likely would have been accepted by the owner as a "Cost of the Work" without analysis.

[578] **Owner Additional Insured on CCIP; Waiver of Subrogation.** Additional insured coverage was provided for the owner, its project manager, and the adjoining property owners (licensors under the crane swing license and staging area license) on the CCIP CGL, both primary and the umbrellas. See Appendix of Forms: See AIA **A133 Art. 8** Insurance and Bonds; and **AIA A201 §§ 11.0** *et seq*. Insurance **Specs. § 11.1.4**; also see Exhibit A – Insurance. **Specs. § A.1.7** and definition of "**Owner Parties**" at Insurance **Spec. § B.1.a**.

The Insurance Specs. specified the form of the additional insured endorsements, **ISO CG 20 10 07 04** (as to ongoing operations) and **ISO CG 20 37 07 04** (as to completed operations). The Insurance Specs. provided for the CCIP primary and umbrella policies to provide a waiver of subrogation as to the owner and the additional insureds, and a notice of cancellation to the owner. See Exhibit A – Insurance. **Specs. §§ 1.9, 1.11**, **4.4** and **4.7**.

[579] **Contractors/Subcontractors' Workers Compensation and Employer's Liability.** See AIA **A201 §§ 11.1.1.1**, **11.1.1.2** and **11.1.1.3** and Exhibit A Insurance **Spec. § A.3**. Workers Compensation coverage for contractor's and its subcontractors' employees was not included as part of the CCIP in the Case Study. The contractor was required to maintain workers compensation insurance in an amount not less than the statutory limits and employers liability insurance in an amount not less than $1,000,000. The contact did not require subcontractors carry workers compensation or employers liability insurance.

[580] **Contractor's Business Auto Policy.** See Appendix of Forms: AIA **A201 § 11.1.1.6** and Exhibit A Insurance **Spec. § A.2**. The contractor was required to carry business auto insurance in an amount not less than $25,000,000 with owner and the project manager insured as additional insureds. The Insurance Specs specified the form of additional insured endorsement.

[581] **Contractor Limited Form Indemnification of Owner.** See this Chapter Forms: AIA **A201 § 3.18.1** (Contractor's Indemnity of Owner Parties) is a limited form indemnity by the contractor. The contractor indemnifies the owner for liabilities arising from the acts or omissions of the contractor and its subcontractors and from the negligence of contractor and such contractor-related persons, provided the claim as to bodily injury or death or property damage is caused in whole or in part by the negligent acts or omissions of the contractor or the contractor-related persons. This indemnity expressly excludes liabilities to the extent that they are caused in whole or in part by the negligence of an Owner Party, and thus is neither a "**broad form**" nor an "**intermediate form**" indemnity. Obtaining a "**limited form**" written indemnity by the contractor is important as it overcomes the "workers comp" bar as to injuries to employees of the contractor as required by TEX. LABOR CODE § 417.004 and results in the passing back to the contractor the contractor's comparative share of the negligently caused injury. See *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983). It also passes back to the contractor liability for injuries or deaths of employees of its subcontractors to the extent caused by the contractor's or subcontractor's negligence as permitted by the Texas Anti-Indemnity Act, Chapter 151 of the TEXAS INSURANCE CODE. See discussion at **Endnote 503** (Additional Insured Coverage in the Construction Context - Anti-Indemnity Statute).

[582] **Builder's Risk Insurance Purchased by Builder.** See Chapter 3 Insurance **IIB.3** (Not All Builder's Risk Policies Are The Same); and this Chapter Forms, Endnote 597 *et seq.* (Builder's Risk) for a discussion of builder's risk insurance. See this Chapter Forms: AIA **A201 § 11.3** Property Insurance and Exhibit A Insurance **Spec. § B.1** Builder's Risk Insurance. See this Chapter Forms: AIA **A133 § 6.6.1(2)** charging the Cost of Work for the builder's risk insurance at the rate of .145% of the Contract Sum. The contractor scheduled the project on its master builder's risk policy. The parties added to the policy a "business income/rental value" loss coverage endorsement with a coverage sublimit of $7,113,570. The insurance consultant assisted the owner in completing a worksheet to substantiate the sublimit. This endorsement provided insurance against late delivery of the completed project. The parties discussed the relative advantages and disadvantages of the contractor or the owner placing the builder's risk insurance. The insurance consultant advised owner that if the builder's risk policy was owner-purchased, the owner would be the negotiation-party for losses. If liability insurance was placed through an OCIP, then the it would be best for the owner to be the purchaser of the builder's risk insurance.

[583] **Owner Named Insured on Builder's Risk Policy.** See this Chapter Forms: **Exhibit A to Office Lease - Insurance Spec. § B.1**. The owner, contractor, subcontractors and suppliers were Named Insureds on the builder's risk policy. The contractor was the "**first Named Insured**" and the other insureds were designated as "**Additional Named Insureds**". The builder's risk policy provided:

> The first Named Insured shown in 3.A above shall be deemed the sole and irrevocable agent of each and every Insured hereunder for the purpose of giving and receiving notices to/from the Company, giving instructions to or agreeing with the Company as respects Policy alteration, for making or receiving payments of premium or adjustments to premium and as respects the payment for claims. All owners, all contractors and subcontractors of every tier, and tenants at the project location, except as named in A. above, as required by any contract, subcontract or oral agreement for the Insured Project, and then only as their respective interests may appear are recognized as Additional Named Insureds hereunder. As respects architects, engineers, manufacturers and suppliers, their interest is limited to their site activities only. Additional Named Insureds as provided above, may be shown on any Project Certificate issued to this Master Policy or ACORD Certificates of Insurance (or equivalent) issued by Lockton Companies, LLC, copies of which will be forwarded, if requested, to the Company.

An ACORD Evidence of Property Insurance was issued by Lockton Companies, LLC to owner certifying the existence of the builder's risk policy and the inclusion of owner as an Additional Named Insured, and a copy of the ACORD certificate was sent to the Company at owner's request.

[584] **Contractor's Indemnification of Owner.** See this Chapter Forms: AIA **A201 §§ 10.3.1** (Hazardous Materials Handling) and **10.3.5** (Contractor's Indemnity of Owner Parties). The contractor indemnified the Owner Parties against claims and losses incurred for remediation of materials brought by contractor or its subcontractors to the site or where it failed to perform its obligations under § 10.3.1 or required by law, except to the extent the loss is caused in whole or in part by the negligence of an Owner Party.

[585] **Contractor's Environmental Liability Insurance.** See Chapter Forms: AIA **A201**, **Exhibit A** Insurance Spec. **§ A.6** (Construction Manager's Pollution Liability Insurance). The policy was written with limits of $2,000,000 per incident and $2,000,000 aggregate; the policy's term was one year, requiring annual renewal; the policy was endorsed with a waiver of subrogation as to the Owner Parties; mold was added as a covered "pollutant".

[586] **Owner's Indemnification of Contractor.** See Chapter 3 Indemnity.

[587] **Owner's Pollution Legal Liability Insurance.** See this Chapter Forms: AIA **A201 § 10.3.3** the construction contract required the owner to purchase a pollution liability insurance policy for this project with project-specific limits of $2,000,000 each loss and a $2,000,000 policy aggregate. The contract provided that the policy was to be written on an occurrence basis and include contractual liability coverage. A certificate of insurance evidencing such coverage and copy of such policy was to be provided to the contractor prior to commencement of construction. The contract required the owner to maintain the pollution liability insurance in effect until substantial completion of the construction. The contract also required the policy to be endorsed to provide contractor with at 30 days' notice of cancellation. In order to obtain this insurance, the owner provided the insurer with the site-specific environmental reports generated during the owner's pre-purchase due diligence on the property. The insurance consultant obtained proposals for 3 yrs. and 5 yrs., with limits of $ 3 MM, $5 MM, and $10 MM. The owner purchased a policy the following specifications: a 5 year term; $5,000,000 incident/aggregate limit, with coverage for Emergency Response Costs of up to $250,000 per incident, $1,000,000 aggregate; a $50,000 deductible. The premium was $60,000.

[588] **Payment and Performance Bonds.** See this Chapter Forms: AIA **A133 § 6.6.1(3)** defining the limit of the charge to the Cost of Work for the payment and performance bonds to .63% of the Contract Sum. The insurance consultant negotiated lowering the bond premium charge back to the Project to this percentage.

[589] **Retainage.** See this Chapter Forms: AIA **A201 §§ 9.10.2** and **9.107** provided for 10% retainage to be withheld from periodic payments which was to be paid out as the final payment 31 days after final completion unless the payment bond surety approved an earlier payment or a reduction in the percent retained.

[590] **Periodic Waivers and Releases of Lien.** See this Chapter Forms: AIA **A201 § 9.3.3.1** was added to the A201 to require the delivery of conditional waivers and releases as to currently requested progress payments and unconditional waivers and lien releases for previously paid progress payments by first-tier subcontractors in the forms prescribed by TEXAS PROPERTY CODE § 53.284.

[591] **Deadlines and Liquidated Damages.** The construction contract provided for a 16 month construction period. See the following Forms in this Chapter: **AIA A133 - 2009 § 2.3.3.7** (Liquidated Damages). Contractor agreed to be liable for up to $2,000,000 in liquidated damages. Owner would suffer significant damages if contractor delivered the completed project at a date that caused owner to hold over under its existing lease, or would not allow owner to deliver shell space to tenants with sufficient time for tenant improvements to be completed by lease term expiree dates. The parties identified milestones for completion of certain critical phases of the project (see **AIA A133 - 2009 § 2.2.11** (Milestones)). The parties also determined and agreed on the number of permitted weather delay days that were included in the milestone dates (see **AIA A133 -2009 § 2.3.3.6** (Adverse Weather Days)). The contract provided that owner could direct the acceleration or re-sequencing of the construction at owner's expense if permitted delays were encountered (see AIA **A133 § 2.3.3.5.1** (Owner Directed Acceleration)) and required

contractor to institute a recovery plan and work expediting if work fell behind schedule for reasons not justifying a time extension (see **AIA A133- 2009 § 2.3.3.5** (Recovery of Contractor's Schedule)).

[592] **Bonus.** See this following form in this Chapter Forms: **AIA A133 - 2009 § 2.2.3.8** (Discretionary Bonus). Owner's project manager recommended, and the parties added to the construction contract, a discretionary bonus provisions as a potential incentive to the contractor and subcontractor to work in a cooperative manner.

[593] **Subguard and Performance Bond.** See the following form in this Chapter Forms: **AIA A133 - 2009 § 6.6.1(4)**. The contractor recommended that the project not be bonded with payment and performance bonds, arguing that its financial size and track record would justify the owner not paying for payment and performance bonds. However, the contractor proposed including within the Contract Sum its costs in enrolling the subcontractors into a subcontractor's insurance default program ("**Subguard**"). The owner insisted on the project being bonded, and after extensive negotiations, the owner agreed to a cost splitting with the contractor of the Subguard premium (see AIA **A133**, **§ 6.6.1(4)**). The parties entered into a compromise as to including in the Cost of Work the premium payable by the contractor for Subguard insurance. Owner agreed that the lesser of 55% of the premium or $160,000 would be reimbursed as a Cost of Work. The actual premium for Subguard was 1% of subcontract and supplier values (*i.e.*, approximately $320,000). The contractor argued that Subguard was a legitimate Cost of Work as it assured performance by subcontractors and suppliers. Owner argued that the contractor chose the subcontractors and suppliers and performance was a contractor risk. Also, owner argued that only a statutory payment bond (and not Subguard) provided statutory protection of the project from mechanics and materialman's liens due to non-payment by subcontractors of lower tier subcontractors. The owner negotiated for and obtain endorsement of the Subguard policy to make it a third party beneficiary with rights of enforcement.

[594] **Professional Liability Insurance.** See this Chapter Forms: **A201 Exhibit A** – Insurance Specifications to the Case Study Construction Contract Insurance Spec. **§ A.5**. Contractor agreed to carry a professional liability insurance policy with limits of $2,000,000 per claim/$2,000,000 general aggregate and dedicated the limits to the project by endorsement; the coverage period was retroactive to date of work commencement and continued for the 10 year statute of repose.

[595] **Consequential Damages.** See the following Form in this Chapter: **A201- 2007 General Conditions § 15.1.6** (Claims for Consequential Damages). Contractor initially tendered the contract without modification of the AIA standard waiver of consequential damages provision. Owner objected to waiving recovery for (1) damages arising from contractor's performance of the work including diminution in the value of the project resulting from defective construction and (2) "loss of use" damages as a result of construction defects. Contractor countered that it would agree to these exceptions if the amount were capped at half of its fee; after owner resistance, it offered to cap damages at the amount of its fee. It argued that it could not undertake the work for potentially no fee. Ultimately, it accepted responsibility for "benefit of the bargain" damages and loss of use damages, but as to loss of use damages limited recovery to such damages as were covered by and within the limits of the insurance required by the contract documents ($40,000,000 of liability insurance) and provided the damages were incurred within 24 months of substantial completion of the project.

[596] **Indemnification.** See **Endnote 503** (Additional Insured Coverage in the Construction Context - Anti-Indemnity Statutes).

[597] **Contractor's Indemnification.** See **Endnote 503** (Additional Insured Coverage in the Construction Context - Anti-Indemnity Statutes).

[598] **Admitted Insurer.** See **Endnote 429** (Admitted Insurer).

[599] **Ongoing Operations.** See **Endnote 501** (Additional Insureds - ISO CG 20 10 07 04 Additional Insured - Owners, Lessees or Contractors - Scheduled Person or Organization); **Endnote 713** (Additional Insureds - ISO CG 20 10 04 13 Additional Insured - Owners, Lessees or Contractors - Scheduled Person or Organization); **Endnote 715** (ISO CG 20 10 "Ongoing Operations"); **Endnote 714** (ISO CG 20 10 - "Caused by Your Acts or Omissions").

[600] **Completed Operations.** See **Endnote 495** (Products-Completed Operations); **Endnote 497** (Post-Completion Coverage); **Endnote 732** (ISO CG 20 37 04 13 Additional Insured - Owners, Lessees or Contractors - Completed Operations).

[601] **Workers Compensation Claims.** See **Endnote 465** (Workers Compensation Limits Required by Law).

[602] **Employers Liability Claims.** See Endnote 465 (Workers Compensation Limits Required by Law); **Endnote 467** (Employer's Liability Insurance - Bodily Injury by Disease).

[603] **Bodily Injury Claims.** See **Endnote 447** (Commercial General Liability Insurance (CGL)) for a discussion of coverage of injuries to persons other than employees of the named insured contractor.

[604] **"Personal Injury" Claims.** See **Endnote 447** (Commercial General Liability Insurance (CGL)) for the definition of "Personal and Advertising Injury".

[605] **Bodily Injury or Property Damage Claims Arising Out of Motor Vehicles.** See **Endnote 463** (Business Auto Liability).

[606] **Bodily Injury and Property Damage Claims Arising Out of Completed Operations.** See **Endnote 495** (Products-Completed Operations); **Endnote 497** (Post-Completion Coverage); **Endnote 467** (ISO CG 20 37 04 13 Additional Insured - Owners, Lessees or Contractors - Completed Operations).

[607] **Contractual Liability Insurance.** See **Endnote 453** (Contractual Liability Coverage - An Exception To An Exclusion From Coverage).

[608] **Post-Completion Coverage.** See **Endnote 497** (Post-Completion Coverage).

[609] **Claims Made Basis.** See **Endnote 448** (Occurrence Policy vs. Claims Made Policy).

[610] **Certificates of Insurance.** See **Endnotes 434 – 437** and **441 – 444** for discussions of Certificates of Insurance.

[611] **General Aggregate Per Project.** See **Endnote 451** (General Aggregate Per Project)

[612] **Umbrella and Excess Policies.** See **Endnote 470** (Umbrella and Excess Policies).

[613] **Additional Insureds on Contractor's CGL Policy.** See **Endnote 500** (Additional Insureds on Contractor's CGL Policy).

[614] **Commercial General Liability – Products – Completed Operations.** See **Endnote 495** (Products – Completed Operation).

[615] **Primary and Noncontributing.** See **Endnote 455** (Primary and Noncontributing).

[616] **Waiver of Subrogation Endorsement.** See **Endnote 456** (Waiver of Subrogation Endorsement).

[617] **Builder's Risk.** See **Endnote 507** *et seq.* (Builder's Risk Insurance).

[618] **Occupancy Pre-Completion Clause.** See **Endnote 530** (Occupancy Pre-Completion Clause).

[619] **Boiler and Machinery Coverage.** See **Endnote 492** (Boiler and Machinery Coverage).

[620] **Business Income and Additional Expense.** See **Endnote 490** (Business Income and Additional Expense).

[621] **Contractual Waivers of Claims; Contractual Waivers of Insurer's Subrogation Rights.** See Chapter 4 Wavier of Subrogation.

[622] **Products - Completed Operations.** See **Endnote 495** (Products - Completed Operations).

[623] **Parties to Policy: "First Named Insured"; "Named Insured"; "An Insured"; "An Additional Insured".** See **Endnote 438** (Parties to Policy: "First Named Insured"; "Named Insured"; "An Insured"; "An Additional Insured").

[624] **Commercial General Liability Insurance (CGL).** See **Endnote 447** (Commercial General Liability Insurance (CGL)).

[625] **Occurrence Policy vs. Claims Made Policy.** See **Endnote 448** (Occurrence Policy vs. Claims Made Policy).

[626] **General Aggregate.** See **Endnote 449** (General Aggregate).

[627] **Products-Completed Operations.** See **Endnote 495** (Products-Completed Operations).

[628] **Self-Insurance.** See **Endnote 433** (Self Insurance).

[629] **General Aggregate Per Premises or Project.** See **Endnote 496** (*General Aggregate Per Premises of Project*).

[630] **Post-Completion Coverage.** See **Endnote 497** (Post-Completion Coverage); and **Endnote 732** (ISO CG 20 37 04 13 Additional Insured - Owners, Lessees or Contractors - Completed Operations); and this form attached in the Forms.

[631] **"Or Equivalent".** See **Endnote 452** ("Or Equivalent").

[632] **Owner's and Contractor's Protective Liability Policy ("OCP Policy").** See **Endnote 498** (Owner's and Contractor's Protective Liability Policy ("OCP Policy")).

[633] **Incidental Design Liability.** See **Endnote 499** (Incidental Design Liability).

[634] **Contractual Liability Coverage - An Exception To An Exclusion From Coverage.** See **Endnote 453** (Contractual Liability Coverage - An Exception To An Exclusion From Coverage).

[635] **Contractual Liability Coverage - An Exception To An Exclusion From Coverage.** See **Endnote 453** (Contractual Liability Coverage - An Exception To An Exclusion From Coverage).

[636] **Additional Insureds on Contractor's CGL Policy.** See **Endnote 500** (Additional Insureds on Contractor's CGL Policy).

[637] **Additional Insureds – ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** See **Endnote 501** (Additional Insureds – ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization).

[638] **Primary and Noncontributing.** See **Endnote 455** (Primary and Noncontributing).

[639] **Waiver of Subrogation Endorsement.** See **Endnote 456** (Waiver of Subrogation Endorsement).

[640] **Amendment of Cancellation Provisions or Coverage Change.** See **Endnote 458** (Amendment of Cancellation Provisions or Coverage Change).

[641] **Contractual Liability Limitation.** See **Endnote 459** (Contractual Liability Limitation).

[642] **Amendment of Insured Contract Definition.** See **Endnote 460** (Amendment of Insured Contract Definition).

[643] **Limitation of Coverage to Designated Premises or Project.** See **Endnote 461** (Limitation of Coverage to Designated Premises or Project).

[644] **Severability of Interest.** See **Endnote 462** (Severability of Interest).

[645] **ACORD Certificates - Not Reasonable To Rely Upon.** See **Endnote 434** (ACORD Certificates - Not Reasonable To Rely Upon).

[646] **Business Auto Liability.** See **Endnote 463** (Business Auto Liability).

[647] **"Any Auto".** See **Endnote 464** ("Any Auto").

[648] **Workers Compensation Limits Required by Law.** See **Endnote 465** (Workers Compensation Limits Required by Law).

[649] **Bodily Injury by Accident Limit (Workers Compensation).** See **Endnote 466** (Bodily Injury by Accident Limit (Workers Compensation).

[650] **Bodily Injury by Disease.** See **Endnote 467** (Bodily Injury by Disease).

[651] **Umbrella and Excess Policies.** See **Endnote 470** (Umbrella and Excess Policies).

[652] **Allocation of Limits Between Primary and Excess Umbrella Policy.** See **Endnote 471** (Allocation of Limits Between Primary and Excess Umbrella Policy).

[653] **No Standard Builder's Risk Policy.** See **Endnote 509** (No Standard Builder's Risk Policy).

[654] **Replacement Cost.** See **Endnote 475** and **510** – (Replacement Cost).

[655] **Typical Exclusions.** See **Endnote 515** (Typical Exclusions).

[656] **Builder's Risk – Insureds.** See **Endnote 512** (Builder's Risk – Insureds).

[657] **Insureds – Subcontractors.** See **Endnote 513** (Insureds – Subcontractors).

[658] **Special Form.** See **Endnote 474** (Property Insurance - "Causes of Loss"); **Endnote 480** (Property Insurance – Special Causes of Loss) ; **Endnote 514** (Special Form).

[659] **"All Risks".** See **Endnote 514** (Special Form).

[660] **Completed Value Basis.** See **Endnote 516** (Completed Value Basis).

[661] **Non-Reporting Form.** See **Endnote 517** (Non-Reporting Form).

[662] **Prohibition of Protective Safeguard Warranty.** See **Endnote 518** (Prohibition of Protective Safeguard Warranty).

[663] **Minimum Sublimit.** See **Endnote 519** (Minimum Sublimit).

[664] **Agreed Value.** See **Endnote 476** (Valuation Terminology - Agreed Value Endorsement). See **Endnote 475** (Valuation Terminology - Replacement Cost or Actual Cash Value).

[665] **Collapse Additional Coverage Endorsement.** See **Endnote 521** (Collapse Additional Coverage Endorsement).

[666] **Debris Removal.** See **Endnote 522** (Debris Removal).

[667] **Flood.** See **Endnote 525** (Flood).

[668] **Occupancy Pre-completion Clause.** See **Endnote 530** (Occupancy Pre-completion Clause).

[669] **Ordinance or Law Coverage.** See **Endnote 531** (Ordinance or Law Coverage).

[670] **Replacement Costs.** See **Endnote 575** (Valuation Terminology - Replacement Cost or Actual Cash Value); **Endnote 510** (Replacement Cost); **Endnote 520** (Agreed Value)

[671] **Soft Costs Coverage Added to Builder's Risk Policy.** See **Endnote 537** (Soft Costs Coverage Added to Builder's Risk Policy).

[672] **Terrorism.** See **Endnote 486** (Terrorism).

[673] **Waivers of Subrogation on a Builder's Risk Policy.** See **Endnote 538** (Waivers of Subrogation on a Builder's Risk Policy).

[674] **When Does Coverage Begin and End?** See **Endnote 540** (When Does Coverage Begin and End?).

[675] **Boiler and Machinery.** See **Endnote 492** (Boiler and Machinery Coverage).

[676] **ISO.** See **Endnote 427** (ISO).

[677] **Insurer Ratings.** See **Endnote 428** (Insurer Ratings).

[678] **Admitted Insurer.** See **Endnote 429** (Admitted Insurer).

[679] **Status as a Certificate Holder Does Not Create Rights.** See **Endnote 442** (Status as a Certificate Holder Does Not Create Rights).

[680] **Producer.** See **Endnote 443** (Producer).

[681] **Signed By An "Authorized Representative"?.** See **Endnote 444** (Signed By An "Authorized Representative"?).

C. Sales Documents

1. Commercial Contract – Improved Property (Modified TAR Form)

[682] **Context of Sales Contract.** The Seller of this property desired protection should after closing during the excavation of the site for the construction of a high-rise hotel that Seller's property was contaminated. When the Seller purchased the property 10 years earlier he had a Phase I done on the property which indicated that the property did not have a recognized environmental condition. The area in question many years previously had had numerous car dealerships and gas stations. This property was down gradient of the those uses. The Seller had no knowledge as to whether his property was contaminated, but was concerned that historical contamination up gradient could have migrated to his property. He did not want the Buyer to do soil testing and a Phase II on his property which could reveal that his property was in fact contaminated. See the next two Endnotes.

2. Environmental Liability Assumption, Release and Indemnity (Seller Oritented)

[683] **Context of Environmental Agreement.** See the preceding Endnote and the Endnote following this Endnote. The Buyer, which signed the Sales Contract and its SPE that closed the purchase of the Property, signed this agreement to protect the Seller against the risk that the Property was discovered to be contaminated after closing. Principals in the Buyer had developed another property across the street from and up gradient to the Property and had done extensive excavation on their other property. The Seller did not know whether or not the Buyer had knowledge of any contamination of the Buyer's other property which would have been gained in the Buyer's activities on its own property.

3. Environmental Information Mutual Confidentiality Agreement

[684] **Context of Confidentiality Agreement.** See the two preceding Endnotes. The Buyer entered into a Sales Contract to purchase both the Seller's Property and an adjoining property. In connection with the purchase of both properties, in order to gain the cooperation of the sellers of each of the properties, it entered into this confidentiality agreement

4. Purchase and Sale Agreement (Buyer Removes USTS)

[685] **Context of Purchase and Sale Agreement.** The Seller owned and operated a service station with small convenience store on this Property. It leased the Property to a one station operator. It was approached by a national pharmacy chain (like CVS) to sell it the site. The Seller did not want to pull its USTs and gas pumps off of the Property prior to closing of the sale to the national chain. The national chain agreed to test the Property prior to closing, and agreed to pull the tanks after closing.

5. USTs Removal Agreement

[686] **Context of the Agreement.** This agreement was reached between the Seller and the national chain for the removal after closing by the national chain of the gas pumps and USTs.

II. INSURANCE INDUSTRY FORMS

A. Standard Forms

1. Liability Insurance

[687] **ISO CG DS 01 10 01 Commercial General Liability Declarations – Retroactive Date.** The following definition of the "**Retroactive Date**" of a CGL policy is found in the online IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx. **"**A provision found in many (although not all) claims-made policies that eliminates coverage for claims produced by wrongful acts that took place prior to a specified date, even if the claim is first made during the policy period. For example, a January 1, 2015, retroactive date in a policy written with a January 1, 2015-2016, term, would bar coverage for claims resulting from wrongful acts that took place prior to January 1, 2015, even if claims (resulting from such acts) are made against the insured during the January 1, 2015-2016, policy period. There are two purposes of retroactive dates: (1) to eliminate coverage for situations or incidents known to insureds that have the potential to give rise to claims in the future and (2) to preclude coverage for "stale" claims that arise from events far in the past, even if such events are unknown to the insured. In the former case, the retroactive date preserves the principle of "fortuity"—that is, the insurer should not be called upon to cover the so-called burning building. In the latter instance, the retroactive date makes policies more affordable by precluding coverage for events that, while insurable, are remote in time."

[688] **ISO CG DS 01 10 01 Commercial General Liability Declarations – Form of Business.** See in this Chapter **Forms** the **ISO CG 00 01 04 13** Commercial General Liability Coverage Form, Section II, Who Is An Insured, Par. 1 as to automatic insureds covered by the standard CGL

policy based on the form of business. Following is a discussion of automatic insureds. Different "insured" terminology is used to define the insured in liability policies and property policies.

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

Named Insureds. The Declarations Page of a liability policy names the person or organization who is the insured and such person or organization is the named insured. If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the first named insured.

Automatic Insureds. Additionally, the liability policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy on which an organization is the named insured, may provide that the organization's employees are automatically covered and are **automatic insureds**. The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; *partners* and joint venturers in a named insured partnership or joint venture; *members and managers* of a named insured limited liability company; *officers, directors, and stockholders* of a named insured corporation or other named insured organization; *trustees* of a named insured trust; *employees* and *volunteer workers* of the named insured business; any person having proper temporary custody of a deceased named insured's property; the deceased named insured's legal representative; and *newly acquired or formed organizations*.

Additional Insureds. An "**additional insured**" is a person other than the named insured who is protected under the terms of the contract. Usually, additional insureds are added by endorsement or referred to in the wording of the definition of "**insured**" in the policy itself. The reason for including another person might be to protect the other person because of the named insured's close relationship with that person or to comply with a contractual obligation that requires the named insured to do so (*e.g.*, owners of property leased by the named insured -landlords). Under a CGL policy many types of persons or organizations may be added by endorsement as an additional insured, upon approval of the insurer. Many liability insurers issue **blanket endorsements** specifying certain parties that are "**automatic additional insureds**" under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. A common error in insurance specifications is to specify that a party is to be added to the named insured's policy as an **additional named insured**.

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

Insured. In a property policy, the insured is the party identified on the Declarations Page as having an **insurable interest** in the covered property and to whom loss payments will be paid if the property is damaged or destroyed.

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

Mortgageholder. Similarly, the standard commercial property policy contains the standard mortgage clause providing that loss payments will be made to the insured and the **mortgageholder** as their interests may appear.

689 **ISO CG DS 01 10 01 Commercial General Liability Declarations – Premises You Own, Rent or Occupy.** See **Endnote 695** - ISO CG 00 01 04 13 Commercial General Liability – "Exclusion j" Damage To Property You Own, Rent Or Occupy.

690 **ISO CG DS 01 10 01 Commercial General Liability Declarations – Endorsements To This Policy.** The various endorsements to the CGL policy are listed on the Declarations Page. If you are not provided with a copy of the policy, including its endorsements, in addition to obtaining a copy of the endorsement, you should obtain the Declarations Page, including this schedule, to confirm that the particular form of endorsement required by the insurance specifications has in fact been issued as part of the policy.

691 **ISO CG 00 01 04 13 CGL – Contractual Liability Coverage.** See **Endnote 453** (Contractual Liability Coverage - An Exception to an Exclusion From Coverage). The Texas Supreme Court in *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014) held that Exclusion 2.b, the "Contractual Liability" Exclusion, did not apply to negate coverage for a contractor where the "property damage" at issue is only to the property constructed. The supreme court was asked to answer questions posed to it by the Fifth Circuit. In 2008, Ewing Construction Company, Inc. (Ewing) entered into a standard AIA construction contract with a school district to build in a good and workmanlike manner additions to a school in Corpus Christi, including constructing tennis courts. Shortly after construction of the tennis courts was completed, the courts started flaking, crumbling, and cracking, rendering them unusable. Ewing tendered defense of the school district's suit to its insurer. The federal district court, and the Fifth Circuit initially held, that Ewing "assumed" the liability for its own performance under the contract. The Texas Supreme Court concluded that a contractor that agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract and thus does not "assume liability" for damages arising out of its defective work and does not trigger the contractual liability exclusion. The court found that the allegations that Ewing did not perform

its work in a good and workmanlike manner were substantively the same as the allegations that it negligently performed its work under the contract. The court held that

> Accordingly, we conclude that a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not "assume liability" for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion. We answer the first question "no" and, therefore, need not answer the second question. Id. at 38.

692 **Liquor Liability Exclusion to CGL – 2013 Revisions Both Narrow and Expand Coverage –ISO CG 00 01 – Coverage A, Exclusion 2.c.** See Endnote **108** - *Liquor Law Liability (Dram Shop)*.

693 **ISO CG 00 01 04 13 Commercial General Liability – Workers Compensation and Employers Liability Exclusion.** The standard CGL Policy, CG 00 01 04 13 at Section I, Par. 2.d and 2.e excludes from coverage the insured's obligation under workers compensation, disability benefits or unemployment compensation law or any similar law and "bodily injury" to its employees and consequential damages to an employee's spouse, child, parent, brother or sister as a consequence of bodily injuries to the employee. The insured may protect itself for liabilities arising out injuries to its employees by becoming a subscriber under its state's workers compensation system. It can also obtain Employers Liability Insurance.

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

695 **ISO CG 00 01 04 13 Commercial General Liability – "Exclusion j" Damage To Property You Own, Rent Or Occupy.** This portion of the "damage to property" exclusion, **Par. 2.j.** ("Exclusion j") does not apply to premises rented to the Named Insured for 7 or fewer consecutive days, or to the contents of such premises, *e.g.*, damages to a hotel room or its furnishings or to a conference room or special events facility rented to the Named Insured for this short period. See the Fire Damage Legal Liability Exception to exclusion language at the end of Paragraph 2 Exclusions reading as follows (the "Fire Damage Legal Liability Exception"):

> Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III - Limits Of Insurance.

The Fire Damage Legal Liability Exception creates coverage for fire damage to premises rented to the Named Insured when the damage is caused by the Named Insured's negligence, sometimes called "**fire damage legal liability**". A separate limit of liability applies to this coverage and typically ranges $50,000 - $100,000. This limit can be increased by endorsement to the CGL policy or written for higher limits, but as limits increase they can approximate a property policy's premium.

696 **Exclusion 2.j(5) - the "Operations" Exclusion (aka the "Property Being Worked On" Exclusion) - "That Particular Part"**. This exclusion reads as follows:

> 2. Exclusions. **This insurance does not apply to: …**
>
> j. Damage to Property**. "Property damage" to: …**
>
> (5) **That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; (emphasis added.)**

That the phrase "**that particular part**" is intended to limit the breadth of the exclusion from coverage is illustrated by the following analysis by the Missouri Supreme Court in *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 80 (Mo. 1998) when it was called on to decide whether this exclusion resulted in excluding coverage for all fire loss damages to a house or merely to the portion of the work from which the fire originated:

> Houses and buildings can be divided into so many parts that attempting to determine which part or parts are the subject of the insured's operations can produce several reasonable conclusions. For example, the "particular part of the real property on which [the insured] is performing operations" could mean, as Columbia Mutual contends, "the entire area of the real property that Schauf is scheduled to work." Under this interpretation, any damage the insured causes to property in the area which he was contracted to work would be excluded from coverage.
> Another possible definition of the instant exclusion is that the "particular part of real property on which [the insured] is performing operations" is only the part of the property that is the subject of the insured's work at the time of the damage. Under this interpretation, only the damage the insured causes to the particular part of the property that is actually the object of

> the insured's work where the damage occurs is excluded from coverage; any other damage would not be subject to the exclusion….
>
> In accordance with the relevant maxims of construction and the language and purpose of the instant exclusion, this Court upholds that the instant exclusion denies coverage for property damage to the particular part of real property that is the subject of the insured's work at the time of the damage, if the damage arises out of those operations.
>
> Applying the holding to the facts of this case compels the conclusion that the exclusion applies to any damage to the kitchen cabinets. When the damage in this case occurred, Schauf was cleaning from his spray equipment the lacquer he had applied to the kitchen cabinets. Because cleaning the lacquer was the last step in the job of lacquering the kitchen cabinets, the kitchen cabinets were the particular part of the real property that was the subject of Schauf's operations at the time of the damage. Consequently, the damage to the kitchen cabinets is excluded from coverage.

[697] **Exclusion 2.j(5) - the "Operations" Exclusion (aka the "Property Being Worked On" Exclusion) - "Are Performing Operations".** The phrase "**are performing operations**" is not defined. The vast majority of courts have concluded that this exclusion is limited to barring coverage for property damage occurring during on-going operations. This language is interpreted to exclude damages involving "works in progress", in other words the exclusion does not apply to "completed operations." The "arises out of operations" has caused confusion for some courts in interpreting the scope of the exclusion. However, the vast majority of courts have concluded that this exclusion is limited to barring coverage for property damage occurring during on-going operations. *See e.g., Mid-Continent Casualty Co. v. JHP Development, Inc.*, 557 F.3d 207, 215 (5th Cir. [Tex.] 2009). See Turner, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES (2d ed.) § 31:5:

> The use of the word "**particular**" suggests that the exclusion should only apply to the smallest unit of division available to the work in question. This coverage approach is often called the "component parts" approach. Even in cases where work is being performed on a large, undivided and undifferentiated piece of property, such as bare land, the "particular part" language seems too limiting to allow the entire property to fall within the exclusion. More appropriately, only the immediate area of the work where the property damage arises should fall within the exclusion. Certainly, the entire building or piece of real property being worked on cannot be the "particular part." Thus, damages for the diminution in value of the entire building or property have been held to be unaffected by exclusions containing the "particular part" limitation.

New Mexico. A federal district court in New Mexico in *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp.2d 1157, 1199 (D. N.M. 2012) held that water damage caused when a contractor intentionally diverted water onto plaintiff's property as not an "occurrence", even though the contractor did not intend to cause the water damage. However, the contractor's negligent misrepresentation to plaintiff that the contractor had the authority to construct the water diversion system on plaintiff's property was an occurrence because the contractor believed it had such authority. H. Brennenstuhl, Annot., *Negligent Misrepresentation as "Accident" or "Occurrence" Warranting Insurance Coverage*, 58 A.L.R. 483 (5th ed. 1998). Hartford Fire Ins. Co. v. Gandy Dancer, LLC, 864 F. Supp.2d 1157, 1200 (D. N.M. 2012):

> Here, the construction which Gandy Dancer and BNSF Railway performed is the property damage that Mercer LLC alleges. BNSF Railway made no arguments regarding the application of exclusion of j(5) to coverage of the negligent misrepresentation allegations. Because the damages, from the removal of materials and the construction, constitute property damage arising out of the work of the insured and its contractors, the Court finds that provision j(5) excludes these allegations from coverage.

[698] **Exclusion 2.j(6) - the "Incorrect Work" Exclusion and the "Products-Completed Operations Hazard" Exception.** This exclusion reads as follows:

> 2. Exclusions. **This insurance does not apply to: …**
>
> j. Damage to Property**. "**Property damage**" to: …**
>
> (6) **That particular part of any property that must be restored, repaired or replaced because "**your work**"** *was* **incorrectly performed** on it**.**
>
> **Paragraph (6) of this exclusion does not apply to "property damage" included in the "**products-completed operations hazard**". (emphasis added.)**

The exclusion is for "**property damage**" to "**that particular part**" because of "**incorrect work on it**". The purpose of exclusion 2.j(6) is to exclude coverage for the costs to repair or replace particular work discovered while the insured is still performing its work. Note that exclusion 2.j(6) employs the "that particular part" in the exclusion. This exclusionary wording has been held to permit coverage for damage to other non-defective work emanating from defective work.

Exclusion 2. j(6) for "Property Damage" to That Particular Part. *Mid-Continent Casualty Co. v. Krolczyk*, 408 S.W.3d 896 (Tex. App. – Hou. [1st Dist.] 2013, pet. denied) - in a "duty to defend" issue case, a court construed a HOA's pleadings in a suit against a subdivision developer that the developer built a "totally inadequate" road as not excluding coverage of the developer under 2.j(6). The court found the HOA's pleadings had alleged that the asphalt laid on the surface of the road cracked, but no allegations were made that the surface work was defective. Accordingly, only the defectively performed work (*e.g.*, the road base) would not be covered by the CGL insurance, while the non-defectively performed work would be covered, such as the paving and repaving work.; also see *E & R Rubalcava Const., Inc. v. Burlington Ins. Co.*, 147 F. Supp.2d 523 (N. D. Tex. 2000) "[T]he *business risk* exclusion [2.j(6)] … only applies to the cost of repair of the foundation work itself, not to the cost of repair of any other damage to the homes in issue."; and *Dorchester Development Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex. App.—Dallas 1987).

However, some courts have interpreted the exclusion to apply to the whole project. *See, e.g., E. H. Spencer & Company, LLC v. Essex Insurance Co.*, 2009 WL 2231222 (Mass. Super.) following the rationale in *Jet Line Servs., Inc. v. American Employers Ins. Co.*, 494 Mass 706 (Mass. 1989) where court stated "[w]here the insured was retained to perform work on an entire unit of property, and not just a portion of it, the applicability of the exclusion to damage of the entire unit is more apparent than in cases in which the insured was retained to work on only a part of the unit."

699 **Exclusion 2.j(6) - the "Products-Completed Operations Hazard" Exception.** The purpose of exclusion 2.j(6) is to exclude coverage for the costs to repair or replace particular work discovered while the insured is still performing its work and to except from the Incorrect Work Exclusion property damage included in the "**product and completed operations hazard**". *American States Ins. Co. v. Powers*, 262 F. Supp.2d 1245, 1251-52 (D. Kan. 2003):

> Thus, when exclusion j(6) is read together with the "product-completed operations hazard" provision, the result is that exclusion j(6) does not apply to claims arising from 'defective work that is discovered after the contractor has completed its work.' The application of exclusion j(6), then, turns on whether Mr. Powers' work on the building was incomplete (in which case the exclusion would apply) or complete (in which case the exclusion would not apply). There is no evidence before the court suggesting that Mr. Powers' work on the building was incomplete at the time the Stouts discovered the allegedly defective work. Rather, the uncontroverted facts demonstrate that Mr. Powers completed the building on May 30, 2000 and that sometime thereafter the Stouts realized that the building allegedly did not meet the contract specifications, did not meet various building codes pertaining to structural design, and was not constructed in a workmanlike manner. While the work performed by Mr. Powers may have needed significant correction, repair or replacement, such work is nonetheless treated as "complete" for purposes of the policy. Thus, because Mr. Powers' work was complete at the time of the damage, the property damage falls within the 'property-completed operations hazard' exception to exclusion j(6) and, accordingly, exclusion j(6) does not apply here.

The function of the "products-completed operations hazard" ("**PCOH**") exception has been defined as follows:

> Before proceeding to our analysis of whether there was coverage, we think it would be helpful to explain how the PCOH provision fits into a CGL policy. A CGL policy, like every other insurance policy, has an insuring clause under which the insurer agrees to pay sums that the insured becomes legally obligated to pay because of property damages caused by an occurrence. The CGL policy also has exclusions that take away some of this coverage. The PCOH provision is an exception to these exclusions. Or, stated another way, the PCOH provision is simply a category of losses that are covered even though these losses might otherwise be excluded. Viewed in this light, the PCOH provision does not create a separate category of coverage. Rather, any loss falling within the PCOH provision must still meet all the requirements of the policy, like any other loss, except the exclusion from which the losses are excepted.

Pursell Const., Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 69 (Iowa 1999). Note that the Iowa Supreme Court found in a case of first impression in Iowa that defective workmanship was not an "occurrence" to begin with and thus did not reach a decision as to whether an exclusion applied.

700 ISO CG 00 01 04 13 Commercial General Liability – Damage To "Your Work" Exclusion – "Subcontractor Exception" for Subcontractor's Work - Construction Defects Coverage**.** This exclusion reads as follows:

> 2. Exclusions. This insurance does **not** apply to: …
>
> l. Damage to Your Work**.** "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor. (emphasis added.)

The exclusion is limited to damages to "**your work**". Damage to other property (*i.e.*, others' non-defective work or personal property) is not encompassed by this exclusion. The Fifth Circuit in *Wilshire Insurance Co. v. RJT Construction Co.*, 581 F.3d 222, 226 (5th Cir. [Tex.] 2009) found that Exclusion 2.l precluded coverage only for the cost of repairing its insured's own work, the defective foundation, but did not exclude coverage of the damages caused to the balance of the home. The court noted that in *Travelers Insurance Co. v. Volentine*, 578 S.W.2d 501, 503 (Tex. Civ. App.—Texarkana 1979, no writ) the insured, an automobile mechanic, performed faulty work on an engine's valves which resulted in the destruction of the entire engine; the Texas court found that the exclusion 2.l precluded only the cost of replacing the valves themselves, but not the extent those other parts [of the engine] were damaged or destroyed. *Travelers* at 504.

This exclusion is the "heart" of the "business risk" doctrine. It is most often asserted by insurers in claims against contractors for latent defective work. It is oft said that "CGL insurance does not insure against faulty workmanship." The policy arguments supporting this exclusion are the concerns that substituting CGL insurance for the contractor's workmanship obligation is tantamount to providing a performance bond; expanding CGL insurance to cover performance promises will encourage poor workmanship; shifting the economic loss to the insurer for the contractor's faulty performance affords little incentive for the insured to exercise the necessary care and workmanship to operate in a sound business manner; and to do otherwise would encourage the contractor to underestimate the cost of performing the job, and thus shift the cost of doing business from the insured to the insurer.

Note that that Exclusion 2.l does not apply if the "damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." This exclusion and this exception were introduced into the standard policy and have remained unchanged since their introduction in the 1986 revision to the standard CGL policy. The 1986 exclusion/exception to exclusion replaced the 1973 "exclusion o" aka the "Work Performed" exclusion which read:

> This insurance does not apply … to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof or out of the materials, parts or equipment furnished in connection therewith.

The 1973 Work Performed exclusion applied to both property damage occurring during the course of construction and to completed operations. Also, the 1973 exclusion did not contain the "subcontractor exception". The 1986 exclusion is substantially narrower than the 1973 exclusion. Thus, whether this exclusion permits broader coverage depends on the extent to which the contractor has performed its services through subcontractors. As the Texas Supreme Court explained in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), in answer to certified question from the Fifth Circuit, 501 F.3d 435 (5th Cir. 2007):

> Lamar submits that this exclusion would have eliminated coverage here but for the subcontractor exception. According to Lamar, this exception was added to protect the insured from the consequences of a subcontractor's faulty workmanship causing "property damage." Thus, when a general contractor becomes liable for damage to work performed by a subcontractor—or for damage to the general contractor's own work arising out of a subcontractor's work—the subcontractor exception preserves coverage that the "your-work" exclusion would otherwise negate. Lamar's understanding of the subcontractor exception is consistent with other authorities who have commented on its effect.

[701] **Electronic Data Liability Exclusion to CGL Coverage – 2013 Revision - CG 00 01 – Coverage A, Exclusion 2.p. Exclusion 2.p** excludes from the standard CGL policy damages that "arise out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data". The standard CGL policy was revised in 2013 to broaden coverage by adding an exception to this exclusion for "bodily injury" (the "However, this exclusion does not apply …."). Coverage is readily available to cover this gap through an Electronic Data Liability endorsement, the ISO CG 04 37 04 13 and should be required. Be sure to specify the amount of coverage required, as this endorsement is frequently provided with only a minimal sublimit (e.g., $25,000 coverage). See the Electronic Data Liability endorsement.

[702] **Recording and Distribution of Material or Information in Violation of Law Exclusions – 2013 Revision - CG 00 01 – Coverage A, Exclusion 2.q.** The standard CGL policy was amended in 2013 to incorporate into the exclusions, this exclusion previously handled by a mandatory endorsement, the CG 00 68, excluding coverage for injuries and damages arising out of acts or omissions that violate certain consumer protection laws.

[703] **"Who Is An Insured" under the CGL Policy - CG 00 01 – Section II, Par. 1 - Entities.** Paragraph 1, Section II enumerates a number of persons and entities in addition to the Named Insured as insureds under the CGL policy with respect to the conduct of the Named Insured's business, e.g., partners and their spouses of a partnership; members and managers of a limited liability company; "executive officers," directors and shareholders of a corporation; and trustees of a trust.

[704] **Conditions to Coverage under the CGL Policy – "Other Insurance" - CG 00 01 – Section IV, Par. 4.** See **Endnote 455** (Primary and Noncontributing). See the following: (1) Section IV, Paragraph 4.a Other Insurance – Primary Insurance and 4.b – Excess Insurance to **CG 00 01 04 13** Commercial General Liability Coverage Form for provisions in the standard CGL policy establishing that coverage to the Named Insured under the CGL is provided on a primary basis and co-contributing with other insurance available to the Named Insured but is excess under specified circumstances, including if the Named Insured's other insurance is an additional insured provided on a primary basis; (2) **Endnote 705** (*2013 Revision to "Other Insurance" Provision*); and (3) **CG 20 01 04 13** Primary and Noncontributory - Other Insurance.

[705] **2013 Revision to "Other Insurance" Provision - CG 00 01 – Section IV, Par. 4(b)(1)(b).** Prior to the 2013 revision, the standard policy provided that the CGL coverage was excess over any primary insurance for which the named insured had been added as an additional insured "by attachment of an endorsement". However, some insurers provide additional insured status directly in their policy as opposed to by endorsement. This raised concerns among commentators that the additional insured's own insurance was primary and co-contributing with the additional insured coverage if the additional insured coverage was not provided by an endorsement. The 2013 revisions deleted "by attachment of an endorsement". By this revision the additional insured's own insurance (its "other insurance") is revised to state that the additional insured's own insurance is excess insurance over the additional insurance coverage provided to the additional insured whether by endorsement or other means.

[706] **Separation of Insureds – CG 00 01 – Section IV, Par. 7.** See **Endnote 454** (Separation of Insureds).

[707] **CGL Insurer's Contractual Right of Subrogation - CG 00 01 – Section IV, Par. 8.** The standard CGL policy contains a contractual transfer to the insurer of the Named Insured's right of recovery against third parties for payments made by the insurer. See in the Appendix of Forms the ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others To Us.

[708] **ISO CG 00 01 04 13 Commercial General Liability – Notice of Nonrenewal.** Notice that the notice is sent by the insurer to the "**first Named Insured**" as opposed to "all insureds".

[709] **"Occurrence".** What is an "**Accident**"? There are multiple judicial views of this question. See the National Summary Chart (current as of February 2015) appearing in Wielinski, Patrick J., INSURANCE FOR DEFECTIVE CONSTRUCTION (IRMI 4th Ed. 2015) in the slides accompanying this article.

Decisions Finding Faulty Workmanship Not a Basis for an "Occurrence":

Ark. *Nabohlz Const., Corp. St. Paul Fire and Marine Ins. Co.,* 354 F.Supp. 2d 917 (E. D. Ark. 2005) – Suit to recover cost to repair faulty roof did not allege an "occurrence".
Illinois. *Viking Const. Management, Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 294, Ill. Dec. 478, 831 N.E.2d 1 (1st Dist. 2005) - wall collapse caused by defective construction not covered as complaint did not allege property damage caused by an occurrence; collapse of wall under natural and ordinary circumstances did not constitute "occurrence" within the meaning of CGL policy.
Indiana. *Amerisure, Inc. v. Wurster Const. Co., Inc.*, 181 N.E.2d 998 (Ind. Ct. App. 2004), decision clarified on reh'g, 822 N.E.2d 1115 (Ind. Ct. App. 2005) - defective exterior insulation finish system was not an "occurrence".
Ill. *Stoneridge Development Co., Inc. v. Essex Ins. Co.*, 888 N.E.2d 633 (Ill. 2d Dist.), app. denied 897 N.E.2d 264 (Ill. 2008) - cracks that developed in home "were not an unforeseen occurrence that would qualify as an 'accident' because they were the natural and ordinary consequences of defective workmanship"; *Cincinnati Ins. Co. v. Tayor-Morely, Inc.* 556 F. Supp.2d 908 (S.D. Ill. 2008) - developer's allegedly faulty construction of homes did not constitute an "accident" or "occurrence".
Md. *OneBeacon Ins. v. Metro Ready-Mix, Inc.*, 427 F. Supp. 2d 574 (D. Md. 2006) - concrete manufacturer's provision of defective grout that was insufficient to support pile caps did not involve an accident within the policy definition of "occurrence".
Mo. *Hartford Ins. Co. of the Midwest v. Wyllie*, 396 F. Supp. 2d 1033 (E. D. Mo. 2005) - suit against seller of condominium alleging intentional misrepresentation for failing to disclose problems and defects with roof and heating systems did not allege an "occurrence"; *Charles Hampton's A-1 Signs, Inc. v. American States Ins. Co.*, 225 S.W.3d 482 (Tenn. Ct. App. 2006 app. denied 2007) – applying Missouri law; *J. E. Jones Const. Co. v. Chubb & Sons, Inc.* 486 F.3d 337 (8th Cir. 2007) – applying Missouri law; *St. Paul Fire and Marine Ins. Co. v. Building Const. Enterprises, Inc.*, 484 F. Supp.2d (W.D. Mo. 2007).
N.D. *Century Sur. Co. v. Demolition & Dev., Ltd*, 2006 WL 163174 (N. D. Ill. 2006) - misidentifying building for demolition was not an "occurrence".
Oh. *Westfield Cos. v. Gibbs*, 2005 WL 1940305 (Oh. Ct. App. – 11th Dist. 2005) – property owner's action against contractor alleging fraud and trespass did not satisfy occurrence element; and later case at 2006 WL 120041 – damages resulting from contractor's delay was not an "accident" and therefore did not arise for an "occurrence".
Or. *Oak Crest Const. Co. v. Austin Mutual Ins. Co.*, 998 P.2d 1254 (Or. 2006).
Pa. *Millers Capital Ins. Co. v. Gambone Bros. Development Co., Inc.* 941 A.2d 706 (Pa. 2007), app. denied. 963 A.2d 471 (Pa. 2008) - defective drywall resulting in delamination, pealing and disfigurement, which compromised structural integrity, was not caused by an accident and, thus, the policy provided no coverage as there was no "occurrence" ; *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888 (Pa. 2006) - failure to construct coke oven battery properly such that oven walls spalled, rod housings bowed, and ovens cracked paver bricks was not an accident and, therefore, was not an "occurrence".
S.C. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (S. C. 2005) – poor workmanship resulting in roads that deteriorated much more quickly than normal did not amount to an "occurrence".
Wash. *Mid-Continent Cas. Co. v. Williamsburg Condominium Ass'n*, 2006 WL 2927664 (W. D. Wash. 2006) - property damage to condominiums caused by builder's breach of contract and/or breach of warranty could not be regarded as an "occurrence".
W. Va. *Webster County Solid Waste Authority v. Brackenrich & Associates, Inc.* 217 W.Va. 304, 617 S.E.2d 851 (W. Va. 2005) - defective workmanship by engineering firm hired to design and supervise the construction of upgrades to a county land fill was not an "occurrence".

Decisions Finding Faulty Work a Basis for an "Occurrence":

Ariz. *Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538 (Ariz. Ct. App. Div. 1 2007).
Ark. *U.S. Fidelity & Guar. Co. v. Continental Cas. Co.*, 120 S.W.3d 556 (Ark. 2003) - "First, we must consider whether there was an occurrence. Appellants argue that the 'occurrence' that gave rise to the property damage was Ray's defective workmanship on the Wal-Mart projects. The policy defines an 'occurrence' as 'an accident.' We have defined an 'accident' as 'an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.' Because the policy has defined 'occurrence,' and because we have defined 'accident,' we conclude that the remaining fact question which must be resolved in this case before coverage can be determined is whether Ray's workmanship on the Wal-Mart projects constituted an 'accident.'" The court noted that there is a split of authority on whether defective workmanship is an accident and therefore an "occurrence" under a general liability policy.
Cal. *McGranahan v. Insurance Corp. of NY*, 544 F. Supp.2d 1052 (E.D. Call 2008) - "occurrence" alleged where complaint was neutral regarding whether insured intended to install moldy drywall, as it only asserted it installed moldy drywall.
Colo. *Hoang v. Monterra Homes (Powderhorn) LLC,*, 129 P.3d 1028 (Colo. Ct. App. 2005), as modified on denial of reh'g and cert. granted - claim that homebuilder was negligent in constructing homes on unsuitable site containing expansive soils alleged an "occurrence".
Fla. *U. S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007). See discussion in this Article.

Ga. *SawHorse, Inc. v. Southern Guar. Ins. Co. of Georgia*, 269 Ga. App. 493, 604 S.E.2d 541 (Ga. 2004) - "Southern Guaranty has cited no Georgia authority supporting its apparent claim that faulty workmanship cannot constitute an 'occurrence' under a general commercial liability policy. And this claim runs counter to case law finding that policies with similar 'occurrence' language provide coverage for 'the risk that. . . defective or faulty workmanship will cause injury to people or damage to other property.' Furthermore, Southern Guaranty has pointed to no evidence that SawHorse intended for the faulty workmanship to occur. Under these circumstances, Southern Guaranty is not entitled to summary judgment based on the "occurrence' language in the policy."

Ind. *Indiana Ins. Co. v. Alloyd Insulation Co.*, 2002 WL 1770491 (Ohio Ct. App. 2d Dist. Montgomery County 2002) - corrosion and consequential property damage from faulty roof due to defective workmanship constituted an "accident" and thus an "occurrence".

Kan. *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 33 Kan. App.2d 504, 104 P.3d 997 (Kan. 2005) - damage that occurs over time as a result of defective materials or workmanship in the construction of a home and leads to structural damage is an "occurrence"; 281 Kan. 844, 137 P.3d 486 (Kan. 2006) - homeowners' claim for property damage from window leaks against general contractor constituted an "occurrence" as there is nothing in the basic coverage language of the CGL policy to support any definitive tort/contract line of demarcation for purposes of determining coverage.

Ky. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2007) - intentional act of contractor's employee in demolishing part of home, allegedly because contractor had not communicated to employee that the project was limited to demolishing the home's carport, constituted an "accident" and therefore was an "occurrence," within the meaning of CGL policy.

La. *Broadmoor Anderson v. National Union Fire Ins. Co. of Louisiana*, 912 So.2d 400 (La. Ct. App.2d Cir. 2005) - defective ceramic tile and stone work resulting in water infiltration constituted an "occurrence"; *North American Treatment Systems, Inc. v. Scottsdale Ins. Co.*, 943 So.2d 429 (La. Ct. App. [1st Cir.] 2006), writ denied, 2007 WL 781850 and 2007 WL 781854 - claims of negligent work resulting in a collapse at a wastewater treatment plant clearly claimed damages by reason of an "occurrence".

Minn. *O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99 (Minn. Ct. App. 1996) abrogated on other grounds by *Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002).

Mo. *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667 (Mo. Ct. App. E.D. 2007) - defect in concrete purchased for house foundation was "accident" and, thus, "occurrence"; *American States Ins. Co. v. Herman C. Kempker Const. Co., Inc.*, 71 S.W.3d 232 (Mo. Ct. App. W.D. 2002) - developer's claim that insured contractor negligently misrepresented construction of street in development potentially was an "occurrence" and therefore, insurer had a duty to defend.

New Mexico. In *Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869 (N. M. Ct. App. 2015) the N. M. Court of Appeals held that property damage to homes stucco emanating from incorrect work by Pulte's subcontractor in installing sliding glass doors and windows was an "accident" and thus an "occurrence" for which Pulte was entitled to defense and indemnity as an additional insured on the subcontractor's policy. This case involved two tenders by Pulte to the insurer, both of which the insurer rejected. The court found that the first tender was correctly rejected as it was as to property damage (replacement) to the work itself, whereas the second tender was as to resultant damage to property other than the work itself. The court determined that recent cases in which courts have found that incorrect (faulty) work is an accident, and therefore an occurrence, represented a "more reasoned approach to construing the meaning of the term occurrence." Therefore, because noting in the policy's language definition of "occurrence" explicitly stated that faulty workmanship can never be an accident and nothing limited the definition to particular classes of property damage, insured's faulty workmanship was an occurrence.

Oh. *Dublin Bldg. Sys. v. Selective Ins. Co. of South Carolina*, 874 N.E.2d 788 (Ohio Ct. App. 10th Dist. Franklin County 2007) - property damage, including mold contamination, caused by exterior stucco subcontractor, who failed to properly seal office building's exterior walls, constituted an insurable "occurrence"; *Erie Ins. Exchange v. Colony Dev. Corp.* 736 N.E.2d 941 (Ohio Ct. App. 10th Dist. Franklin County 2006); *Victoria's Secret Stores, Inc. v. Epstein Contracting, Inc.*, 2002 WL 723215 (Ohio Ct. App. 10th Dist. Franklin County 2002) - collapse of store's ceiling was an "accident" and, therefore, an "occurrence" within the meaning of contractor's CGL policy, but express contractual liability exclusion applied to shield insurers from liability.

Pa. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 2003 Pa Super 149, 825 A.2d 641, 654 (Pa. 2003) - "In the instant case, the damage at issue is not the absence of the grout or the size of the grout spaces but the deformation and deflection of the brick work, tie rods and roof of the battery which occurred after the battery was placed in use. Whether that damage was caused in whole or in part by the torrential rains of October 31st and November 1st, or by some other event during the heatup of the battery, we are not hesitant to conclude that the physical damage to the battery constituted an occurrence for which the policies provide coverage *UNLESS* otherwise precluded by one of the exclusions set forth in the policy."

N.D. *ACUITY v. Burd & Smith Const., Inc.*, 721 N.W.2d 33, 39-40 (N.D. 2006) - "We agree with the rationale of those courts holding that faulty workmanship causing damage to property other than the work product is an accidental occurrence for purposes of the CGL policy. . . . Here, the Kailliers allege damage to the interior of the apartment building. We conclude that claim is the type of risk covered by a CGL policy and constitutes an 'occurrence' under Acuity's policy."

Neb. *Auto-Owners Ins. Co. v. Home Pride Companies, Inc.*, 268 Neb. 528, 684 N.W.2d 571, 577-78 (Neb. 2004) - "Although it is clear that faulty workmanship, standing alone, is not covered under a standard CGL policy, it is important to realize that there are two different justifications for this rule. On the one hand, the rule has been justified on public policy grounds, primarily on the long-founded notion that the cost to repair and replace the damages caused by faulty workmanship is a business risk not covered under a CGL policy. Today, the business risk rule is part of standard CGL policies in the form of "your work" exceptions to coverage. Therefore, the business risk rule does not serve as an initial bar to coverage, but, rather, as a potential exclusion, via the "your work" exclusions, if an initial grant of coverage is founded. . . . Important here, although faulty workmanship, standing alone is not an occurrence under a CGL policy, an accident caused by faulty workmanship is a covered occurrence. . . . In the instant case, [insureds' subcontractors] negligently installed shingles on a number of apartments, which caused the shingles to fall off. Additionally, the amended petition alleged that as a consequence of the faulty work, the roof structures and buildings have experienced substantial damage. This latter allegation represents an unintended and unexpected consequence of the contractors' faulty workmanship and goes beyond damages to the contractors' own work product. Therefore, the amended petition properly alleged an occurrence within the meaning of the insurance policy."

S.C. *Auto Owners Ins. Co., Inc. v. Newman*, 2008 WL 648546 (S.C. 2008) - water intrusion and resulting damage was an "occurrence" covered under the policy; *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.* 350 S.C. 549, 567 S.E.2d 489 (S. C. Ct. App. 2002) - deterioration and failure

of roads from repeated water runoff was an "accident" and, therefore, an "occurrence" and subcontractor exception to policy's business risk exclusion restored coverage otherwise excluded under the policy.
S.D. *Corner Const. Co. v. U. S. Fidelity and Guar. Co.*, 2002 S.D. 5, 638 N.W.2d 887 (S.D. 2002) - failure to fill voids between studs with insulation and to securely attach the vapor barrier was an "accident" resulting in property damage.
Tenn. *Travelers Indem. Co. of America v. Moore & Associates, Inc.*, 216 S.W.3d 302, 308-09 (Tenn. 2007) – see discussion in this Article; and *State Farm Fire and Cas. Co. v. McGowan*, 421 F.3d 433, 2005 FED App. 0374P (6th Cir. 2005) - holding that an insured's negligence was an "occurrence" under an insurance policy because it was unintended and unforeseen.
Tex. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), answer to certified question conformed to, 501 F.3d 435 (5th Cir. 2007) – see discussion in this Article; and *CU Lloyd's of Texas v. Main Street Homes, Inc.*, 79 S.W.3d 687 (Tex. App.—Austin 2002) - homeowners' allegations that general contractor built homes after learning that foundation designs were inadequate for soil conditions and failed to disclose that knowledge to purchasers stated an "accident" and thus an "occurrence". *King v. Dallas Fire Ins. Co.* 45 Tex. Sup. Ct. J. 715, 2002 WL 1118438 (Tex. 2002), op. withdrawn and superseded on reh'g on other grounds, 85 S.W.3d 185 (Tex. 2002) - liability insurer owed duty to defend employer accused of negligently hiring and supervising employee accused of battery, because the employer's negligent hiring constituted an "occurrence"; *Lennar Corp. v. Great American Ins. Co.*, 2005 WL 1324833 (Tex. App.—Hou. [14th Dist.] 2005) - suit to recover costs paid to repair water damage and replace defective exterior insulation and finish systems on hundreds of homes built in the Houston area in the late 1990s alleged an "occurrence", and 200 S.W.3d 651 (Tex. App. Hou. [14th Dist.] 2006, writ granted) - homebuilder's negligent construction of homes using defective exterior insulation and finish system constituted an "occurrence" within scope of CGL and commercial umbrella liability policies; *Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 2009 WL 189886 (5th Cir. [Tex.] 2009) - faulty workmanship allegations against contractor in the construction of five condominiums that resulted in water leakage was an occurrence; *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*, 2006 WL 1892669 (Tex. App.—Hou. [14th Dist.] 2006) - property damage caused by defective construction may constitute an "occurrence" if it is inadvertent and results in damage to the insured's own work, the result of which is unintended and unexpected, *rev'd on other grounds Pine Oak Builders' Inc. v. Great American Lloyds Ins. Co*., 279 S.W.3d 650 (Tex. 2009).
Utah. *Great American Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp.2d 1275 (D. Utah 2006) - subcontractor's faulty work causing cracks in building foundation, basement floor, and driveway involved an occurrence such that breach of warranty claim and breach of contract claim were potentially covered.
Wash. *Mid-Continent Cas. Co. v. Titan Const. Corp.* 281 Fed. Appx. 766 (9th Cir. 2008) - negligent construction of condominium that resulted in breach of contract and breach of warranty claims constituted "occurrence" under CGL policy.
Wisc. *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 76 (Wis. 2004) - "American Family argues that because Pleasant's claim is for breach of contract/breach of warranty it cannot be an "occurrence," because the CGL is not intended to cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes overlooked and has resulted in some regrettably overbroad generalizations about CGL policies in our case law."; *1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 284 Wis.2d 387, 2005 WI. App. 121, 701 N.W.2d 13 (Ct. App. 2005), review granted 2005 WI. 150, 286 Wis.2d 97, 705 N.W.2d 659 (Wis. 2005) - CM-at-risk failures that result in property damage and delays were an occurrence; *Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer*, 721 N.W.2d 704 (Wis. Ct. App. 2006) - concluding, after a detailed discussion, that "occurrence" is not equivalent to faulty workmanship, but rather faulty workmanship may result in an "occurrence" and, in this case, where pleading alleges that the rubber mats that subcontractor improperly installed were damaged by a scraper that cleans manure from them is a claim for property damage caused by an occurrence in that the damage was not intended or anticipated and that it was also not intended or anticipated that using the scraper to clean the manure off the mats would damage the mats; *Stuart v. Weisflog's Showroom Gallery, Inc.*, 722 N.W.2d 766 (Wis. Ct. App. 2006, review granted), 727 N.W.2d 34 (Wis. 2006) - insured's misrepresentations that it was a licensed architect and familiar with building code requirements qualified as "occurrences" per its insurance policy because intent to deceive is not a necessary element of homeowners' cause of action.

710 **Amendment of Cancellation Provisions or Coverage Change.** The ACORD 24 Certificate of Property Insurance, **ACORD 25** Certificate of Liability Insurance and **ACORD 28** Evidence of Commercial Property Insurance were revised in late 2009 and early 2010 to change the Cancellation notice language to read as follows:

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

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

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

Similar language appeared in the ACORD Certificate of Property Insurance. A New York appeals court has held that the presence of an ACORD "endeavor"-type notice of cancellation provision in the certificate does not impose on the insurer a contractual obligation to give the certificate holder notice of cancellation of the policy for the insured's premium non-payment. The court held that the insurer satisfied its contract obligations by complying with the contract's requirement of giving notice to the "first named insured" (the insurer's customer). The court

pointed to a New York statute which required notice to the first named insured but did not also specify that notice be given to additional insureds. The court dismissed the additional insured/certificate holder's arguments as follows:

> Charlew contends that it reasonably relied, to its detriment, upon the certificate of insurance which named it as an additional insured and, therefore, under our decision in [citation omitted], Merchants Mutual was equitably estopped from denying coverage. Notably, however, the situation presented herein is distinguishable because the Merchants Mutual insurance policy was not in existence at the time of (the employee's) accident. "Where there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel cannot be used to create coverage." (citations omitted). Furthermore, Charlew argues that the policy was not properly cancelled because it was not notified of such action, as an additional insured…. Even assuming that Merchants Mutual received the policy change request from Weller-Marcil, we disagree with that argument. Since Merchants Mutual strictly complied with the notice of cancellation provisions set forth in … (reference to NY statute omitted) by mailing a timely notice of cancellation to the "first-named insured" (Regels) and "such insured's authorized agent or broker" (Weller-Mercil), the policy was effectively cancelled … (citation omitted), irrespective of its failure to comply with its "courtesy" policy of notifying additional insureds of a cancellation. Charlew's (the additional insured's) argument is further belied by the unambiguous disclaimer contained in the certificate of insurance … (quotation of the ACORD language is omitted.). *Wainwright v. Charlew Construction Co. Inc*., 755 N.Y.S.2d 751, 753-54 (NY [3rd Dept.] 2003).

for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. ISO CG 02 05 12 04 Texas Changes - Amendment of Cancellation Provisions or Coverage Change provides for the insurer to give the designated person advance notice of cancellation or material change to the First Named Insured's CGL policy. Many but not all states have a similar form approved by the state's insurance commissioner for use in their state.

[711] **ISO CG 04 37 04 13 Electronic Data Liability.** See Chapter 3 Insurance **IIA.11a(l)** (Exclusions May Be Invisible – Electronic Data Liability) in beginning of this article for a discussion of Exclusion 2.p - Electronic Data exclusion to the standard CGL policy's coverage. This endorsement to the CGL policy adds a definition for "electronic data" and amends the definition of "property damage" to incorporate the electronic data definition. **CG 04 37** was revised in 2013 to add to this exclusionary endorsement the "bodily injury" exception to the exclusion which also is included by the 2013 revisions in **Exclusion 2.p**. See **ISO CP 00 10 10 12** Building and Personal Property Coverage Form, Par. 4.f Additional Coverages – Electronic Data for property insurance coverage of loss or damage to electronic data.

[712] **ISO CG 20 10 04 13 Primary and Noncontributory – The "Other Insurance" Condition.** See **Endnote 455** (Primary and Noncontributing). **ISO CG 20 01 04 13** Primary and Noncontributory – Other Insurance Condition has been introduced in 2013 by ISO to provide an endorsement form to be added to the Named Insured's policy (the protecting party's policy) to reiterate that it provides "primary" coverage and that its issuer "will not seek contribution from any other insurance available to an additional insured". Note, however, that Provision (2) of this endorsement requires that the written agreement of the additional insured (the protected party) and the Named Insured (the protecting party) must provide that the Named Insured's insurance is primary and will not seek contribution from the additional insured's other insurance. Requiring in the written agreement between the Named Insured and the Additional Insured that an ISO CG 20 10 endorsement be added to the Named Insured's policy may not achieve the Additional Insured's objectives, if the written agreement itself does not also specify that the additional insured coverage on the Named Insured's policy is "primary and noncontributory" plus contain language defining what is meant by primary and noncontributory. Note that this new endorsement is worded to apply only where the additional insured is a Named Insured. Many of the parties that require additional insured protection are not named insureds under a CGL policy, *e.g.*, officers, directors, and employees of a primary additional insured. Also note that this new endorsement provides that it applies only if the person or entity is named as an additional insured by an endorsement. Also, note this endorsement endorses the Named Insured's Commercial General Liability Policy and is not an endorsement to the Named Insured's umbrella or excess policy. This result might be avoided if the umbrella or excess policy provides that it is primary and does not require the additional insured's policy to contribute, and the additional insured's policy does not provide that it contributes along with other insurance above the primary contributing policies. This desired result of an additional insured is exacerbated by the standard policy's "other insurance" language that provides the policy is "Excess over: … (b) Any other primary insurance available to you covering liability … for which you have been added as an additional insured." The additional insured's policy does not state it is excess over umbrella policies of the Named Insured on which it has been added as an additional insured.

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

[714] **ISO CG 20 10 – "Caused by Your Acts or Omissions".** This endorsement provides coverage to the additional insured (*e.g.*, landlord and tenant) on the contractor's CGL policy for "liability" "***caused, in whole or in part, by***" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those of its subcontractors, *etc.*). (This form is also used to provide additional insured coverage for a contractor on a subcontractor's CGL policy). The "caused in whole or in part" language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties.

The 2004 revision to this additional insured endorsement was in part a response to holdings, such as *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App. – Austin [3rd Dist.] 1999, no writ), *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. [1st Dist.] 1999, writ denied) and *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) holding that the "arising out of" language was ambiguous and should be broadly interpreted as providing coverage for liabilities arising out of the concurrent and even the sole negligence of the additional insured. Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent and the additional insured was the solely negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent?

The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named insured's employee is barred by the workers comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer. In *W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 937 N.Y.S.2d 28 (N.Y. 2012) the New York court held that "caused by your ongoing operations performed for that insured" did not materially differ from "arising out of" and "the additional insured endorsement granting coverage does not require a negligence trigger". The court found that the fact that an employee of a subcontractor was injured while performing the named insured's work was sufficient to demonstrate that the injuries were "caused by" the named insured's operations.

715 **ISO CG 20 10 – "Ongoing Operations".** This Additional Insured endorsement form was revised in 2001 by ISO to limit the time of the "acts or omissions" triggering liability to those occurring "in the performance of the ongoing operations" of the Named Insured. Previously, this Additional Insured endorsement applied to liabilities arising out of "your work" (language which did not address the time of the occurrence). A companion endorsement, **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations was introduced in 2001 (as subsequently modified) to cover liabilities caused, in whole or in part, by "your work" "at the location described in the Schedule" "performed for that additional insured" and "included in the 'products-completed operations hazard". Restricting the endorsement to locations and operations described in the ISO CG 20 37 permits insurers the opportunity to underwrite the coverage risk.

716 **2013 Revisions – Additional Limitations to the Additional Insured Endorsements.** ISO revised the Additional Insurance forms to add the following three additional limitations to their additional insured coverage:

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

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

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

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

718 **ISO CG 20 11 Additional Insured – Managers or Lessors of Premises - Designation of Premises.** See **Endnote 720** (*ISO CG 20 11 - "Arising Out of 'Premises'"*) for a discussion of the importance of the description of the "premises".

719 **ISO CG 20 11 - "Arising Out of Ownership, Maintenance or Use" of Premises.** Coverage is broad as it covers the additional insured's liability for Injuries "**arising out of**" its "ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)" as opposed to using language employed in some of the other current ISO endorsement forms that were amended in 2004 to change from "arising out" to "caused by." Coverage also is broad as it covers the additional insured's liability for Injuries arising out of its "ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)." This language is broad. It applies clearly to the landlord's vicarious liability for acts of the tenant (i.e., the "**use**" of the premises). The language is also expansive and general enough to apply directly to the landlord's own negligence. It covers liability arising out of the "**ownership**" and "**maintenance**" of the premises, areas in which

the landlord could be held liable regardless of any involvement of the tenant. The ISO industry standard additional insured endorsement form above does not expressly extend coverage to the additional insured's sole negligence. It also does not expressly exclude coverage of a landlord's sole negligence. In 2004 ISO modified several of its endorsement forms (but not this one) to expressly exclude from coverage the sole negligence of the additional insured. An issue may exist as to whether the above ISO endorsement form extends to cover a landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its CGL policy that expressly covers a landlord's sole negligence.

[720] **ISO CG 20 11 - "Arising Out of 'Premises'".** This endorsement provides a blank line for the description of the "Premises." Care must be exercised in completing this blank. This endorsement has a major potential coverage issue. It extends coverage to the additional insured landlord for liability for bodily injury and property damage "arising out of" ownership, maintenance or use of "that part of the premises leased" to the Tenant. A coverage issue may occur if the bodily injury or property damage occurs outside of the "premises" as such term is defined in the lease (for example, in the common areas maintained by the landlord or in the alley behind the project). The most common factually litigated scenario regarding these endorsements involves injuries occurring "outside" the "part" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is affected if the schedule designates more or less than the "part of the premises" leased to the named insured. Some courts have found that the reference to "premises" is not a geographic limitation of the additional insured's coverage. Such courts have construed the endorsement's use of "arising out of" the premises as meaning that the injury or damage does not have to actually occur in the premises. However, some courts have placed a literal meaning on the "premises" and have required the injury to occur in the premises leased to a tenant.

Cases Finding No Coverage. For example, in *General Accident, Fire and Life Assurance Corp.* v. *Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the additional insured endorsement did not cover a claim brought by the named insured's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant named insured's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the covered location where the injury must occur, and do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility. *See Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc.*, 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N. Y. App. Div. Lexis 13316 (2003) a case involving an injury that occurred to a HVAC repairman who was injured while walking on the roof of a landlord's multi-tenant retail center to get to a HVAC unit that the tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement form was the above ISO CG 20 11 Additional Insured – Managers and Lessors of Premises. The court found that the additional insured endorsement did not insure the landlord for the injury as the injury neither occurred in the retail space leased to tenant or on the roof directly above the space. *Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993)-additional insured endorsement held not to cover injuries occurring in alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center) and the additional insured endorsement described the "premises" as the 3,200 square feet of space occupied by the named insured tenant. The court stated:

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

The court also reasoned that since the lease provided for the landlord to maintain the alley the parties did not intend to transfer to the tenant's insurer the risk of liabilities occurring in the alley. A similar conclusion was reached in *Minges Creek* v. *Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006). This case arose out of injury to a customer of a card shop who slipped in the icy parking lot of the mall in which the shop was located. The customer sued both the card shop and the mall. The lease provided that the shop was required to maintain liability insurance "with respect to the leased premises and the business operated by the tenant" and to "name landlord (i.e., the mall owner), any other parties in interest designated by landlord, and tenant as insured." The additional insured endorsement to Tenant's CGL policy provided coverage to the additional insured landlord "with respect to liability arising out of premises owned or used by you (the tenant)." The court held that the landlord was not insured against the liability by tenant's additional insured endorsement. The court viewed the lease and the additional insurance endorsement as "inextricably intertwined" and stated that they "should be interpreted in context with each other." The court concluded that the card shop was required by its lease to provide insured status for the mall only with respect to the "leased premises"–the limited square footage set out in the lease, 6,796 square feet of interior space as shown in the mall's site plan attached to the lease. The court found that although the parking lot was provided for the "use" of the card shop and other tenants, it was not part of the "premises" used by the card shop. The court found that the context of the lease agreement "requires that the definition of premises in the policy be coextensive with the card shop's obligation to name (the mall owner) as an additional insured." Also see *USF&G* v. *Drazic*, 877 S.W.2d 140 (Mo. 1994)-additional insured not covered for injuries to named insured tenant's employee who slipped and was injured on an icy parking lot. See also cases construing the scope of indemnities as to injuries arising out of the use of the "premises" as not extending to injuries not occurring in the premises (but note courts follow a strict construction rule limiting private parties contracts not employed in construing insurance contracts): *Rensselaer Polytechnic Inst.* v. *Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991). The court was not persuaded that a duty to indemnify existed by the argument that, although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co.* v. *Admon Realty, Inc.*, 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)–finding no duty to indemnify where the cause of the damage occurred outside the leased premises.

[721] **ISO CG 20 24 Additional Insured – Owners or Other Interests From Whom Land Has Been Leased.** This additional insured endorsement applies to a lease of "land", and **ISO CG 20 11** applies to a lease of "premises". Should **ISO CG 20 24** or **ISO 20 11** be used in a "ground lease"? The answer may be clearer if the land will be unimproved throughout the tenancy. Like the ISO CG 20 11 discussed in **Endnote 720** above, the **ISO CG 20 24** has two carve outs: first, cessation of the lease, and second, alterations, new construction or demolition operations.

[722] **ISO CG 20 24 – Designation of Premises.** See **Endnote 720** (ISO CG 20 11 - "Arising Out of 'Premises'") for a discussion of the importance of defining with care the "premises".

[723] **ISO CG 20 24 - "Arising Out of Ownership, Maintenance or Use" of Premises.** See **Endnote 719** (ISO CG 20 11 - "Arising Out of Ownership, Maintenance or Use" of Premises) for a discussion of the term "arising out of ownership, maintenance or use".

[724] **2013 Revisions – Additional Limitations to Additional Insured Endorsements.** See discussions in article at Chapter 3 Insurance **IIA.6.e** (2013 Amendments to the ISO Additional Insured Endorsements – Not a Friend But a Foe?).

[725] **ISO CG 20 26 04 13 Additional Insured – Designated Person or Organization.** This endorsement may be used when no other ISO form exists for the purpose or when the parties designate this Form as the form to be used. This form is suitable for use to designate a tenant as an additional insured on Landlord's CGL policy. In a landlord-tenant context, it may be used to provide additional insured coverage to an owner on a tenant's CGL policy and *vice versa* to provide additional insured coverage to a tenant on a landlord's CGL policy. In cases where the landlord is to be included as an additional insured on the tenant's CGL policy and the tenant is to be included on a landlord's CGL policy, the insurance specifications and the additional insured endorsements must be drafted to allocate on a geographic basis the areas where the landlord's insurance is to afford primary and noncontributory coverage to the landlord and the tenant (for example, the common areas) and the areas where the tenant's insurance is to afford primary and noncontributory coverage to the landlord and the tenant (for example, inside the suite or demised premises leased to the tenant, exclusive of common areas). This endorsement is the broadest of the ISO Additional Insured Endorsements. This endorsement provides additional insured coverage for liability bodily injury, property damage and personal and advertising injury caused, in whole or in part, by the named insured's (in this case the Landlord) acts or omissions "in connection with your premises owned by ... you." This endorsement form does not contain any carve outs from coverage like other ISO additional insured endorsement forms. However, by its express coverage terms it eliminates certain coverages. For example, the injury must be caused at least in part by the named insured. This eliminates coverage for the additional insured's sole negligence. The injury must occur in connection with premises owned by the named insured. The term "**premises**" is not defined, but likely will be given a broad meaning by courts. In the context of a lease, courts will likely interpret this endorsement listing the tenant as an additional insured on the landlord's CGL policy as covering more than merely the "Premises" leased to the tenant, but also the common areas.

[726] **ISO CG 20 26 04 13 – "Your Acts or Omissions".** This endorsement provides coverage to the additional insured (*e.g.*, landlord and tenant) on the contractor's CGL policy for "liability" "**caused, in whole or in part, by**" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those of its subcontractors, *etc.*). (This form is also used to provide additional insured coverage for a contractor on a subcontractor's CGL policy). The "caused in whole or in part" language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties.

The 2004 revision to this additional insured endorsement was in part a response to holdings, such as *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App. – Austin [3rd Dist.] 1999, no writ), *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. [1st Dist.] 1999, writ denied) and *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) holding that the "arising out of" language was ambiguous and should be broadly interpreted as providing coverage for liabilities arising out of the concurrent and even the sole negligence of the additional insured. Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent and the additional insured was the solely negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent?

The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named

insured's employee is barred by the workers comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer. In *W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 937 N.Y.S.2d 28 (N.Y. 2012) the New York court held that "caused by your ongoing operations performed for that insured" did not materially differ from "arising out of" and "the additional insured endorsement granting coverage does not require a negligence trigger". The court found that the fact that an employee of a subcontractor was injured while performing the named insured's work was sufficient to demonstrate that the injuries were "caused by" the named insured's operations.

[727] **ISO CG 20 26 04 13 – Ongoing Operations.** This Additional Insured endorsement form was revised in 2001 by ISO to limit the time of the "acts or omissions" triggering liability to those occurring "in the performance of the ongoing operations" of the Named Insured. Previously, this Additional Insured endorsement applied to liabilities arising out of "your work" (language which did not address the time of the occurrence). A companion endorsement, **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations was introduced in 2001 (as subsequently modified) to cover liabilities caused, in whole or in part, by "your work" "at the location described in the Schedule" "performed for that additional insured" and "included in the 'products-completed operations hazard". Restricting the endorsement to locations and operations described in the ISO CG 20 37 permits insurers the opportunity to underwrite the coverage risk.

[728] **2013 Revisions – Additional Limitations to the Additional Insured Endorsements.** See discussion in the article at Chapter 3 Insurance **II.A.6e** (The 2013 Revisions - Not a Friend But a Foe). ISO revised the Additional Insurance forms, ISO CG Forms 20 10, CG 20 11, CG 20 24, CG 20 26, CG 20 33, CG 20 37, and CG 20 38 to add the following three additional limitations to their additional insured coverage:

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

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

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

[729] **ISO CG 20 33 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement with You.** See discussion in this article at Chapter 3 Insurance **IIA.8** (Additional Insureds May Not Be Covered by Automatic (Blanket) Additional Insured Coverage). **ISO CG 20 33** endorsement amends the "Who Is An Insured" provision of the Named Insured's policy to add as an additional insured "any person or organization for whom you are performing operations when you and such person organization have agreed in writing … that such person … be added as an additional insured on your policy." It is commonplace for the agreement between contractors and subcontractors and landlords and tenants to provide that persons other than the parties to the agreement be afforded additional insured status. Under **ISO CG 20 33** "no agreement between the Named Insured and the Additional Insured, no additional insured coverage". **ISO CG 20 33** at **Par. B.2** excludes coverage for liabilities arising out of the products and completed operations hazard. Also, at **Par. B.1** the 2013 revision to this endorsement added an exclusion for professional services, including the additional insured's hiring, training or monitoring of employees who perform professional services themselves. See **ISO CG 20 38**. It provides for coverage even when there is no direct agreement between the Named Insured and the Additional Insured.

[730] **ISO CG 20 33 04 13 – "Your Acts or Omissions".** See **Endnote 714** (ISO CG 20 10 – "Caused by Your Acts or Omissions") for a discussion of the meaning of "your acts or omissions".

[731] **2013 Revisions – Additional Limitations to Additional Insured Endorsements.** See **Endnote 716** (2013 Revisions – Additional Limitations to the Additional Insured Endorsements). See discussion in the article in Chapter 3 Insurance at **II.A.6e** (The 2013 Amendments to the ISO Additional Insured Endorsements - Not a Friend But a Foe).

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

[733] **ISO CG 20 38 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status For Other Parties When Required in Written Construction Agreement.** This form was added by ISO in 2013 to its list of additional insured endorsement forms. Paragraph **.2** extends additional insured coverage to "Any other person … you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above." Paragraph **.2** cures the malady discussed at this **Item III.A.8** (Additional Insureds May Not Be Covered by Blanket Additional Insured Coverage). Thus, make sure that, if automatic additional insured status is being afforded and there is not a direct

contract between the Named Insured and the Additional Insured, **ISO CG 20 38** is the appropriate endorsement form to attach to the Named Insured's policy. Your examination of the Certificate of Insurance will not confirm which automatic additional insured endorsement form is part of the Named Insured's policy. Many times the parties' written agreement has a laundry list of Additional Insureds. In such circumstances it is not assured that the Insurer will be willing to extend additional insured status to numerous entities with which the Named Insured does not have a contract. **CG 20 38** at Paragraph **B.2** excludes coverage for liabilities arising out of the products and completed operations hazard. Also, at Paragraph **B.1** the 2013 revision to this endorsement added an exclusion for professional services, including the additional insured's hiring, training or monitoring of employees who perform professional services themselves.

[734] **ISO CG 20 38 04 13 – "Caused By Your Acts or Omissions".** See **Endnote 726** (ISO CG 20 26 04 13 – "Your Acts or Omissions"). This endorsement provides coverage to the additional insured (*e.g.*, landlord and tenant) on the contractor's CGL policy for "liability" "**caused, in whole or in part, by**" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those of its subcontractors, *etc.*). (This form is also used to provide additional insured coverage for a contractor on a subcontractor's CGL policy).

[735] **2013 Revisions – Additional Limitations to ISO Forms CG 20 10, CG 20 11, CG 20 24, CG 20 26, CG 20 33, CG 20 37, and CG 20 38 Additional Insured Endorsements.** ISO revised the Additional Insurance forms, CG 20 10, CG 20 11, CG 20 24, CG 20 26, CG 20 33, CG 20 37, and CG 20 38 to add the three additional limitations to their additional insured coverage listed at **Endnote 716** (2013 Revisions – Additional Limitations to the Additional Insured Endorsements). See discussion in this article in Chapter 3 Insurance at **II.A.6e** (The 2013 Amendments to the ISO Additional Insured Endorsements –a Friend or a Foe?).

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

[737] **ISO CG 21 44 07 98 Limitation of Coverage to Designated Premises or Project. ISO CG 21 44** is added as an endorsement to the CGL policy to confirm and limit coverage to the designated premises or project. The danger of this form is if it confirms and limits the CGL policy's coverage to a location other than the Landlord's or Owner's premises or project. For this reason, the Insurance Specifications list it as a prohibited endorsement. So listing it as a prohibited endorsement hopefully will bring its existence to light.

[738] **ISO CG 22 94 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf.** See discussion of this egregious exclusion endorsement in Chapter 3 Insurance at **II.A.11.a(5)** (Exclusions May Be Invisible) of this article. Liability insurers have sought to exclude from the coverage of CGL policies so-called "business risks", those risks thought generally to be under the control of the insured (contractor or subcontractor) and which are not regarded as fortuitous in nature. In crafting policy language (coverage and exclusions) insurers have struggled for decades to draft policy language that clearly and unambiguously covers "accidental" property damage but does not cover uninsurable business risks. The insurance industry has resisted insuring contractors for property damage caused by "business risks" within the contractor's control. This issue has been the subject of considerable litigation. Although the vast majority of cases involve interpretation of the same CGL policy language, there is a marked split of authority. As reviewed below, the recent focus has been on the "property damage" and "occurrence" requirements of the CGL policy, with some courts applying the legal theories of "business risk" and "economic loss" as a means to exclude coverage. In 2007 courts in Texas, Florida and Tennessee courts rejected negligence, foreseeability of damage and natural and probable consequences as grounds to exclude finding that damage to property arising out of a contractor's performance of work was an "occurrence" possibly triggering coverage under its CGL policy. See *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007); and *Travelers Indem. Co. of America v. Moore & Associates, Inc.*, 216 S.W.3d 302, 308-09 (Tenn. 2007).

[739] **ISO CG 22 95 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations.** See discussion of this egregious exclusion endorsement in Chapter 3 Insurance at **II.A.11.a(5)** (Exclusions May Be Invisible) of this article.

[740] **ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others To Us. ISO CG 24 04** waives the CGL insurer's right to step into the shoes of its insured to recover against a third party tortfeasor, that has been transferred by the insured to its insurer by Paragraph 8, to Section IV of the standard CGL Policy. See **ISO 00 01 04 13** Commercial General Liability Coverage Form, Section IV, Paragraph 8 Transfer of Rights Of Recovery Against Others To Us.

[741] **ISO CG 24 26 Amendment of Insured Contract Definition.** See the following: (1) the discussion in this article in Chapter 3 Insurance at **IIA.12.a(3)** (Exclusions May Be Invisible); (2) Endnote 453 (Contractual Liability Coverage - An Exception to an Exclusion from Coverage) for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy; and (3) **ISO CG 24 26** Amendment of Insured

Contract Definition. This endorsement amends the definition of "insured contract" to limit contractual liability coverage insuring the named insured's indemnities for the indemnified person's tort liability to bodily injury and property damage *caused in whole or in part by* the named insured (the indemnifying person). This causation language was added by ISO to eliminate from the Contractual Liability Coverage of "insured contracts" the sole negligence of the indemnified party. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer.

2. Property Insurance Forms

742 **ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page.** The Declarations Page is likely the most important page of the Policy! Among other policy details it designates the name of the Named Insured, the Covered Causes of Loss category, the valuation method (Agreed Value, Replacement Cost), and the name of the Mortgageholders protected by the policy, and a listing of the endorsements to the Policy.

743 **ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page – Covered Causes of Loss.** See **Endnote 474** (Property Insurance – "Causes of Loss").

744 **ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Agreed Value.** An "**agreed value endorsement**" is an optional endorsement used where the named insured and the insurer agree upon the actual cash value or the replacement cost of the covered property before the policy is written and agree that co-insurance will not apply.

745 **ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Replacement Cost.** See **Endnote 475** (Valuation Terminology - Replacement Cost or Actual Cash Value).

746 **ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders.** One of the primary concerns of the lender is the right to claim insurance proceeds arising from destruction of the mortgaged property. Joshua Stein, *What a Mortgage Lender Needs to Know About Property Insurance: The Basics*, THE REAL ESTATE FINANCE JOURNAL Winter 2001; and *Benchmark Insurance Requirements for Commercial Real Estate Loans and Why They Say What They Say*, THE REAL ESTATE FINANCE JOURNAL Winter 2004, each found at www.joshuastein.com. If the mortgagee does not carry its own insurance, but requires the mortgagor to carry insurance for the benefit of both parties, the mortgagee must also verify that its interests are properly reflected in the policy. There is more than one form of endorsement for this purpose and they each provide widely different protection. There are at least three types of mortgagee clauses which cover the mortgagee's interest under a hazard insurance policy and the policy's proceeds: the open mortgage clause, the standard mortgage clause, and the assignment of the mortgagor's interest clause.

Simple Loss Payee/Open Mortgage Clause. Courts have held that a clause that simply provides that insurance proceeds will be payable to a mortgagee "as its interest may appear" links the mortgagee's recovery to the right of the mortgagor to recover and exposes the mortgagee to risks that the insurer will be afforded a defense to payment to the mortgagee based upon inequitable conduct of the mortgagor. An "open" mortgage clause provides that any loss is payable to the lender "as its interest may appear". This type clause exposes the lender to all the defenses and limitations that the insurer has against the insured mortgagor, such as failure to pay the premium or perform a condition for coverage under the policy. See cases and discussion at 48 A.L.R. 121 (1927) and 38 A.L.R. 367 (1925) and Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE 3d § 65:8 (2013). Examples of the effect of such a clause are *Commerce Bank & Trust Co. v. Centennial Ins. Co.*, 446 N.E.2d 73 (Mass. 1983) and *Pioneer Food Stores Coop., Inc. v. Fed. Ins. Co.*, 563 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991). In Commerce Bank the mortgagee claimed that it should receive the insurance proceeds regardless of whether the loss was caused by a fire set by the mortgagor. While the court did not determine the question of arson, it held that because the mortgagee was essentially merely a loss payee, it could recover only if the mortgagor would have been entitled to recover. Pioneer also involved suspected arson by the mortgagor; because the mortgagor would not provide financial information or submit sworn affidavits regarding the loss, the mortgagee was denied recovery. Not all borrowers facing financial difficulty consider insurance fraud as the way out of their problems, but the mortgagee of one who has taken this path will be unprotected if it is simply named as loss payee or is covered under an "open mortgage clause" type of endorsement.

Standard Mortgage Clause. See 4 COUCH ON INSURANCE 3d § 65:48 (2013) "**Standard**" or "**Union**" Mortgage Clause – General Rule That Mortgagee Unaffected. Standard commercial property policies (e.g., ISO's CP 00 10) automatically extend coverage to the mortgagee as an insured through the inclusion of the standard mortgage clause. Other property insurance forms that do not include a mortgage clause must be endorsed to provide coverage equivalent to that contained in CP 00 10.

The standard mortgage clause was developed to protect recovery by the mortgagee even though the insurance contract between the mortgagor and the mortgagee might be voided by the insurance company because of certain omissions or acts by the mortgagor (for example, neglect, arson, concealment). The most significant protections afforded by the standard mortgage clause are the following:

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

(2) coverage applies for the benefit of the named mortgagee even if coverage is denied the insured because of some violation by the insured of the policy's conditions (see Standard Mortgage Clause Section **F.2.d** in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form);

(3) the mortgagee is to be given notice of policy cancellation by the insurer – 10 days' notice of cancellation for nonpayment of premium and 30 days' notice when cancellation is for other reasons (see Standard Mortgage Clause Section **F.2.f(1)** in the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form); and

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

Numerous cases exist upholding the standard mortgage clauses requirement that notice must be given. *E.g.*, *Firstbank Shinnston v. West Virginia Ins. Co.*, 408 S.E.2d 777 (W. Va. 1991) held that a fire insurance company could not remove the lender under a deed of trust from the owner's insurance policy without giving notice to the lender of the cancellation. In that case, a homeowner had agreed through a standard mortgage clause to maintain fire insurance on his home, which was subject to a deed of trust securing a loan from Firstbank Shinnston. After two items of correspondence sent to the bank were returned undelivered to the insurance company, the insurance company unilaterally deleted the bank as an additional insured under the policy. The house burned, and the homeowner collected $18,000 from the insurance company but did not rebuild. As a result, the insurance company canceled the policy. The homeowner also defaulted on his loan. Firstbank Shinnston sought to collect the insurance proceeds from the fire, and the insurance company refused coverage. This court held on those facts that cancellation of the policy was not effective as to Firstbank Shinnston, because the insurance company failed to notify the bank that its interest as mortgagee was being canceled.

Courts hold that a standard mortgage clause grants independent rights to the mortgagee from the insurer that can be enforced regardless of the actions of the mortgagor. A standard mortgage clause, like the open mortgage clause, provides that the loss will be payable to the mortgagee "as its interest may appear", but it goes further to provide that the insurance, as to the mortgagee, will not be invalidated by acts of the insured. Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE § 65:9 (2013). Examples of cases that provided payments to the mortgagee under such clauses are *Nat. Comm. Bank & Trust Co. v. Jamestown Mut. Ins. Co.*, 334 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1972) and *Foremost Ins. Co. v Allstate Ins. Co.*, 460 N.W. 2d 242 (1990). In the National Commercial Bank case the insurer claimed that material misrepresentations of the insured voided the policy. However, the court found that the standard mortgage clause created a separate contract between insurer and mortgagee that was not affected by the actions of the insured. *Foremost* involved yet another case of arson by the insured, but because the policy named the mortgagee under the standard or union clause, it was entitled to recover despite the actions of the insured. See, John W. Steinmetz and Stephen E. Goldman, The Standard Mortgage Clause in Property Insurance Policies, 33 TORT & INS. L. J. 81 (1997).

747 **ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page – Forms Applicable.** The Declarations Page lists the endorsements, amendments, and forms comprising the Policy.

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

749 **ISO CP 00 10 10 12 Building and Personal Property Coverage Form.** One of the components comprising the standard property policy is the Building and Personal Property Coverage Form. Among its provisions are provisions addressing the following topics: A. Coverage: Par. 1 – Covered Property; Par. 2 – Property Not Covered; Par. 3 – Covered Causes of Loss (incorporating by reference the Causes of Loss form as shown on the Declarations page); E. Loss Conditions: Par. 6 Vacancy; F. Additional Conditions: Par. 1 Coinsurance; Par. 2. Mortgageholders; and G. Optional Coverages: Par. 1 Agreed Value; Par. 2. Inflation Guard; Par. 3. Replacement Cost.

750 **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Exclusions – Electronic Data. Paragraph 4.f** Additional Coverages – Electronic Data as an exception to **Paragraph 2.n** Property Not Covered to **CP 00 10 10 12** Building And Personal Property Coverage Form provides coverage for the replacement or restoration of electronic data destroyed or corrupted by a Covered Cause of Loss, subject to the limitations set out in the Additional Coverage.

751 **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Causes of Loss.** The category of Causes of Loss for the policy is designated on the Declarations page and incorporated by reference into the policy by this reference at **Paragraph A.3** Coverage – Covered Causes of Loss **ISO CP 00 10 10 12** Building and Personal Property Coverage Form.

752 **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages - Debris Removal.** See **ISO CP 00 10 10 12** Building and Personal Property Coverage Form **Paragraph A.4.a** Coverage – Additional Coverages – Debris Removal. The ISO Commercial Property Policy provides coverage for debris removal as "additional coverage" and is limited to 25% of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the ISO CP 04 15 10 12 Debris Removal Additional Limit of Insurance endorsement.

753 **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages - Increased Costs of Construction.** Ordinance or Law Coverage is available by endorsement to a standard property policy to insure against loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Many communities have building ordinances that require that a building that has been damaged to a specified extent (typically, 50 percent) be demolished and rebuilt in accordance with current building codes rather than simply

repaired. Unendorsed, standard property insurance forms do not cover the loss of the undamaged portion of the building, the cost of demolishing that undamaged portion of the building, or the increased cost of rebuilding the entire structure in accordance with current building codes. Ordinance or law coverage may be purchased using ISO CP 04 05 to cover the cost above the limit available under the ISO property insurance for cost of construction incurred to comply with an ordinance or law. The base form ISO property insurance limits such coverage to the lesser of $10,000 or 5% of the policy limits.

754 **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages – Electronic Data. Paragraph 4.f** Additional Coverages – Electronic Data as an exception to **Paragraph 2.n** Property Not Covered to **CP 00 10 10 12** Building And Personal Property Coverage Form provides coverage for the replacement or restoration of electronic data destroyed or corrupted by a Covered Cause of Loss, subject to the limitations set out in the Additional Coverage.

755 **Vacancy Clause – Standard Commercial Property Policy – ISO Form CP 00 10 – Section E.6 Loss Conditions - Vacancy.** See 17 AM. JUR. PROOF OF FACTS 2d 103 "Vacancy" of Insured Commercial Structure (2010); Annot., What constitutes "vacant or unoccupied" dwelling within exclusionary provision of fire insurance policy 47 A.L.R.3d 398 (1973); 45 C.J.S. Insurance § 999 Change in Use or Occupancy and §1002 What Constitutes Vacancy or Nonoccupancy.

Some Policies Provide for Cancellation or Suspension of Coverage. Unlike the standard commercial policy (ISO CP 00 10), some commercial property policies provide that the policy is cancelled and no proceeds are payable if the property is vacant for a specified period. In *Lynn v. USAA Casualty Ins. Co.*, 1997 WL 61485 (Tex. App. – San Antonio 1997, writ denied) a vacancy clause prevented coverage. In this case the vacant house did not contain any appliances, furniture or other contents, except for one metal desk, as all contents had been stolen during various break-ins and the owner had not spent a night at the house for more than a year as there was no bed. Also see *Carolina Ins. Co. of Wilmington, N.C. v. St. Charles*, 98 S.W.2d 1088 (Tenn. 1936); and *Republic Ins. Co. v. Dickson*, 69 S.W.2d 599 (Tex. Civ. App. – Beaumont 1938, writ dism'd). Some commercial property policies suspend coverage rather than void the policy where the insured property is vacant. *Barlow v. Allstate Texas Lloyds*, 214 Fed. Appx. 435 (5th Cir. 2007).

Policy Issued With Insurer's Knowledge Of Vacancy Or Partial Vacancy. Policies are sometimes written with knowledge of the insurer that a portion of the premises will be vacant and in such cases the insured will covenant to keep the vacant portion secure. In *730 J&J LLC v. Twin City Fire*, 740 N.Y.S.2d 119 (NY 2002) the policy did not cover fire loss; insured breached warranty to keep vacant 3rd and 4th floors of building locked and secured.

Notice Provision. Also, some commercial property policy forms require the insured to notify the insurer that the premises have become vacant and permit the insurer to elect to continue coverage or cancel coverage unless a vacancy permit or rider issue issued and paid for. *National Mut. Fire Ins. Co. v. Duncan*, 98 P. 634 (Colo. 1908); *Corey v. Niagara Fire Ins. Co.*, 47 S.W.2d 955 (Ky. 1932); *Hartford Fire Ins. Co. v. Merrimack Mut. Fire Ins. Co.*, 457 A.2d 410 (Me. 1983); *Lumbermens Mut. Cas. Co. v. Thomas*, 555 So.2d 67 (Miss. 1989).

Occupancy Requirement. Some commercial property policies trigger coverage termination if the property is "unoccupied" for a specified period as distinguished from being "vacant". In *Grannemann v. Columbia Ins. Gro.*, 931 S.W.2d 502, 504 (Mo. 1996) a city's order prohibiting occupancy due to disrepair of property did not render insured's performance impossible and excuse compliance with occupancy requirement in property policy and vandalism loss was excluded from coverage of loss on premises that was unoccupied for over four months prior to loss; in *Rojas v. Scottsdale Ins. Co.*, 678 N.W.2d 527, 529 (NE 2004) sporadic presence of insureds and their workers to make renovations did not rise to the level of residency; and in *Young v. Linden*, 719 N.E.2d 556 (Oh. 1998) a court held that a property policy did not cover loss due to erroneous demolition of an unoccupied tavern by a contractor hired by the purchaser at a tax lien foreclosure sale, which was subsequently set aside, as vacancy clause in the policy provided for no coverage for any loss or damage occurring if building became "vacant" or "unoccupied" for more than specified periods (presence of $100,000 worth of personal property in tavern did not constitute "occupancy").

756 **Vacancy Clause - ISO Form CP 00 10 – Definition of "Vacancy".** The standard commercial property policy (**ISO CP 00 10**) at **Section B.6** Exclusions and Limitations – Vacancy addresses the increased insurance risk arising out of the vacancy of the covered property. The standard commercial property policy states that a building is "vacant" unless

> at least 31% of its total square footage is:
> (i) Rented to a lessee or sublessee and used by the lessee or sublessee to conduct its customary operations; and/or
> (ii) Used by the building owner to conduct customary operations.

757 **Vacancy Clause - ISO Form CP 00 10 – "Customary Operations".** The court in *Langill v. Vermont Mut. Ins. Co.*, 268 F.3d 46 (Ma. 2001) found that a property is vacant even though the owner sporadically spent time refurbishing an unoccupied rental property vacated by tenants three months prior to arson loss; in *Catalina Enterprises v. Hartford Ins.*, 67 F.3d 63, 64 (Md. 1995) the court held that an industrial storage warehouse was considered to be vacant even though scaffolding and a hand truck had remained in the premises after tenant vacated five months previously; and in *Schmidt v. Underwriters*, 82 P.3d 649 (Or. 2004) the court held that an intent to commence residency in premises that had been vacant for more than 60 days at time of fire was not sufficient to constitute use.

[758] **Vacancy Clause - ISO Form CP 00 10 – Building Under Construction.** A building under construction or renovation is not considered vacant under the standard commercial property policy. The court in *Myers v. Merrimack Mut. Fire Ins.*, 601 F.Supp. 620, 621 (Il. 1985), judgment aff'd, 788 F.2d 468 (7th Cir. 1986) interpreted a fire policy that contained a construction exception to the vacancy clause as not excepting repairs or renovations but only the construction of something which did not previously exist or the creation of something new.

[759] **Vacancy Clause - ISO Form CP 00 10 – 60 Consecutive Days Vacancy – 6 Excluded Causes Of Loss.** The Vacancy Clause in the standard property policy further provides that if the building has been vacant for more than 60 consecutive days losses or damages from the following six causes are not covered losses: (1) vandalism; (2) sprinkler leakage, unless the insured has protected the system against freezing; (3) building glass breakage; (4) water damage; (5) theft; or (6) attempted theft. In *Sorema N. Am. Reinsurance Co. v. Johnson*, 574 S.E.2d 377 (Ga. 2002) the vandalism exception applied preventing a mortgagee, which acquired property through foreclosure, from coverage for damages caused post foreclosure by vandals; the fact that the former mortgagor's equipment was left on premises did not mean that the property was not vacant; in *MDW Enterprises v. CNA Ins. Co.*, 772 N.Y.S.2d 79 (NY 2004) the vandalism exception did not exclude coverage for arson destroying a building that had been vacant for the preceding 15 months while pending sale. In *Essex Ins. Co. v. Eldridge Land, L.L.C.*, 2010 WL 1992833 (Tex. App. – Hou. [14th Dist.] May, 2010) the court held that damage to the interior of an insured building inflicted by thieves incidentally to their theft of copper wiring and copper pipe fell within the theft exclusion to vacancy coverage under a standard commercial property policy. Also see *Nautilus Ins. Co. v. Steinberg*, 316 S.W.3d 752 (Tex. App. – Dallas 2010, no writ) similarly holding that damage to roof HVAC caused by thieves removing copper wiring is excluded from coverage under the standard policy.

[760] **Vacancy Clause - ISO Form CP 00 10 – 15% Reduction in Proceeds.** The standard commercial policy further provides that with respect to Covered Causes of Loss other than those listed as (1) – (6) above, the amount the insurer would otherwise pay for the loss or damage is reduced by 15%.

[761] **The Standard Mortgage Clause – Standard Commercial Property Policy - ISO Form CP 00 10 – Section F.2 Additional Conditions – Mortgageholders.** See Endnote **385** - *ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders.*

[762] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Agreed Value.** An "agreed value endorsement" is an optional endorsement used where the named insured and the insurer agree upon the actual cash value or the replacement cost of the covered property before the policy is written and agree that co-insurance will not apply.

[763] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Inflation Guard.** "Inflation guard" is an optional endorsement designed to offset potential inflation by specifying a percentage in the declarations by which the coverage will increase annually as to the portion of the covered property specified.

[764] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Replacement Cost.** See **Endnote 475** (Valuation Terminology - Replacement Cost or Actual Cash Value). Whether the policy is a "Replacement Cost" policy or an "Actual Cash Value" policy, the loss paid will be limited to the policy limits.

[765] **ISO CP 00 30 10 12 Business Income (And Extra Expense) Coverage Form.** This form of insurance (**ISO CP 00 30**) covers two types of loss: (1) loss of business income/earnings - covers losses suffered by a business as a result of not being able to use property damaged by a covered cause of loss under a property insurance policy during the time required to repair or replace it (formerly called "business interruption insurance") and/or (2) extraordinary additional expenses ("Extra Expense Coverage") incurred due to a necessary suspension of operations during a period of restoration caused by direct physical loss of or damage to property at the premises described in the policy. This coverage is available with no co-insurance or monthly limitation. Frequently recovery is limited to the length of time required to rebuild or repair the damaged property, plus an additional 30 days for recovering business that may have been lost to competitors (typically limited to an aggregate of 120 days unless policy is endorsed to provide for extended time period coverage). Business income insurance may be purchased without the Extra Expense Coverage (ISO Form CP 00 32) and extra expense coverage can be purchased without business income insurance (ISO Form CP 00 50). Extra Expense Coverage covers expenses in excess of normal operating expenses incurred by a business that remains in operation following a direct damage property loss. Extra Expense Coverage is appropriate for service businesses whose property is not essentially income-producing (attorneys, banks, insurance agencies, and doctors' offices), and for businesses that would find it imperative to continue operating regardless of cost (newspapers, dairies).

"Business Income Rental Value" is included under both forms of business income forms (ISO CP 00 32 and **CP 00 30**) if the attached declaration so provides. Rental value protects the landlord against loss of rents during reconstruction and abatement of rentals if the abatement results from a loss under a named cause of loss in the property insurance.

ISO has recently promulgated an additional insured endorsement form. This endorsement to the tenant's property policy adds the person identified in the endorsement (the landlord) as an insured for loss of "rental value" and thus meets lease requirements that the tenant obtain coverage for loss of the additional insured's rental income. The ISO CP 15 03 provides that notice of insurer cancellation will be provided by the insurer to the additional insured, landlord.

[766] **ISO CP 00 90 07 88 Commercial Property Conditions.** The Commercial Property Conditions set out conditions for maintenance of the policy, including the Named Insureds agreement to protect the insurer's right of subrogation unless it is waived by the insurer (see **Paragraph I,**

1 permitting pre-loss waiver by the Named Insured of the insurer's subrogation right and **Paragraph I 2(c)** and post-loss waiver against the Named Insured's tenant).

767 **ISO CP 04 05 10 12 Ordinance or Law Coverage.** See **Endnote 485** (Ordinance or Law Coverage).

768 **ISO CP 10 30 10 12 Causes of Loss – Special Form.** See **Endnote 474** (Property Insurance – "Causes of Loss").

769 **CP 10 30 10 12 Causes of Loss – Special Form – Exclusion - Ordinance or Law.** See CP 04 05 10 12 Ordinance or Law Coverage endorsement to add coverage excluded by the **Par. B.1.a.** Exclusion – Ordinance or Law to the **ISO CP 10 30 10 12** Causes of Loss – Special Form.

770 **CP 10 30 10 12 Causes of Loss – Special Form – Exclusion - Water. Par. B.1.g.** Exclusion –Water to the Causes of Loss – Special Form excludes certain water related causes of loss from coverage (*e.g.*, flood) under the **ISO CP 10 30 10 12** Causes of Loss – Special Form.

771 **CP 10 30 10 12 Causes of Loss – Special Form – Exclusion – Boiler Explosion. Par. B.2.e.** Exclusion to the Causes of Loss – Special Form excludes damages to the property from the explosion of steam boilers and other similar apparatus from coverage. Coverage for damage due to boiler explosion is a special insurance line which can be covered by boiler and machinery insurance. See **Endnote 492** (Boiler and Machinery Coverage).

772 **CP 10 30 10 12 Causes of Loss – Special Form – Special Exclusion – Contractual Liability.** The **Paragraph 4.c.(2)(a)** Contractual Liability exclusion is in the Causes of Loss – Special Form to exclude from the coverage of the Named Insured's property insurance liability for loss due to the Named Insured's indemnity except in the very limited circumstance that the indemnity is by the Named Insured under a written lease in which it has assumed the liability for building damage resulting from a robbery and provided the assumption was prior to the accident and the building is a Covered Property under the policy. This type of coverage is addressed as an insured contract under a CGL Policy.

773 **ISO CP 12 18 16 07 Loss Payable Provisions.** In November 2008 ISO amended its **CP 12 18** Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the CP 12 19. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

774 **ISO CP 12 19 06 07 Additional Insured – Building Owner.** In November 2008 ISO amended its **CP 12 18** Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the CP 12 19. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner. The phrase "as their interests may appear" often is added in a property additional insured endorsement. This is done in order to limit the additional insured's recovery rights to covered property with respect to which the additional insured has an interest. Without these limiting words, if the policy covers multiple properties, the insurer could include the additional insured on all policy proceeds checks. Under the **CP 12 19** the building owner is an additional insured with respect to the coverage provided for direct physical damage to the building and covered loss is adjusted with and payable to both the tenant, as the first named insured (the insured whose name is listed first in the Declarations), and to the building owner, as additional insured. The **ISO CP 12 19** Building Owner Additional Insured Endorsement does **not** provide for notice of cancellation to be given to the landlord/additional insured. Further, the cancellation provision in the ISO common policy conditions states that notice of cancellation is given only to the first named insured. Thus, the tenant's property policy provides notice of cancellation will only be given to the tenant. In *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5th Cir. – Tex. 2007) the landlord learned the hard way that it needed to follow up and obtain a corrected additional insured endorsement on the tenant's property policy. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". In addition to issuing the additional insured endorsement to the property policy, the landlord should also have obtained an endorsement to the property policy requiring notice of cancellation be given to it of policy cancellation. The standard property policy only requires notice of cancellation be sent to the first named insured.

Caveat: To assure notice of cancellation by the insurer, the landlord must obtain a notification endorsement to the policy. Additionally, note that the notification endorsement likely will not address notification as to cancellations by the tenant and will need to be manuscripted to include notice to the landlord of tenant cancellations.

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

3. Certificates

776 **ACORD 25 Certificate of Liability Insurance.** See **Endnotes 434 – 437** and **441 - 444** for discussions of Certificates of Insurance.

777 **Producer.** See **Endnote 493** (Producer).

778 **Personal and Advertising Injury.** See **Endnote 447** (Commercial General Liability Insurance (CGL) "Personal and Advertising Injury").

779 **General Aggregate.** See **Endnote 449** (General Aggregate).

780 **Products – Completed Operations.** See **Endnote 495** (Products - Completed Operations).

781 **General Aggregate – Per Project.** See **Endnote 496** (General Aggregate Per Project).

782 **Auto Liability.** See **Endnote 463** (Business Auto Liability).

783 **Auto Liability – Any Auto.** See **Endnote 464** (Any Auto).

784 **Retention.** See Endnote (Self-Insurance) for a definition of "Self-Insured Retention". See Chapter 3 Insurance at **II.A.12 (**Self Insurance is Not Insurance).

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

786 **Certificate Holder.** See **Endnote 442** (Status as a Certificate Holder Does Not Create Rights).

787 **Notice - Cancellation.** See **Endnote 441** (Cancellation Notice Statement and **Endnote 458** (Amendment of Cancellation Provisions or Coverage Change).

788 **Authorized Representative.** See **Endnote 444** (Signed By An "Authorized Representative"?).

789 **ACORD Certificates.** See **Endnotes 434 – 437** and **441 - 444** for discussions of Certificates of Insurance.

790 **Producer.** The "**Producer**" of a certificate of insurance typically is the broker for the named insured of the policies described in the certificate.

791 **Additional Named Insured(s).** See **Endnote 438** (Parties to Policy: "First Named Insured"; "Named Insured"; "An Insured"; "An Additional Insured"; "Additional Named Insured").

792 **Causes of Loss - Basic.** See **Endnote 474** (Property Insurance – "Causes of Loss").

793 **Causes of Loss - Broad.** See **Endnote 474** (Property Insurance – "Causes of Loss")

794 **Causes of Loss - Special.** See **Endnote 474** (Property Insurance – "Causes of Loss").

795 **Business Income.** See **Endnote 490** (Business Income and Additional Expense).

796 **Terrorism Coverage.** See **Endnote 486** (Terrorism).

797 **Replacement Cost.** See **Endnote 475** (Valuation Terminology – Replacement Cost or Actual Cash Value).

798 **Agreed Value.** See **Endnote 476** (Valuation Terminology – Agreed Value Endorsement).

799 **Coinsurance.** See **Endnote 479** (Coinsurance).

800 **Ordinance or Law.** See **Endnote 485** (Ordinance or Law Coverage).

[801] **Flood.** See **Endnote 483** (Flood).

[802] **Notice - Cancellation.** See **Endnote 449** (Cancellation Notice Statement).

[803] **Protections of Mortgagee.** See **Endnote 746** (ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders). See ISO **CP 12 18 06 07** Loss Payable Provisions, Paragraphs **C** Loss Payable Clause and **D** Lender's Loss Payable Clause.

[804] **Lenders Loss Payable.** See **Endnote 746** (ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders). See **ISO CP 10 10 12** Standard Commercial Property Policy - Section F.2 Additional Conditions – Mortgageholders. Also see **ISO CP 12 18 06 07** Loss Payable Provisions, **Paragraph C** Loss Payable Clause and **Paragraph D** Lender's Loss Payable Clause (forms attached to this Article).

[805] **Authorized Representative.** See **Endnote 444** (Signed By An "Authorized Representative"?).

[806] **Causes of Loss. Property Insurance – "Causes of Loss".** See **Endnote 474** (Property Insurance – "Causes of Loss").

[807] **Causes of Loss - Basic.** See **Endnote 474** (Property Insurance – "Causes of Loss").

[808] **Causes of Loss - Broad.** See **Endnote 474** (Property Insurance – "Causes of Loss").

[809] **Causes of Loss - Special.** See **Endnote 474** (Property Insurance – "Causes of Loss").

[810] **Commercial General Liability Insurance (CGL).** See **Endnote 447** (Commercial General Liability Insurance (CGL)).

[811] **Commercial General Liability – Claims Made Policy.** See **Endnote 448** (Occurrence Policy vs. Claims Made Policy).

[812] **Commercial General Liability – Occurrence Policy.** See **Endnote 448** (Occurrence Policy vs. Claims Made Policy).

[813] **Commercial General Liability – Personal and Advertising Injury.** See **Endnote 447** (Commercial General Liability Insurance (CGL)).

[814] **Commercial General Liability – General Aggregate.** See **Endnote 449** (General Aggregate); and **Endnote 451** (General Aggregate Per Project).

[815] **Commercial General Liability – Products – Completed Operations.** See **Endnote 495** (Products – Completed Operations).

[816] **Automobile Liability.** See **Endnote 463** (Business Auto Liability).

[817] **Automobile Liability – Any Auto.** See **Endnote 465** (Any Auto).

[818] **Self-Insured Retention.** See **Endnote 446** (Self- Insurance).

[819] **Workers Compensation and Employers' Liability.** See **Endnote 465** (Workers Compensation Limits Required by Law).

[820] **The Standard Mortgage Clause – Standard Commercial Property Policy – ISO Form CP 00 10 10 12 - Section F.2 Additional Conditions – Mortgageholders.** See **Endnote 746** (ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders).

[821] **Additional Insured.** See **Endnotes 477** and **481** (Designation of Landlord as an Additional Insured on Tenant's Property Policy).

[822] **Signed By An "Authorized Representative"?** See **Endnote 444** (Signed By An "Authorized Representative"?).

B. Samples of Manuscripted Endorsements

[823] **Context for Issuance of the Manuscripted Endorsements.** The next two endorsement forms are manuscript endorsements. They were tendered by a subtenant to the landlord in connection with request for approval of the sublease. The tenant had sold its dental practice to the subtenant and vacated the leased premises by the time of the request for sublease and insurance approval. The lease contained the typical but problematic additional insured requirement "tenant shall insured landlord as an additional insured on tenant's liability insurance".

[824] **Manuscript Additional Insured Endorsement No. 1 – Excludes Insuring Additional Insured's Negligence.** Note the first endorsement provides

> The following persons or entities scheduled below are added as **additional insureds** under the Insuring Agreement indicated below, but only with respect to any damages payable as a result of the **additional insured's** vicarious liability for the acts of omissions of an **Insured** otherwise covered under the applicable Insuring Agreement. This insurance does not apply to **losses** arising from or in connection with liability for any acts or omissions alleged against the **additional insured**.

Upon objection by the landlord and explanation that the tendered additional insurance was inadequate, after much delay and argument that the above was industry standard provided the second additional insured endorsement. The second endorsement provides

> The **Company's** duty to defend and pay damages on behalf of an **Insured** shall extend to any **premises lessor** named in a **claim** solely as a result of the acts or omissions of an **Insured** in the maintenance, operation, or use of that part of a premises leased to an **insured business**. However, this extension of coverage shall only apply to a **claim** that arises from an **event** or offense that took place during the term of the lease and that is otherwise covered under the Commercial General Liability Insuring Agreement. In addition, under no circumstances shall the **Company** have any duty to defend or pay damages on behalf of a **premises lessor** with regard to any damages caused by, or allegedly caused by, the **premises lessor**. If a **premises lessor** is entitled to a defense and indemnity under this policy, all terms and conditions of the policy shall apply as if the **premises lessor** were an **Insured**.

[825] **Manuscript Additional Insured Endorsement No. 2 – Excludes Insuring Additional Insured's Negligence.** The second proposed endorsement is as problematic as the first. In the second endorsement the insurer drops the "vicarious" liability coverage language and the exclusionary language and substitutes first seemingly beneficial language "acts or omissions of an Insured (which arguably would include the acts or omissions of an additional insured"), but expands the exclusionary language. The exclusionary language excludes both the duty to defend the premises lessor (the additional insured) and the duty to pay damages on behalf of the premises lessor (the additional insured) "with regard to any damages caused by, or allegedly caused by, the premises lessor". Thus, no defense or coverage for the additional insured for its acts or omissions or even for damages "allegedly caused by the premises lessor". The subtenant argued "well I provided you with an endorsement insuring you as an additional insured"!