

ALLOCATING EXTRAORDINARY RISK IN LEASES:

Indemnity/Insurance/Releases and Exculpations/Condemnation
(Including a Review of the Risk Management Provisions of the
Texas Real Estate Forms Manual's Office Lease)

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State Bar of Texas
27th ANNUAL ADVANCED REAL ESTATE LAW COURSE
June, 2006

San Antonio, Texas

CHAPTER 45

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I. INTRODUCTION

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

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

This Article concerns lease provisions dealing with the shifting of certain “extraordinary” risks from one party to the other including indemnities, exculpations and releases and supporting liability insurance. This Article does not address casualty loss of property or property insurance, which topic is being addressed by an Article at this seminar.

“**Indemnity**”^[2] is, “I agree to be liable for your wrongs.” Indemnity is a shifting of the risk of a loss from a liable person to another. However, many times scrivener use an indemnity provision when they do not know whether the Indemnified Person is a potentially liable person. Sometimes, an indemnity provision is no more than a restatement of existing duties, “I will indemnify you for my wrongs;” “You will indemnify me for your wrongs.”

“**Exculpation**”^[76] is, “I am not liable to you for my wrongs.” An exculpatory provision is designed to exclude, as between the parties to a contract, certain designated duties, liabilities or costs due to the occurrence or non-occurrence of events.

“**Release**”^[76] 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.

Each contracting party’s risk-related goals are (1) to accept no more risk than it can reasonably bear or insure, and (2) to transfer the balance of the risk to the other party. The following factors are involved in the ultimate determination as to how much risk a party receives or transfers: (A) which party is in the best position to control the extent of the occurrence of the risk?; (B) does one party have specialized knowledge of the type of risks most likely to occur and how to prevent or identify them?; (C) custom and practice in the particular industry (for example,

sellers to buyers; landlords to tenants; owners to contractors; contractors to subcontractors); (D) the bargaining strength of the respective parties; and (E) statutory and common law public policies.

This Article examines how liability insurance can be used to protect an indemnifying party through coverage for its contractually assumed liabilities and to protect an indemnified party by being an additional insured on the indemnifying party’s liability insurance. Generally, the indemnifying party is required by the indemnified party to carry commercial general liability (“**CGL**”) insurance naming the indemnified party as an additional insured on the indemnifying party’s CGL policy. In such case, the indemnifying party is the “**named insured**” and the indemnified party is the “**additional insured**.” In this article the indemnifying party and the named insured are sometimes referred to in this article as the “**protecting party**” and the indemnified party and the additional insured are sometimes referred to as the “**protected party**.” Insurance is also a form of indemnity. However, Texas courts on public policy grounds construe the same “arising out of” indemnity triggering language used in both types of indemnity strictly against coverage of an indemnified party’s negligence by a contract and broadly in favor of coverage of an additional insured’s negligence in additional insured endorsements issued pursuant to the same contract.^[26 - 29] Indemnity agreements are strictly construed in favor of the indemnifying party.^[14]

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

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

- Insurance requirements are clear, using recognized terms that can be interpreted both at the time the contract is negotiated and in possible future disputes.
- Insurance and other support for the indemnity is in place when a loss occurs.
- A thorough insurance monitoring process keeps the transferee in compliance with the insurance requirements.
- The performance of the contract is monitored and regularly evaluated.

Criteria quoted from CONTRACTUAL RISK TRANSFER Strategies for Contract Indemnity and Insurance Provisions (International Risk Management Institute, Inc. 2005).

This Article contains a discussion of certain risk management provisions in the lease forms contained in the *Texas Real Estate Forms Manual* of the State Bar of Texas. Accompanying each of these forms is a commentary noting the bias (the protected party) and a discussion of the risk allocations and the methods by which the risk is allocated. Also, included are the insurance endorsement forms commonly referenced in the risk management provisions and a commentary as to risk coverage and exclusions to coverage addressed by these insurance endorsements. Each of these forms has been annotated with footnotes identifying relevant case law and containing additional commentary explaining the risks being addressed by each form and certain gaps in coverage not addressed or possibly inadvertently being misaddressed.

II. INDEMNITY

A. Terminology

“Indemnity”^[2] 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. It is like insurance between the parties. Sometimes, an indemnity provision is no more than a restatement of existing duties, “I will indemnify you for my wrongs;” “You will indemnify me for your wrongs.”

B. Requirements for Enforceability

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

1. Fair Notice.

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

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

2. Express Negligence.

In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) adopted the “express negligence” requirement.^[6] In *Ethyl*, the court observed

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

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

the gross negligence or willful misconduct of y” will not be enforced to indemnify y for loss caused by its negligence.

3. Overcoming the Worker’s Compensation Bar.

Unless there is an enforceable written indemnity covering an employer’s negligence, a landlord, tenant, and 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 has executed before the injury a written indemnity agreement for injuries to its employees arising out of the employer’s negligence. Texas Workers’ Compensation Act, TEX. LABOR. CODE ANN. § 417.004 (Vernon 1996).

[20 - 22]

4. Comparative Indemnity.

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did not protect an “indemnified” party either for its negligence or the indemnifying party negligence for injuries caused to the indemnifying party’s employee:

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

Id. at 708. [12] The court termed this claim as one for “**comparative indemnity**.” The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

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

5. Strict Liability.

In 1994 the Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) expanded the express negligence doctrine to require indemnity agreements intending to cover a protected party’s strict liability to expressly state that it covers such strict liability. [17 - 19]

III. INSURANCE

There are two insurance methods to effectuate protection: (1) directly, either by 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; and (2) indirectly, by the protecting party insuring its contractually assumed liability (its indemnity).

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” the following exceptions to the exclusion from coverage of contractually assumed liability. [43]

Coverage A under standard form CGL policies is for loss arising out of “Bodily Injury” or “Property Damage.” “Bodily Injury” is in such policies defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” “Property Damage” in such policies is defined as “physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured.” The exception to exclusion from Coverage A reads

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

1. **assumed in a contract or agreement that is an “Insured Contract”,** provided the “Bodily Injury” or “Property Damage” occurs subsequent to the execution of the contract or agreement; or
2. that the insured would have in the absence of the contract or agreement. (Emphasis added)

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

that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you **assume the tort liability** of another party to pay for “Bodily Injury” or “Property Damage” to a third person or organization [2004 endorsement CG 24 26 , *provided the ‘bodily injury’ or ‘property damage’ is caused, in whole or in part, by you or by those acting on your behalf*]. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (Emphasis added)

Note that ISO has published the italicized language for inclusion in CGL policies by an endorsement CG 24 26. [43] This introduces into the “insured contract” definition a “contributory negligence” condition equivalent to the one contained in the 2005 revisions to ISO’s additional insured endorsements discussed below in Section III **B5b(2)**. Inclusion of this type language into a CGL policy effectively eliminates coverage for the named insured’s indemnification of a third party for its sole negligence. Care therefore must be taken by named insureds in coordinating and negotiating the terms of their CGL policies and indemnity agreements. It is possible for a named insured to be “uncovered” in such circumstances for an indemnity of another party’s sole negligence. If this is coupled with an exclusion from additional insured coverage for an additional insured’s sole

negligence, the named insured may find itself acting as the insurer or in breach of its covenants to protect the additional insured/indemnified party!

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

Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for its indemnitee’s sole negligence. [39] ISO issued in 2004 an endorsement, CG 24 26 07 04, which modifies the definition of “insured contract” to eliminate coverage for the sole negligence of an indemnitee. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party’s sole negligence. See Forms E-G to this Article.

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. [44-56] An additional insured endorsement is equivalent to an insurance policy written for the additional insured. The strongest rationale for this request is the perceived fairness of making the protecting party’s insurance carrier responsible for the increased exposure to loss created for the additional insured due to the protecting party’s operations, work or control of the premises. Issuance of additional insured endorsements is routine and inexpensive as compared to a separate policy being issued to cover the exposure of the party to be protected. The risk of loss has been factored into the named insured’s premium.

An additional insured designation seeks to achieve the following results: It provides a limited form of primary coverage for the additional insured. It may remove the possibility of subrogation against the additional insured for covered liabilities. It provides the additional insured with direct policy rights within the primary insured’s policy, including separate defense cost coverage for claims involving the additional insured. It provides a “safety net” should the indemnity provision be unenforceable or otherwise be deficient. Additional insured endorsements generally do not carve out from the

coverage afforded the additional insured loss due to “**Personal and Advertising Injury**.” In these circumstances, protection for the protected party’s Personal and Advertising Injury is covered whereas without specific endorsement to the named insured’s CGL Coverage B, the named insured’s indemnity for such liabilities is not reinsured and the named insured not carving out this type of liability is uninsured as to its contractually assumed liability. Additionally, additional insured status may automatically entitle the additional insured to the named insured’s excess liability or umbrella coverage because such policies frequently cover all insureds (including the additional insureds) under the primary liability policy.

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

2. Automatic Coverage or by Endorsement.

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

3. Endorsements: ISO or Manuscripted Forms.

Additional insured endorsements can be divided into two categories: endorsement forms promulgated by the Insurance Services Office, Inc. (“**ISO**”) and all other endorsement forms (referred to in the insurance industry as “**manuscripted**” forms).^[39] There are four nationwide insurance advisory organizations that develop standard insurance forms. ISO is the largest national insurance advisory organization. Its forms are considered to be the industry’s “standard” forms. 1 CONTRACTUAL RISK TRANSFER Strategies for Contract Indemnity and Insurance Provisions §XIII, p. XIII.B.2 (International Risk Management Institute, Inc. 2003).

ISO forms are identified by a two-letter prefix identifying the type of coverage, four digits identifying the form category and individual form number, and four digits identifying the edition date by month and year. For example, the CG 20 10 07 04 additional insured endorsement form is made up of “**CG**” to indicate that this is a CGL form; “**20**” indicates the category of CGL endorsement that this form belongs to, an additional insured endorsement; “**10**” is the number assigned to this particular CGL additional insured endorsement; and “**07 04**” indicates that this form is the July 2004 edition of the CG 20 10.^[39]

ISO has promulgated 33 forms of additional insured endorsements, each tailored to a different risk transfer, including CG 20 10 07 04–Additional Insured–Owners, Lessees or Contractors–Schedule Person or Organization and CG 20 26 07 04–Additional Insured–Designated Person or Organization.^[39]

4. Covered Matters.

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

a. Ongoing Operations

ISO form CG 20 10 is ISO’s standard endorsement for use in adding a project owner as an insured to a general contractor’s CGL policy or a general contractor to a subcontractor’s CGL policy (See **Form G** CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization). CG 20 10 provides coverage for the additional insured’s liabilities arising out of the “**ongoing operations**” of the named insured. CG 20 10 has undergone changes from coverage for liabilities “*arising out of the work*” of the named insured in the November 1985 version (CG 20 10 11 85), to “*arising out of the ongoing operations*” of the named insured in the October 1993 version (CG 20 10 10 93), the March 1997 version (CG 20 10 03 97), and the October 2001 version (CG 20 10 10 01). ISO made this change to clarify that this particular form of additional insured endorsement is intended to cover liabilities arising out of the “ongoing operations” of the named insured as opposed to liabilities arising out of operations that have been completed. The October 2001 revision added an express exclusion from coverage for liabilities “*occurring after ... all work ... has been completed*” to further emphasize the “ongoing” operations requirement. The 2004

revision to CG 20 10 to eliminate coverage for the additional insured's sole negligence is discussed at III B5b(2) of this Article.

b. Completed Operations

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

c. Premises

There are two ISO endorsements used primarily to add as an additional insured the owner of premises or land leased to the named insured, CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises and CG 20 24 11 85 Additional Insured – Owners or Other Interests from Land Has Been Leased. Similarly, see **Form E** for CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises, which ISO additional insured endorsement adds designated persons as additional insureds as to designated "**premises**" and covers the Additional insured's liability:

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

An almost identical ISO endorsement is CG 20 24 11 85 Additional Insured – Owners or Other Interests from Land Has Been Leased. The sole and obvious difference being "land" versus "premises." The most common factually litigated scenario regarding these endorsements involves injuries occurring "**outside**" the "**part**" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is effected if the schedule designates more or less than the "part of the premises" leased to the named insured.

Cases Finding No Coverage.

For example, in *General Accident, Fire and Life Assurance Corp. v. Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the AI endorsement did not cover a claim brought by the named insured's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant named insured's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the location ("the premises") where the injury must occur, and do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility. See *Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc.* 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N. Y. App. Div. Lexis 13316 (2003)—injury occurred to a HVAC repairman who was injured while walking on roof of landlord's multi-tenant retail center to get to HVAC unit that tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement form was an ISO CG 20 11 Additional Insured – Managers and Lessors of Premises (**Form E**). The injury neither occurred in the retail space leased to tenant or on the roof

directly above the space. See also *Rensselaer Polytechnic Inst. v. Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991)—stating that court was not persuaded that a duty to indemnify existed by the argument that although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co. v. Admon Realty, Inc.*, 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)—finding no duty to indemnify where the cause of the damage occurred outside the leased premises; *Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993)—additional insured endorsement held not to cover injuries occurring in alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center); *USF&G v. Drazic*, 877 S.W.2d 140 (Mo. 1994)—additional insured not covered for injuries to named insured tenant's employee who slipped and was injured on an icy parking lot.

Cases Finding Coverage.

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

However, the requirement that there be a causal link or connection between the accident and the leased premises does not mean that there must be any degree of physical proximity between the leased premises and the scene of the accident. The two concepts are quite different. Thus, we would expect the outcome in the *Franklin* case to have been the same had

the tenant's business guest fell on the building's exterior steps even if they were some distance from the luncheonette. This so because the negotiating for such an endorsement in a lease the landlord is simply attempting to ensure against the risk of liability generated by the business about to be conducted by the tenant, and place the cost of insuring that risk on the tenant.

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

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

Unable to reconcile that ambiguity, the court followed a basic principle of contract law and construed the ambiguity against the insurer as the policy's drafter. Thus, because the damage occurred within the leased premises, the court found in favor of coverage. The court in *Hormel Foods Corp. v. Northbrook Property & Casualty*

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

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

5. Covered Liabilities.

a. Negligence

(1) 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. [44] An additional's insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors* (1996); and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429 (1966). It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy. See the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured's vicarious liability for the named insured's negligence, or even to cases where the named insured is concurrently negligent with the additional insured.

(2) Additional Insured's Own Negligence.

Depending on the language of the protecting party's insurance, the protected party may be covered for its own negligence, whether or not the protecting party is negligent. As such, it supplements the protection afforded by the protecting party's indemnity. [44]

b. Interpretation of Additional Insurance Covenants

(1) Express Negligence Test Not Applicable to Insurance Covenant

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

was an additional insured under NL Industries' policies (e.g., through an automatic blanket insured provision).

(2) 2004 Revision to ISO Forms

Recently, ISO issued revisions to its AI Endorsements, including the CG 20 26, CG 20 10 and CG 20 37 (attached hereto as **Forms F and G**) to eliminate coverage for an Additional insured's sole negligence. For example, the CG 20 10 form will exclude coverage for liabilities attributable to the additional insured's sole negligence as follows:

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organizations shown in the Schedule, but only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused, in whole or in part, by:

1. Your (the named insured's) acts or omissions; or
2. The acts or omissions of those acting on your behalf;

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

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

c. Manuscript Additional Insured Endorsement to Limit Coverage to Indemnified Liabilities

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

Section Two—Who Is an Insured:

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

The insurance provision of the construction contract, required the protecting party (the named insured contractor providing construction services to the plant owner) to provide insurance coverage for all “liability assumed” by the protecting party. The construction contract contained an indemnity agreement whereby the protecting party indemnified the protected party (the additional insured plant owner) for its negligence except if due to its sole negligence. The court construed the blanket addition insured provision as covering the additional insured'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.

6. Liability for Failure to List Other Party as Additional Insured.

A party that breaches its contractual obligation to list the other party as an additional insured is liable for all damages that would have fallen within the protection of the additional insured endorsement.^[50] The court in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d. 119 (Tex. App.-Houston [14th Dist.] 2000, writ denied) found that Coastal failed to list Crown as an additional insured on Coastal's Trucker's Policy and was liable to Crown for the \$4,816,549.28 judgment obtained by an employee of Coastal that was injured on Crown's premises. The insurance covenant did not refer to an additional insured designation but required Coastal to obtain

insurance “protecting” Crown. The insurance covenant in Coastal Transport reads as follows:

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

7. **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. See Commentary following **Form A2** discussing the Forms Manuals Office Lease. 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. ^[44-56]

C. **Protected Party's “Other Insurance”**

1. **Generally All Policies Are “Primary” and “Contributory” Unless Amended.**

The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under the protecting party's policy rather than the protected party having to rely upon its own policy. By definition, a party that carries its own liability insurance and is also an additional insured under another's liability policy has multiple coverages which fall under the general heading of “**other insurance**” available to “contribute” towards satisfaction of the liability insured by both the protecting party's policy and the protected party's policy. ^[51]

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

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

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

ISO CGL Policy:

4. Other Insurance.

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

a. Primary Insurance

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

b. Excess Insurance.

This insurance is excess over: ...

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

c. Method of Sharing.

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

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

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

a. **Primary vs. Sole Contributing**

Endorsing the protecting party's policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. Endorsing the protecting party's policy to be primary does not address the other insurance clause contained in the named insured's policy, which unamended provides for proportionate payment based on the limits of the additional insured's primary policy ("**contributory**"). This may be addressed by endorsing the named insured's policy to be the sole contributing policy, (i.e, not requiring contribution from the additional insured's policy).^[51]

b. **Endorsing the Additional Insured's Policy to Be Excess Coverage**

The protected party should verify that its own policy provides that it is excess coverage to the insurance available to it as an additional insured under the protecting party's CGL policy and that in such case it is not primary and contributing as "other insurance".^[51]

IV. **RELEASES AND EXCULPATIONS**

In 1993 the Texas Supreme Court in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) extended the fair notice principle and the express negligence doctrine to releases. This principle is likely to be extended to waivers,

exculpations and disclaimers seeking to exclude liability for one's own negligence, being merely a release worded in a different format. [76-82]

Many standard form waivers of subrogation are in the form of a release or waiver of either a landlord's or tenant's liability for its negligently caused injuries. These provisions are releases or waivers of claims and indirectly operate as a waiver of the party's insurance carrier's right of subrogation. If a waiver of subrogation is thus couched in terms of a waiver or release by one party of another party's liability for its negligence, then such provision is unenforceable unless it is written in a fashion that meets the express negligence test. [60-63]

V. CONDEMNATION

The risk that all or a portion of the leased premises or of the facilities supporting the leased premises, such as parking and means of access to parking, is a risk similar to acts of God ("special causes of loss") in that the parties did not cause the event to occur. Unlike that risk, however, the consequence is permanent. In both situations, the parties may have expended significant monies in making the leased premises ready for the lessee's occupancy that are not amortized as of the moment of taking and the lessee may incur significant consequential damages (such as moving costs, loss of good will, and lost profits due to business interruption). The parties can insure against the losses arising out of special causes of loss. The only means to address the losses arising out of condemnation is to contractually allocate in advance in the lease the condemnation award between the landlord and tenant. [83-100]

A. Allocation in the Event Lease is Silent

Texas follows the "**undivided fee**" or so-called "**unit rule**" in valuing property taken in condemnation. The condemned property is first valued as a whole, without consideration for how many parties own an interest in the property or the extent of their interest. The court determines the fair market value of the property. If the lease is silent as to how the award is allocated between landlord and tenant, the judge or jury first determines the market value of the entire property as though it belonged to one person, then the fact finder apportions market value as between lessee and owner of fee, with the value of the tenant's interest being first determined and awarded to the tenant and then the balance is awarded to the landlord. *Urban Renewal Agency v. Trammell*, 407 S.W.2d 772, 774 (Tex. 1966). The residual value

after deduction of the value of the tenant's interest is the landlord's "**leased fee**" value.

1. Value of Tenant's Interest.

a. Loss of Tenant's "Leasehold Advantage"

In the absence of a provision in the lease to the contrary, tenants are entitled to a portion of the condemnation award equal to their lost "**leasehold advantage**", if any. The value of a tenant's leasehold interest is either positive or negative. If there is a positive value it is referred to as a "leasehold advantage." The value of a tenant's leasehold interest is calculated as the present market value of the use and occupancy of the leasehold for the remainder of the lease term, plus the market value of the right to renew if such right exists, less the agreed rent the tenant must pay for the use and occupancy of the property, such values to be determined by the usual "willing seller-buyer rule."

For example, if the tenant pays \$1000/month rent, but the premises could be leased for \$1200/month, there is a \$200/month leasehold advantage being lost by tenant on condemnation of its leased premises for which it is to be compensated out of the condemnation award.

b. No Award Allocated to Tenant for Its Lost Business or Personal Property

Texas common law presumes that a tenant's business is not taken in condemnation. The tenant is free to relocate. Thus, no award is given to the tenant due to the impact of the condemnation on the going concern value of the business so interrupted, its trade name, lost profits, or impact on its personal property. *Luby v. City of Dallas*, 396 S.W.2d 192, 199 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Herndon v. Housing Authority of City of Dallas*, 261 S.W.2d 221, 223 (Tex. Civ. App.—Dallas 19, writ ref'd).

c. Moving Expenses Compensable

A separate award is made to the tenant for reasonable moving expenses to move its personal property up to 50 miles, but not to exceed the value of the personal property itself. TEX. PROP. CODE § 21.043.

d. **Tenant's Improvements and Fixtures Compensable**

The value of the improvements, including fixtures taken or damaged, by condemnation is part of the undivided fee being condemned and is not separately valued in condemnation. Because fixtures are, by definition, part of realty, the condemning authority must pay compensation for the taking of, or damage or destruction to, fixtures caused by a condemnation.

In a lease silent as to allocation of a condemnation award, tenant paid for leasehold improvements, which as a practical matter can not be removed at the end of the lease term, are to be valued as part of the tenant's compensable interest.

In a case perhaps limited to its unique facts, the United States Supreme Court has found that a tenant's compensable interest for its leasehold improvements was to be measured by what a willing buyer would have paid for the improvements, which had a useful life exceeding the remainder of the lease term and which were subject to removal by the tenant, taking into account the possibility that the lease might be renewed as well as that it might not. *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973).

2. **Interplay with Other Lease Clauses**

a. **Permitted Use Clauses**

The condemning authority must pay the market value of the property being condemned valued at its "highest and best use." *E.g., State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992). Absent a provision in the lease addressing allocation of the award on condemnation, even though a tenant's use is limited to a use that is not determined by the court to be the highest and best use of the property, a tenant might successfully argue that the landlord should not get the all of the balance of the award after deducting the value of the tenant's leasehold as its use is limited by the lease's permitted use clause. There is some authority for the proposition that the tenant should share in the balance of the award as without tenant's participation during the lease term, landlord can not realize the property's true value. *Irv-Ceil Realty Corp. V. State*, 43 A.D.2d 775, 350 N.Y.S2d 784 (1973). Whether such leverage is a compensable interest is not yet determined in Texas.

b. **Renewal Clauses**

In valuing a tenant's interest in condemnation, where the lease is silent as to allocation of the condemnation award, the law presumes that a tenant would exercise its renewal option absent a condemnation and in a case where a tenant has a leasehold advantage, it is measured over the term of the lease as if renewed and under the terms applicable to the existing and renewal term. *Fort Worth Concrete Co. v. State of Texas*, 416 S.W.2d 518 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); and *Luby v. City of Dallas*, 396 S.W.2d 192, 199 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

3. **Effect on Tenant's Obligation to Pay Rent**

a. **Rent Abated on Total Condemnation**

Tenant is relieved of its obligation to pay rent when its entire leased premises are condemned. *Elliott v. Joseph*, 351 S.W.2d 879, 881 (Tex. 1961).

b. **Rent Not Proportionally Abated if a Portion of Leased Premises Taken**

If the lease is silent as to partial abatement of rent on a partial condemnation of the leased premises, rent is not abated or partially abated, and tenant's remedy is to look to an apportionment of the damages assessed against the condemning authority based on the reduced value of his lease. *Elliott v. Joseph*, 351 S.W.2d 879, 881-882 (Tex. 1961). The following example of this allocation is given in Adler and Shelton, *Condemnation Issues in Leasing: Who Gets What and How to Get What Your Client Wants*, ADVANCED REAL ESTATE DRAFTING COURSE 1, 3 (2003):

A partial condemnation may reduce a leasehold advantage to a leasehold disadvantage. The tenant holds a leasehold disadvantage when it has a continuing contract rental obligation that exceeds the market rent for the use and occupancy of the "after" condemnation premises. For example, if the market value of the use and occupancy of the premises before the condemnation was \$100 per year and the tenant was only required to pay \$90 per year under the lease, the tenant held a \$10 leasehold advantage. If the condemning entity takes that advantage, it must compensate the tenant for the present value of that \$10 for each of the years remaining in the lease, including the tenant's option to renew if there is one. But, if the condemning entity only takes part of the leased premises such that the tenant is still able to use the premises, but the market rent for the use and occupancy of the lease has been reduced to \$70 per year, the condemning entity must compensate the tenant for the loss of its leasehold advantage plus the disadvantage that results from the condemnation. In total, under this scenario, the tenant is entitled to the present value of \$30 per year (\$10 for the loss of its leasehold advantage + \$20 for the resulting leasehold disadvantage) for the duration of the lease.

B. Contractual Apportionment of Award

The parties are free to contractually apportion a future condemnation award contractually taking into account such future factors as they can contemplate.

1. Value of Tenant's Use is Less than Highest and Best Use at Time of Taking.

As opposed to being silent in the lease as to how the parties will allocate the award, the lease can address allocation of a portion of the award to either landlord or tenant in a case where tenant's use at the time of condemnation is not the compensable highest and best use of the property at the time of taking. For example tenant may be using the property for warehouse uses, but at the time of taking the highest and best use of the property, as a hotel, yields an award greater than the actual use taken. Adler and Shelton, *Condemnation Issues in Leasing: Who Gets What*

and How to Get What Your Client Wants, ADVANCED REAL ESTATE DRAFTING COURSE 1, 4 (2003):

In that situation (where tenant's use is not the highest and best use), is the tenant's leasehold advantage calculated as leasehold advantage of a comparable warehouse property, or is the leasehold advantage valued with regard to the market ground rent for hotel tracts? The parties could agree on the answer in the lease, and avoid litigating the question, by providing that the tenant's leasehold interest is to be calculated using a market rental based either on the use the tenant is making of the premises or the highest and best use of the property as of the date of condemnation.

2. Value of Tenant's Improvements Not Fully Amortized at Time of Taking.

The parties can address in the lease the risk that at the time of condemnation the tenant will not have fully amortized the value of its tenant's leasehold improvement and apply a formula to how to compensate tenant for the ensuing loss on taking of the premises.

C. Contractual Allocation of Award to Landlord

Landlords incorporate into leases several types of clauses to assure that they receive the entire award or to minimize tenant's claim. These clauses include a provision that the lease terminates on condemnation, a disclaimer by the tenant of any right to an award for its taken interest other than the contractually agreed method of compensating it for its loss, and an assignment by tenant of all rights and awards to the landlord other than as expressly set forth in the allocation provision in the lease. Due to the perceived harshness of an automatic termination clause, courts will strictly construe such a clause to save the tenant's interest. *Norman's, Inc. V. Wise*, 747 S.W.2d 475, 477 (Tex. App.—Beaumont 1988, writ den'd).

1. **“Termination-on-Condemnation”
Clauses.**

a. **Automatic, Optional and Mixed**

(1) **Automatic termination clauses**

A “termination-on-condemnation” clause provides that the tenant’s interest terminates on condemnation of the leased premises (called an “**automatic termination clause**”). The result of such a clause is to terminate the tenant’s interest in the property and extinguish any right of the tenant to share in the condemnation award.

See for example the following clause upheld in *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946):

If the whole or any part of the demised premises shall be taken by Federal, State, county, city or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

Termination of lease without termination of all rights leaves tenant right to some compensation.

The following clause in *Evans Prescription Pharmacy, Inc. v. County of Ector*, 535 S.W.2d 704, 706 (Tex. Civ. App.–El Paso 1976, writ ref’d) was construed as not terminating tenant’s interest to the extent of tenant’s right to compensation for its improvements taken by condemnation and its removal expenses:

Should the leased property be taken by right of eminent domain the lease shall be terminated.

No termination on partial condemnation if clause fails to specify termination of lease on partial condemnation.

Sometimes strict construction against termination of tenant’s interest can work to the tenant’s disadvantage. In *Norman’s, Inc. v. Wise*, 747

S.W.2d 475, 476 (Tex. App.–Beaumont 1988, writ den’d), the tenant’s leasehold estate was held not to have been terminated by condemnation of a portion of the landlord’s property (condemnation of a portion of the parking area) where the automatic termination clause was determined by the court to apply only in a case of the condemnation of the entire premises and not to a condemnation of “any part thereof.” The *Wise* automatic termination clause reads as follows:

It is specially understood and agreed by and between Lessor and lessee that in the event the demised premises are condemned for public use by any governmental agency, or other entity with the power of condemnation, this lease shall cease and terminate and be of no further force and effect, and Lessee shall have no claim or demand of any kind or character in and to any award made to Lessor by reason of such condemnation.

No termination if fail to state lease terminates as of condemnation.

A lease was held not to terminate automatically on condemnation where it terminated the “further liabilities” of the parties. 26 AM. JUR. 2d *Eminent Domain* § 264 (1996) citing *Maxey v. Redevelopment Authority of Racine*, 288 N.W.2d 794 (Wis. Ct. App. 1980).

(2) **Optional termination clause.**

Optional termination on taking of entire premises.

Some clauses are drafted to provide an option in tenant or landlord to terminate the lease on condemnation of the leased premises or on condemnation of a part of the leased premises. The following clause was construed by the court to automatically terminate the lease as the court held the optional termination on condemnation of the entire leased premises was superfluous, no option applied :

If the whole or any substantial part of the demised premises should be taken for any public or quasi-public use under any governmental law, ordinance or regulation, or by right of eminent domain, or should be sold to the condemning authority under threat of condemnation, this Lease shall, at the option of the landlord, terminate and the rent shall be abated during the unexpired

portion of this lease effective when the physical taking of said premises shall occur.

J. R. Sillern, Inc. V. leVison, 591 S.W.2d 598, 599-600 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

The tenant in *Texaco Refining and Marketing, Inc. V. Crown Plaza Group*, 845 S.W.2d 340, 342 (Tex. App.—Houston [1st Dist.] 1992, no writ) elected under the following optional termination clause not to exercise its option to terminate the lease due to a condemnation of a portion of the leased premises that effectively destroyed the use of the balance for its intended use as it wanted to preserve its right to be share in the award for the portion its leasehold interest taken in condemnation:

If, during the term of this lease, a part only of said premises be taken for public use under right of eminent domain, and if the remainder, in the opinion of the lessee, is not suitable for its purpose, lessee, at its option, may cancel and terminate its lease, but if it shall not elect so to do, the monthly rental thereafter to be paid shall be reduced by an amount which bears the same ratio to that herein provided for as the area taken bears to the total area prior to such taking.

The court found that the condemnation took the tenant's interest thereby terminating the lease but tenant's interest was compensable and the award for partial condemnation was to be allocated between landlord and tenant. The court rejected landlord's complaint that the tenant acted in bad faith by continuing to renew the lease even though it was too small to be used as a gas station because, the court said, the tenant had no duty to the landlord to act in good faith in an ordinary commercial contract where there was no special relationship between the parties.

Optional termination on partial taking.

A court upheld tenant's termination of the lease on condemnation of a portion of the common areas of ancillary to the leased premises under the following clause in *Weingarten Realty Investors v. Albertsons, Inc.*, 66 F.Supp. 2d 825, 840 (S. D. Tex. 1999), *aff'd* 234 F.3d 28:

Whether or not any portion of the Leased premises may be taken by ...[an authority having the power of eminent domain], either Landlord or Tenant may nevertheless elect to terminate this Lease or to continue this

Lease in effect in the event any portion of any building in the portion of the Shopping Center outline in green, or more than twenty five percent (25%) of the Common Area of the Shopping Center be taken by such authority.

(3) Mixed termination clause.

A "mixed termination clause" provides for automatic termination in the event the entire leased premises is condemned and optional termination on a partial condemnation.

In *Houghton v. Wholesale Electronic Supply*, 435 S.W.2d 216, 218 (Tex. App.—Waco 1968, writ ref'd n.r.e.) the court upheld tenant's election not to terminate the lease due to a condemnation of a portion of the leased premises that destroyed tenant's use of the leased premises for the purpose for which it was originally leased, but was still useful to tenant for other purposes (condemning authority condemned tenant's building and 55% of the land but tenant wished to use the remaining 45% of the land not condemned to provide a driveway and access to adjoining land owned by tenant):

Condemnation clause:

If the entire premises be taken in Eminent Domain proceedings, then the lease shall terminate. If any taking of less than all the leased premises ... is such as substantially to impair the usefulness of the property for lessee's purposes, then at the lessee's option the lease may be terminated; but if the taking of a portion which does not substantially impair for lessee's purposes, that is, any portion of the area, as for example, any condemnation for a sidewalk or alley way, or if any condemnation of the right to use for some definite or indefinite period shall occur, it is agreed .. that the rights, duties and obligations of the parties hereto under the terms of this instrument shall be modified fairly with such abatement of rent as shall fairly and equitable adjust the rights, duties and obligations of the parties hereto under the changed circumstances...

Use clause:

Lessee is specifically permitted and authorized to use the leased premises for the storage, handling, shipping, display and sale of goods and merchandise (including

without limitation electrical and electronic items) and related activities and for any other lawful business purpose or purposes. Provided, however, anything sated to the contrary notwithstanding, it is expressly understood and agreed that the leased premises shall not be used for any purpose which tends to substantially reduce the value of the leased property.

A different result would have occurred had the condemnation clause provided the lease terminated if tenant's use of the remainder of the premises after condemnation be the same use as the tenant was making of it at the time of the condemnation or to be one of a specified list of uses.

b. Coupling with a clause for rent abatement or partial rent adjustment or partial rent abatement

A corollary provision to the "termination-on-condemnation" clause is to couple it with a "rent abatement clause" or a "partial rent adjustment clause" or "partial rent abatement clause". If the lease provides for termination of the lease on condemnation in order to negate tenant sharing in the condemnation award, the lease should be drafted so as also to address the effect on tenant's obligation to pay rent. Why would a tenant give up its right to share in the condemnation award if it is not released from its obligation to pay rent? If the lease is silent as to rent abatement, the tenant may seek to participate in the condemnation award and argue that its right to share was not terminated as its obligation to pay rent was not expressly abated.

Total taking and total rent abatement.

An example of a coupled clause is

The term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946) fn 4; see also *J. R. Sillern, Inc. V. leVison*, 591 S.W.2d 598, 599-600 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

Partial taking and partial rent adjustment.

See *County of McLennan v. Shinault*, 302 S.W.2d 728, 730-732 (Tex. Civ. App.—Waco 1957, no writ) addressing the following clause in a case where the lease provided that in the event of partial condemnation, if the remaining portion was still capable of being used for the tenant's purpose, the lease would remain effect

with a reduction in the rental price proportionate to the decreased utility to the land remaining.

See *Texaco Refining and Marketing, Inc. V. Crown Plaza Group*, 845 S.W.2d 340, 342 (Tex. App.—Houston [1st Dist.] 1992, no writ) where the lease provided that in the event of partial condemnation, the tenant held the option to terminate, but the tenant did not exercise its option,

but if it shall not elect so to do, the monthly rental thereafter to be paid shall be reduced by an amount which bears the same ratio to that herein provided for as the area taken bears to the total area prior to such taking.

Also see *Houghton v. Wholesale Electronic Supply*, 435 S.W.2d 216, 218 (Tex. App.—Waco 1968, writ ref'd n.r.e.) where the lease provided for partial rent adjustment as follows:

it is agreed .. that the rights, duties and obligations of the parties hereto under the terms of this instrument shall be modified fairly with such abatement of rent as shall fairly and equitable adjust the rights, duties and obligations of the parties hereto under the changed circumstances...

The court held that where the condemnation left only 45% of the leased premises remaining, the rent was reduced 45% from its original \$450 per month to \$202.68 per month and no appraisal was required.

c. Coupled with a Disclaimer of Claim or Assignment of Claim Clause.

Some termination on condemnation clauses are drafted to additionally include an assignment by tenant to landlord of tenant's rights, if any, to an award as a means of back stopping the termination clause. This is a wise tactic given court's disposition to strictly construe the language of a termination clause as not terminating a tenant's interest. Additionally, an assignment clause may broaden

interpretation of a termination clause to also pick up and assign to landlord tenant's right to compensation for its improvements.

See the following lease language:

United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946) fn 4:

the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor...

County of McLennan v. Shinault, 302 S.W.2d 728, 730-732 (Tex. Civ. App.—Waco 1957, no writ)

Lessee shall have no right or interest in the proceeds received by the lessor in such condemnation, for such property taken...

d. "Ownership of Improvements at End of Lease Term" Clauses

A termination of lease clause and an assignment of tenant's interest clause which is silent as to the tenant's right to compensation out of the condemnation award for its tenant improvements has been interpreted as only depriving the tenant of compensation for the value of the leasehold and not as depriving the tenant of compensation for its improvements. 26 AM. JUR. 2d *Eminent Domain* § 265 (1996). The court in *Evans Prescription Pharmacy, Inc. v. County of Ector*, 535 S.W.2d 704, 705 (Tex. Civ. App.—El Paso 1976, writ ref'd) held that the tenant could recover for its fixtures and improvements even though it was not entitled to recover for its leasehold interest (as noted in the discussion above, the lease contained a bare bones termination on condemnation clause merely stating that the lease terminated on condemnation and did not address compensation for tenant's improvements.).

2. Types of Allocation Clauses.

The following are approaches to address compensation for tenant improvements as opposed to remaining silent on the issue.

a. Allocation of Set Amount to Tenant or Establishing a Method of Valuation of Tenant's Interest in Tenant's Improvements

b. Assign Rights to Improvement Value to Landlord

Ervay, Inc. v. Wood, 373 S.W.2d 380, 382 (Tex. Civ. App.—Dallas 1963, writ ref'd n. r. e):

It is expressly understood and agreed that any and all damage and payment awarded or collected for such taking of the property for any public purpose shall belong to and be the property of the Lessor, whether such damage be awarded as compensation for diminution in value to the leasehold or to the fee of the premises herein leased and Less shall assert no right or claim to any damage as the result of any such taking.

c. Permit Removal of Improvements at End of Lease Term due to Condemnation

The termination clause in *Ervay, Inc. v. Wood*, 373 S.W.2d 380, 382 (Tex. Civ. App.—Dallas 1963, writ ref'd n. r. e) went on to state that tenant was entitled to remove its improvements from the leased premises in the event of condemnation. Also see *Fort Worth Concrete Co.*, 416 S.W.2d 518, 520, 522-523 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

d. State Landlord Owns Leasehold Improvements at End of Lease Term

If the lease provides that landlord owns tenant's leasehold improvements at the end of the lease and contains a termination on condemnation clause, then tenant has no compensable interest for its improvements on condemnation, even if it owns the improvements during the lease term.

e. Better to Recognize Tenant's Right to Improvement Value as Opposed to Being Silent

County of McLennan v. Shinault, 302 S.W.2d 728, 730-732 (Tex. Civ. App.—Waco 1957, no writ), the court held that tenant was bound to the measure of damages awarded in the condemnation proceeding, because the lease clause addressed such matter:

no right or interest in the proceeds received by the lessor in such condemnation, for such property taken ... However, in the event any of the demised premises shall be taken as hereinabove mentioned and proceeds received for the removal of improvements thereon, or damages to such improvements, then and in that event such amount or amounts received as damages or for the removal of property shall belong to the lessee and paid directly to him.

3. Protecting Tenant's Lender.

Tenant's lender may require that landlord assign to tenant's lender all or a portion of the condemnation award attributable to tenant's interest under the lease as if the tenant's interest had not been terminated by the landlord required termination of lease clause which also is coupled with an assignment to landlord of tenant's right to compensation for tenant's improvements.

THE BASIC PRINCIPLES AS APPLIED TO A HYPOTHETICAL

I. HYPOTHETICAL

The forms attached to this Article beginning on page 25 have been completed to address the following hypothetical. The Office Lease (**Form A2**) is the standard form TEXAS REAL ESTATE FORMS MANUAL Office Lease Form 11-3 with **Form 11-34** Insurance Addendum and **Form 11-35** Tenant Improvements Rider to Lease or Work Letter attached.

DeBaker & Coolidge, L.L.P. (“**Tenant**”) desires to lease a medical office suite (the “**Leased Premises**”) in a multi-tenant medical office building known as “Fannin Center” (the “**Office Building**”) from Crescent Real Estate, L.P. (“**Landlord**” or the “**Building Owner**”). The Office Building has been completed and is occupied by other tenants. The Leased Premises is an entire floor in the Office Building. The Leased Premises are approximately 20,000 square feet (Rentable Area). DeBaker & Coolidge, L.L.P. will be a prized tenant to the project. It has been offered a below-market rent as its presence will guarantee that the Building will be filled quickly. If DeBaker & Coolidge, L.L.P. were to seek comparable space in another property, it likely would have to pay rent greatly in excess of the rent at Fannin Center. It has negotiated a significant leasehold advantage at Fannin Center.

The Leased Premises have never been occupied by another tenant, and have not been finished-out, but are basically bare concrete shell space enclosed by exterior walls of the Office Building.

The Office Lease provides for the Tenant to build out the improvements to the Leased Premises, including certain improvements that would be considered Common Areas improvements, if located on other floors of the Office Building (for example, the bathrooms, HVAC handlers, and certain partitioning).

The Landlord is funding a tenant allowance of \$30 per square foot (\$600,000) to cover “building standard” improvements to the floor. The balance of the cost of the Tenant Improvements (\$400,000 in upgrades a.k.a. betterments) will be paid for by Tenant.

Tenant has hired Joe AIA (“**Tenant’s Architect**”) to design and supervise the Tenant Improvements. Tenant has also hired ABC Construction, Inc. (“**Tenant’s Contractor**”) to construct the Tenant Improvements. Landlord has required Tenant to coordinate the construction of the Tenant Improvements with Constructors, Inc., the building contractor (“**Building Contractor**”) and its architects and engineers, including the Building Design Architect (“**Landlord’s Architect**”) and the HVAC engineer for the Office Building (“**Office Building HVAC Contractor**”). Tenant’s construction activities will have to be coordinated with various other contractors of the Landlord providing on-going operational services at the Office Building, including the management service (“**Project Manager**”), the security guard service (“**Security Contractor**”) and the parking garage contractor (“**Parking Garage Operator**”).

Landlord has tendered to Tenant to review Landlord’s standard Office Lease (**Form A2**) and assures Tenant that it should have no problem complying with the requirements of the Office Lease and that since this is a standard deal, very little lawyer time should be involved. After all it is the State Bar’s Office Lease form.

The Office Lease provides that Tenant, Drs. DeBaker and Coolidge (the “**Tenant’s Principals**”), and the Tenant’s Contractor are to indemnify Landlord and certain “**Landlord-Related Persons**” (the Project Manager, the Office Building Architect, the Building Contractor, the Office Building HVAC Contractor, the Security Contractor, the Parking Garage Contractor, and Landlord’s Lender) from injuries occurring during construction and thereafter during the tenancy. The Office Lease contains provisions addressing property insurance covering the Tenant Improvements during construction and after their completion during the Lease Term. The Office Lease also requires Tenant to obtain Payment and Performance Bonds covering the construction of the Tenant Improvements.

(Form A2 - Office Lease ¶ A 15):

“**Tenant agrees to** – INDEMNIFY, DEFEND, AND HOLD LANDLORD 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 PREMISES. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF TENANT’S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION Act OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.**”

(Form A2 - Office Lease - Insurance Addendum ¶ A 1, A 2 and B):**A. Tenant agrees to –**

1. Maintain the property and/or liability insurance policies required below and such other insurance coverages an/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: *Liability Insurance Policies* Commercial general liability (occurrence basis) Per occurrence: \$5,000,000, Aggregate: \$5,000,000. *Property Insurance Policies* Causes of loss– special form 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 ...
2. Comply with the following additional insurance requirements:
 - a. The commercial general liability ... must be endorsed to name Landlord and Lienholder as “additional insureds” and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of “insured contract.”
 - b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Landlord or Lienholder.

- B. Landlord agrees to** maintain the property and/or liability insurance policies required below during the Term: Commercial general liability (occurrence basis or occurrence: \$5,000,000, Aggregate: \$5,000,000. Causes of loss–special form property 100 percent of replacement cost of the Building exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirement of all lessees.

Tenant asks you to review the indemnity and insurance provisions of the Office Lease and to assure it that it is “standard and not a problem.”

Tenant’s Architect has prepared and delivered to you a Construction Contract for the Tenant Improvements. You take comfort from the detailed indemnity and insurance provisions contained in the AIA form. You notice, however, that –

The AIA form identifies your tenant client as the “Owner.”

The form provides that the Owner is to purchase and carry the “*Owner’s usual liability insurance.*” (AIA A201 ¶11.2.1).

The Contractor is to purchase “such insurance as will protect the Contractor from claims which may arise out of or result from the Contractors operations” (AIA A201 ¶11.1.1) and that the “Owner may require the Contractor to purchase and maintain Project Management

Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract." (AIA A201 ¶11.3.1). Further "the Owner (is to) reimburse the Contractor" for such insurance. (AIA A201 ¶11.3.1).

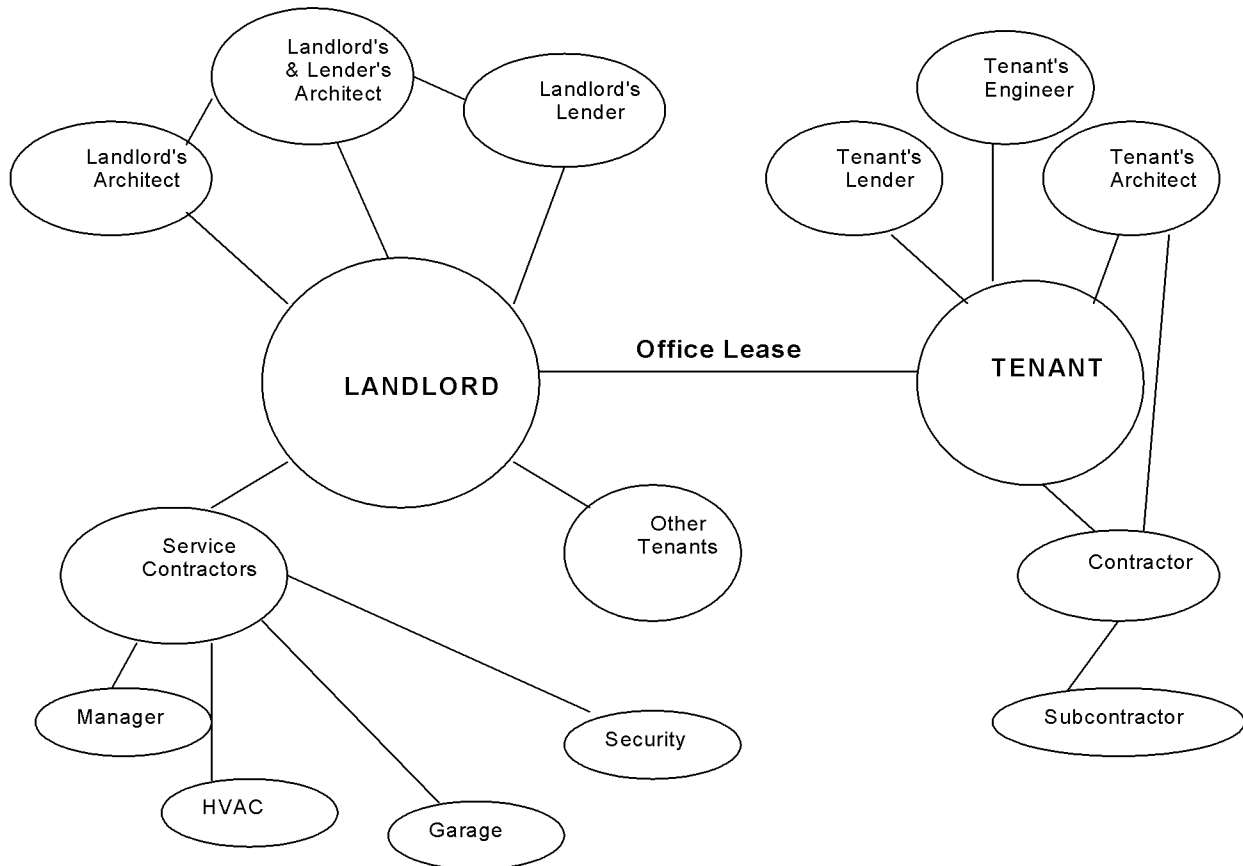
You note that the Contract provides that the "Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds...." (AIA A201 ¶11.3.3).

You further note that the Contract provides that "the Owner shall purchase and maintain ... property insurance written on a builder's risk 'all-risk' or equivalent policy form" and that "this insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the project." (AIA A201 ¶11.4.1).

You wonder if these provisions are consistent with the Office Lease.

The parties involved in this hypothetical have been requested to have their respective insurance agents issue Certificates of Insurance reflecting the contracted-for coverages. (Office Lease ¶A 2c; Construction Contract AIA A201 ¶11.1.3).

You make a sketch of the various parties involved.



II. FORMS

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Appendix A1**Texas Real Estate Forms Manual Ch. 11 Leases and
Ch. 18 Risk Allocation: Indemnity, Waiver, and Insurance**

The following is a quoted portion of the commentary in chapters 11 Leases and 18 Risk Allocation of the *Texas Real Estate Forms Manual* concerning the risk allocation provisions contained in the 8 forms of lease contained in the manual: Manual Form 11-1 Lease [Basic], Manual Form 11-2 Retail Lease, Manual Form 11-3 Office Lease, Manual Form 11-5 Residential Lease, Manual Form 11-6 Industrial Lease, Form 11-7 Hunting Lease, Manual Form 11-8 Agricultural Lease and Manual Form 11-9 Grazing Lease, the form of insurance addendum, Manual Form 11-34 Insurance Addendum to Lease, and the tenant improvement construction addendum, Manual Form 11-25 Tenant Improvements Rider to Lease or Work Letter.

Ch. 8 Leases**§ 11.1:4 Cautions: Risk Allocation**

Indemnities and Waivers: The indemnity provision 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 from 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).

Insurance: The indemnity and casualty provisions of the lease are designed to mirror the insurance coverages required of landlord and tenant under the lease. Thus, it is critical that the parties consult with their insurance professionals to determine the exact insurance coverages to be included on the insurance addendum incorporated into the lease form or, if applicable, the separate insurance addendum (Manual Form 11-34) and that the attorneys tailor the indemnity and casualty provisions in response to the actual insurance policies that will be carried by the parties.

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 11-10-9, 11-10-10, and 11-10-11 in Manual Form 11-10 in this chapter. 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 shall 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.

**Ch. 18 Risk Allocation: Indemnity, Waiver,
and Insurance****§ 18.5:3 Additional Insured
Endorsement Forms**

Additional insured forms contain a granting clause stating that the party listed in the endorsement is to be included as an insured under the policy followed by restrictions introduced by the phrase “but only with respect to.” Additional insured endorsements do not cover partners, employees, agents, and other parties related to the party named as additional insured unless language to that effect is added. Many additional endorsements explicitly or by implication exclude coverage for the sole or contributory negligence of the additional insured. Hence, the type of additional insured endorsement to be used must be stipulated by name, form number, and date or, at a minimum described in terms of the desired coverage. The additional insured endorsements discussed below are standard forms promulgated by Insurance Services Office, Inc....

Form A2**State Bar Form 11-3 Office Lease - Risk Management Provisions****Office Lease****Basic Terms**

Date: June 30, 2006.

Landlord: Crescent Real Estate, L.P.

...

Tenant: DeBaker & Coolidge, L.L.P.

...

Premises

Approximate square feet: 20,000 sq. ft.

Name of Building: Fannin Center

Street address/suite: Suite 1, 909 Fannin

City, state, zip: Houston, TX 78768

Suite No. 1 on Floor 1, Building 1, shown on Exhibit 1 attached hereto and being located on the land described in Exhibit 2.

...

Term (months): 120 months.

...

Tenant's Pro Rata Share: 5%

...

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

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:

All improvements that are not building standard leasehold improvements. For purposes of this lease, building standard leasehold improvements are all partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors,

hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning equipment, and other improvements preselected by Landlord for use throughout the Building.

Definitions

....

"Common Areas" means all facilities and areas of the Building and Parking Facilities and the related land that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Building. Landlord has the exclusive control over and right to manage the Common Areas.

"Essential Services" means the following services: (a) air-conditioning and heating to the premises reasonable for the Permitted Use (exclusive of air-conditioning or heating for electronic data-processing or other specialized equipment) during Building Operating Hours and at such other times at such additional cost as Landlord and Tenant may agree on; (b) hot and cold water for lavatory and drinking purposes; (c) janitorial service and periodic window washing; (d) elevator service, if necessary, to provide access to and from the Premises; (e) electric current for normal office machines and the Building's standard lighting reasonable for the Permitted use; and (f) lighting in Common Areas and fluorescent lights in the Building's standard light fixtures on the premises.

"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.

"Landlord" means Landlord and its agents, employees, invitees, licensees, or visitors.

"Lienholder" means the holder of a deed of trust covering the Premises.

"Operating Expenses" means all expenses that Landlord must reasonably pay in connection with the ownership, operation, and maintenance of the building, except principal and interest on any debt, expenditures classified as capital expenditures for federal income tax purposes, and expenses for which Tenant is required to reimburse Landlord.

“Parking Facility” means the facility or area described in the attached parking facility rider.

....

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

....

Clauses and Covenants

A. Tenant agrees to—

7. Pay (a) monthly, in advance, Tenant’s Pro Rata Share of the monthly estimated Operating Expenses and (b) annually, any difference between the estimated Operating Expenses and the actual Operating Expenses, within thirty days of receiving notice of such difference from the Landlord.

...

15. INDEMNIFY, DEFEND, AND HOLD LANDLORD 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 PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF TENANT’S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION Act OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.

....

C. Landlord agrees to—

3. Provide the Essential Services.

....

4. Repair, replace, and maintain the (a) roof, (b) foundation, (c) Common Areas, (d) structural soundness of the exterior walls, doors, corridors, and windows, and (e) other structures or equipment serving the Premises.

....

8. 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 (A) IS INDEPENDENT OF LANDLORD’S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) 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.

....

E. Landlord and Tenant agree to the following:

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

4. *Release of Claims/Subrogation.* [62-66, 76, 78] LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR BUILDING, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITH THE BUILDING, AND LOSS OF BUSINESS OR REVENUES 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 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.**

...

6. *Condemnation/Substantial or Partial Taking*

a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

c. Tenant will have no claim to condemnation award or proceeds in lieu of condemnation.

Commentary

A brief commentary is provide in this column and a more detailed commentary on the risk allocation provisions of this form and the Insurance Addendum follows the Insurance Addendum.

"Premises", "Building" and "Common Areas". The Lease divides the geographic area subject to the Lease into 3 components: the "Building," the "Premises" and the "Common Areas." Each of these terms are defined in the Basic Terms and Definitions portion of the Lease.

The risk allocation provisions of the Lease allocate responsibilities and "risk" utilizing the geographic area terms. For example, the definition of "Common Areas" states that "Landlord has the exclusive control over and right to manage the Common Areas." The indemnity provisions allocate risk based on the geographic are of the occurrence of an Injury. ¶A 15 provides that "Tenant agrees to ... indemnify ... Landlord from any Injury occurring in any portion of the Premises." ¶C 8 provides that "Landlord agrees to ... indemnify ... Tenant from any Injury occurring in any portion of the Common Areas."

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

Tenant's Rebuilding Obligations. The Manual provides 3 choices to identify the portion of the Building to be rebuilt by Tenant in the event of a casualty loss: **Clause 11-10-9**: if Tenant will rebuild everything other than the building shell; **Clause 11-10-10**: if Tenant will rebuild everything installed by the tenant; and **Clause 11-10-10**: the clause employed in the form completed in the left-hand column for the Hypothetical, where the Tenant will only be required to rebuild the \$400,000 in Tenant-made upgrades or betterments made at the inception of the lease and any subsequent Tenant-made upgrades and betterments.

The Tenant improvements and upgrades are being constructed by Tenant by its contractor pursuant to **Form A4**, the **Manual Form 11-25 Tenant Improvements Rider to Lease or Work Letter**.

"Injury". The defined term "Injury" is used in the indemnity risk allocation provision. ^[20-22] A

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

“Landlord” and “Tenant”. The terms “Landlord” and “Tenant” are used in the Basic Provisions to name the parties to the Lease and are defined in the Definitions as including a laundry list of other persons that are not parties to the Lease. The laundry list is not identical for each party to the Lease. The definition of “Tenant” additionally includes the Tenant’s contractors as “Tenant.”

The purpose for adding a laundry list of other persons not a party to the Lease as being within the defined term “Landlord” or “Tenant” is a risk allocation purpose, both to define the Indemnified Persons (the person who are protected by the indemnity) and to define the broad scope of the indemnity (the persons whose negligence caused the Injury and for which the Indemnified Persons are to be protected by the Indemnifying Person).^[1] For example, Tenant’s indemnity of the Landlord in ¶A 15 is very broad in that “Tenant indemnifies ... Landlord ...from any Injury ... occurring in any portion of the Premises....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord....”

“Tenant”. Tenant is defined as being persons other than the Tenant identified in the Basic Terms. As noted above, The purpose for adding a laundry list of other persons not a party to the Lease as being within the defined term “Tenant” is a risk allocation purpose for liabilities caused by “Tenant.”

Indemnity by Tenant. Tenant’s indemnity of the Landlord in ¶A 15 is very broad in that “Tenant indemnifies ... Landlord ...from any Injury ... occurring in any portion of the Premises....and (d) will apply even if an Injury is caused in whole or in part by the ordinary

negligence or strict liability of Landlord....” This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Tenant for “all liabilities arising out of use of the Premises”, “such as the liability of the Landlord due to its negligence or strict liability [⁷⁻¹⁷] or for injuries to the Tenant’s employees [²⁰⁻²²] arising out of the sole or concurrent negligence of the Landlord.

It thus indemnifies “Landlord” for the “Landlord’s” sole and contributory negligence.

“Landlord” in this context is the laundry list of persons and this provision is an indemnity of Landlord, and Landlord’s agents, employees, invitees, licensees, or visitors for the negligence of Landlord and Landlord’s agents, employees, invitees, licensees, or visitors causing Injury in the Premises.

However, it may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant’s concurrent or comparative negligence.^[12] See discussion of indemnities covering the Indemnifying Person’s share of negligence in Author’s Commentary below following the Insurance Addendum.

Also as discussed below, in Author’s opinion a fairer allocation of risk can be made based on the degree of causation in addition to the where the Injury occurs. 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?

Indemnity by Landlord. Landlord’s indemnity of the Tenant in ¶C 8 is very broad in that “Landlord indemnifies ... Tenant ...from any Injury ... occurring in any portion of the Common Areas....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Tenant....” This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Landlord for liabilities for Injuries arising out of the Common Areas, such as the liability of Tenant due to its negligence or strict liability [^{15-17, 24-26}] or for injuries to the

Landlord's employees [²⁷] arising out of the sole or concurrent negligence of the Tenant.

It thus indemnifies Tenant for the Tenant's sole and contributory negligence.

"Tenant" in this context is the laundry list of persons and is an indemnity of Tenant, and Tenant's and its agents, contractors, employees, invitees, licensees, or visitors for the negligence of Tenant and its agents, contractors, employees, invitees, licensees, or visitors causing injury in the Common Areas.

However, it may not be effective as an indemnity of Tenant against Tenant's liability arising out of the Landlord's concurrent or comparative negligence.^[22] See discussion of indemnities covering the Indemnifying Person's share of negligence in Author's Commentary below following the Insurance Addendum.

Insurance. Comments as to insurance follow Form 11-34 Insurance Addendum.

Waiver of Subrogation. The waiver of subrogation provision (**¶E.4**) is both a release of claims between the parties as to property damages by reason of fire or the elements and a covenant to notify the insurance issuers of the release and to have the insurance companies endorse, if necessary, the policies so as to prevent invalidation of the policies because of the release.

The waiver of subrogation provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test.^[79] The release is written in conspicuous type and meets the requirements of the fair notice test.^[79]

The lease forms in the Forms Manual do not contain other typical forms of releases and waivers common to landlord-oriented lease forms (for example, limiting landlord's liability

for breaches of the lease to its equity in the Building; disclaimers of liability for interruption in Essential Services). Note that any provision of the lease that encompasses a release, waiver, disclaimer or exculpation for a party's negligence must comply with the requirements of the express negligence test in order to be enforceable as to such negligence. Most such provisions in common usage are not drafted in a fashion that comply with the express negligence test!

Condemnation. **¶E.6c** is a release by Tenant of any share of the condemnation award attributable to the condemnation in whole or in part of the Building, including the Premises and the Common Areas. By definition Common Areas include the Parking Facilities. As discussed in the Basic Principles portion of this Article at **V C1a** and **V C1c**, in the absence of **¶E.6** Tenant would be entitled to share in the condemnation award to the extent of the value of Tenant's leasehold estate taken in the condemnation. In a case where the Tenant has not released its right to share in the condemnation award, Tenant is entitled to be compensated for the following: (a) the value of its lost "**leasehold advantage**" and (b) the value of the improvements including fixtures taken or damaged by condemnation.

Applying **¶E.6c** to the Hypothetical, DeBaker & Coolidge will not be compensated either for the \$200,000 in leasehold betterments they have expended or for the loss of the rent advantage it negotiated with Crescent Real Estate to move to Fannin Center.

¶E.6c is not a release of Tenant's right under TEX PROPERTY CODE § 21.043 for reasonable moving expenses to move its personal property up to 50 miles (but not to exceed the value of the personal property itself).

Form A3

Manual Form 11-35

Tenant Improvements Rider to Lease or Work Letter

Terms and Definitions

General Description of Work: Finish out of shell space as medical offices

Architect Preparing Plans: Joe AIA

Architect's Address: Penthouse A, Clover Leaf Towers, Houston, TX

Contractor: ABC Construction, Inc.

Contractor's Address: P. O. Box 666, Houston, TX 78768-666

Contractor's Insurance

Death/bodily injury: \$5,000,000

Property/Builder's risk: 100% of replacement cost of improvements to be built pursuant hereto

Agreements

- A. **Preparation of Plans.** ...
 - B. **Performance of Work.** ...
 - C. **Schedules.** ...
 - D. **Changes in the Work.** ...
 - E. **Contractor's Insurance.** Contractor must maintain insurance reasonably satisfactory to Landlord in the amounts specified in the terms and definitions.
-

Form A4**Manual Form 11-34****Insurance Addendum to Lease**

Lease

Date: June 30, 2006
 Landlord: Crescent Real Estate, L.P.
 Tenant: DeBaker & Coolidge, L.L.P.

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and/or liability insurance policies 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	Minimum Policy Limit
<i>Liability Insurance Policies:</i>	
<input checked="" type="checkbox"/> Commercial general liability ^[71] (occurrence basis)	Per occurrence: ^[71] \$ 1,000,000.00 Aggregate: \$ 5,000,000.00
Or	
<input type="checkbox"/> Business owner's policy	Per occurrence: \$ _____ Aggregate: \$ _____
<i>Required Endorsements:</i>	
<input checked="" type="checkbox"/> Designated location(s) general aggregate limit	
<input type="checkbox"/> _____	\$ 5,000,000.00
<input checked="" type="checkbox"/> Workers' compensation ^[40-42]	\$ 1,000,000
<input checked="" type="checkbox"/> Employer's liability	\$ 1,000,000
<input checked="" type="checkbox"/> Business automobile liability ^[57,72]	\$ 1,000,000
<input type="checkbox"/> Excess liability	\$ _____
Or	
<input type="checkbox"/> Umbrella liability (occurrence basis)	\$ _____

[Include any other desired endorsements. See chapter 18.]

Property Insurance Policies:

- Causes of loss—special form ^[74] 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.

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:

- Business income and additional expense: Sufficient limits to address reasonably anticipated business interruption losses for a period of months
- Boiler and machinery \$ _____
- Flood \$ _____
- Earth movement \$ _____
- Ordinance or law coverage \$ _____
- Glass
- Signs

2. Comply with the following additional insurance requirements:
 - a. The commercial general liability (or business owner’s property policy) must be endorsed to name Landlord and Lienholder as “additional insureds” and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of “insured contract.” ^[43]
 - b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Landlord or Lienholder. ^[44]
 - c. Property insurance policies must contain waivers of subrogation of claims against Landlord and Lienholder. ^[60-63]
 - d. 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. ^[69]

3. Obtain the approval of Landlord and Lienholder with respect to the following: the forms of Tenant’s insurance policies, endorsements and certificates, and other evidence of Tenant’s Insurance; the amounts of any deductibles or self-insured 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:

Type of Insurance	Minimum Policy Limit
<input checked="" type="checkbox"/> Commercial general liability ^[71] (occurrence basis)	Per occurrence: \$ 5,000,000.00
<input checked="" type="checkbox"/> Causes of loss—special form ^[74] Property	Aggregate: \$ 50,000,000.00 100 percent of replacement cost of the Shopping Center <u>Building</u> exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirements of all lessees

Form A5Commentary on Lease and Insurance Addendum:**I. INDEMNITY.****A. Mutual Indemnities.**

The Office Lease contains mutual indemnities. In **Lease ¶A 15** Tenant indemnifies Landlord. In **Lease ¶C 8** Landlord indemnifies Tenant. Each indemnity is a broad form indemnity, indemnifying the Indemnified Person for all liabilities due to the occurrence of an Injury, even if the cause is the sole or concurrent negligence of the Indemnified Person. The Tenant's indemnity is for Injuries occurring in the Premises. The Landlord's indemnity is for Injuries occurring in the Common Areas.

Each indemnity complies with the express negligence and fair notice requirements.^[7-17] Therefore, each indemnity is enforceable as a means of shifting the risk of liability to the Indemnifying Person for Injuries caused in whole or in part by the sole or concurrent negligence of the Indemnified Person.

B. Indemnity by Tenant.

Tenant's indemnity of the Landlord in **Lease ¶A 15** is very broad in that "Tenant indemnifies ... Landlord ...from any Injury ... occurring in any portion of the Premises....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord...." This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Tenant for "all liabilities arising out of use of the Premises", such as the liability of the Landlord due to its negligence or strict liability^[7-17] or for injuries to the Tenant's employees^[20-22] arising out of the sole or concurrent negligence of the Landlord.

It thus indemnifies "Landlord" for the "Landlord's" sole and contributory negligence.

"Landlord" in this context is the laundry list of persons and this provision is an indemnity of Landlord, and Landlord's agents, employees, invitees, licensees, or visitors for the negligence of Landlord and Landlord's agents, employees, invitees, licensees, or visitors causing Injury in the Premises.

However, it may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or comparative negligence.^[12] See below.

C. Indemnity by Landlord.

Landlord's indemnity of the Tenant in **Lease ¶C 8** is very broad in that "Landlord indemnifies ... Tenant ...from any Injury ... occurring in any portion of the Common Areas....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Tenant...." This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Landlord for liabilities for Injuries arising out of the Common Areas, such as the liability of Tenant due to its negligence or strict liability^[7-17] or for injuries to the Landlord's employees^[20-22] arising out of the sole or concurrent negligence of the Tenant.

It thus indemnifies Tenant for the Tenant's sole and contributory negligence.

"Tenant" in this context is the laundry list of persons and is an indemnity of Tenant, and Tenant's and its agents, contractors, employees, invitees, licensees, or visitors for the negligence of Tenant and its agents, contractors, employees, invitees, licensees, or visitors causing Injury in the Common Areas.

II. INSURANCE.**A. Manual.**

The Manual's Lease forms rely on an Insurance Addendum to detail the insurance coverages required to be maintained by the parties. Manual Ch. 18 contains general explanations of the various insurance terms used and choices in the Addendum (for example, "**comprehensive general liability**" versus "**commercial general**

liability, “*business owner’s policy*”, “*employer’s liability insurance*”, “*excess liability insurance*”, “*umbrella*”) and a short commentary on portions of common additional insured endorsement forms applicable to the leases (for example, ISO Additional Insured Endorsement Forms CG 20 10 07 04 - Owners, Lessees or Contractors, CG 20 11 01 96 Managers or Lessors of Premises, and CG 20 26 07 04 - Designated Person or Organization).^[39] These ISO Additional Insured Endorsement Forms are not contained in the Manual but are set forth in full in this Article as **Forms E - G**. Following each of these Forms is Author’s Commentary on the Endorsement.

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

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

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

B. Waiver of Subrogation.

The waiver of subrogation provision (**Lease ¶E.4**) is both a release of claims between the parties as to property damages by reason of fire or the elements and a covenant to notify the insurance issuers of the release and to have the insurance companies endorse, if necessary, the policies so as to prevent invalidation of the policies because of the release.^[76-82]

The waiver of subrogation provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test.^[79] The release is written in conspicuous type and meets the requirements of the fair notice test.^[79]

C. Property Insurance.

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

Author's Commentary.**I. INDEMNITY****A. Lease's Indemnity Failure to Address Comparative Negligence**

The indemnity provisions may not be effective as an indemnity of Tenant against Tenant's liability arising out of the Landlord's concurrent or comparative negligence.^[12]

The indemnity provisions do not expressly state that the Indemnified Person is indemnified for the liability it has due to the negligence of the Indemnifying Person. This may result in the Indemnified Person being indemnified by the Indemnifying Person for the portion of the liability attributable to the Indemnified Person's negligence but not for the portion attributable to the Indemnifying Person's negligence.

For example, if an employee of the Landlord is injured in the Common Areas 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 Landlord) by the Workers' Comp Bar and thus sues the Tenant. Tenant calls on Landlord to defend Tenant from suit relying on Landlord's indemnity in **Lease ¶C 8**. Landlord defends. The jury determines that Tenant was 20% negligent and Landlord was 80% negligent. Jury determines damages to the employee are \$1,000,000. Tenant seeks indemnity and contribution from Landlord. Landlord pays the 20% allocable to Tenant's 20% share of the award = \$200,000. Landlord does not pay the \$800,000 attributable to its negligence. Landlord argues that it did not indemnify Tenant for the share of the liability attributable to Landlord's share of the negligence!

Lease ¶A 15. A similar example can be created for an injury to Tenant's employee occurring in Tenant's Premises and a resultant suit by Landlord against Tenant seeking Tenant's indemnity of the Landlord.

B. Author's Proposed Revision

This point may be addressed by inserting the following underlined language in **Lease ¶A 15** and (a similar revision would be made to **Lease ¶C 8** to address Landlord's indemnity):

A. Tenant agrees to—

15. INDEMNIFY ... LANDLORD ... THE INDEMNITY IN THIS PARAGRAPH ... (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD. (Underlining solely to denote added language)

II. INSURANCE**A. Insurance Addendum's Approach to Liability Policies****1. Policy Form**

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.

a. No Specification of Policy Terms

The Insurance Addendum relies on Landlord's approval authority in **Insurance Addendum ¶ A.3** as opposed to specifying in the Insurance Addendum minimum standards to be met in the policy to be furnished by Tenant.

b. Tenant Not Afforded Policy Review Authority

There is no corresponding 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.

2. Additional Insured Form**a. Unavailable Coverage Specified**

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

b. No Geographic Limitation of Tenant's Additional Insured Endorsement Coverage Specified

Insurance Addendum ¶ 2a 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 as **Form E** is the industry standard ISO CG 20 11 Additional Insured CGL Endorsement designating Landlord as an additional insured on Tenant's CGL policy. The standard form utilizes the term "premises" to define the geographic area giving rise to coverage. But as explained in **III B4c** of the Basic Principles portion of this Article 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. Courts have construed the insurance coverage broadly against the insurer.

c. Persons to Be Listed as Additional Insureds on Tenant's CGL Policy

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

d. Indemnity Insurance

Insurance Addendum ¶ 2a provides that Tenant's CGL policy must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract." This is required so that Tenant's CGL policy will insure Tenant for the full scope of its indemnity under **Lease ¶ A 15**. Tenant's indemnity in **Lease ¶ A 15** covers all Injuries occurring in the Premises "even if caused in whole or in part by the ordinary negligence of Landlord." However, standard CGL policies (including ISO's CGL policies since 07 04) exclude from insured contract coverage the sole negligence of an Indemnified Person. See discussion in this Article at **III B5b** ^[2]. Thus it is likely that Tenant will not comply or be able to comply with this covenant of

the Lease. In order to effect coverage Tenant's CGL carrier will have to issue a manuscripted endorsement to Tenant's CGL policy to cover Tenant's **Lease ¶ A 15**. If Tenant does not obtain such manuscripted endorsement, it will find itself in the position of indemnifying Landlord for a liability not reinsured by Tenant's CGL policy.

e. Tenant Not Covered on Landlord's Policy

The Insurance Addendum does not provide that Tenant is to be listed as an additional insured on Landlord's liability policy as to Injuries occurring in the Common Areas. Tenant should require that Landlord cause its insurance carrier to issue an endorsement to Landlord's CGL policy listing Tenant as an additional insured as to Tenant's liability for Injuries occurring in the Common Areas. After all, Tenant is paying for Landlord's CGL insurance as part of the Operating Expenses. **Lease ¶ A 7**. A form of additional insured endorsement to Landlord's CGL policy is standard form ISO CG 20 26 07 04 as **Form E**. As discussed in the Commentary following Form F, the ISO endorsement form can be tailored to limit Tenant's protection as an additional insured to Injuries occurring in the Common Areas. The ISO form as standardly issued does not make that distinction.

f. Other Insurance Issues

The Insurance Addendum is silent as to the effect of the additional insured having "other insurance" available to it for liabilities covered by the additional insured endorsement. In the event the additional insured does not require or do something more the named insured's carrier will require and be entitled to contribution by the additional insured's other insurance. See the discussion in this Article at Basic Principles at **III C** and at **Footnote** ^[51].

3. Certificates of Insurance

The general reference to the Tenant providing the Landlord with a certificate of insurance does not specify the items to be covered in the certificate of insurance. (See the following forms of Insurance Certificates modified to specify details as to coverages required by Author pursuant to the Hypothetical and the Supplement to the Insurance Addendum **Forms B - D**). As discussed at **Footnote** ^[69] Certificates of insurance are not insurance, just evidence of insurance. Although it is typical to rely on a certificate of insurance as if it were insurance, a more prudent practice is to obtain and review the underlying policy and endorsements.

B. Author's Proposed Revision

The Author recommends that a Supplement be added to the Insurance Addendum to address the following points:

1. Policy Form

The Supplement to the Insurance Addendum can specify minimum acceptable insurance policy forms. This provides the parties with a common expectation and agreement as to insurance coverage prior to the expenditure of significant funds in designing space or making other lease arrangements. It also will permit the parties to involve their insurance advisors prior to signing the Lease.

2. Adding Tenant as an Additional Insured on Landlord's CGL Policy.

Adding Tenant as an additional insured on the Landlord's CGL policy is in line with the indemnities contained in the Lease. Additionally, adding Tenant as an additional insured is in line with the Tenant's expectations that it is insured by the "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.

3. Additional Insured Form Specified with Specified Manuscripted Changes

Adding a Supplement to the Insurance Addendum to specify the additional insured endorsement form similarly adds clarity to the lease negotiation process. It will avoid misunderstanding as to the scope of the additional insured coverage. It hopefully will result in determining on the front end if there will be difficulty in producing the desired additional insurance coverage. The approach recommended by this Author is that sample additional insured endorsement forms for attachment to the Tenant's CGL policy and the Landlord's CGL policy be attached as Exhibits to the Supplement.

4. Certificate of Insurance Form Attached

Similarly, specifying the content of the certificate of insurance helps avoid future failure to produce an appropriately detailed certificate. The approach recommended by this Author is that a sample certificate of insurance be attached to the Supplement as an Exhibit.^[69]

5. Sample Supplement

The following is a Supplement to the Insurance Addendum addressing many of the Author's Comments. This Supplement does not address revisions to the property insurance provisions of the Lease and Insurance Addendum. Property insurance is being addressed by a separate Article presented at this Seminar. In addition to addressing each of the above points, the Author also has proposed manuscript language to customize the additional insured endorsements to produce in the Author's opinion a "faire" coverage result.

a. Applicable ISO Endorsement Forms

Attached as **Form E** is ISO CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises. This is ISO's endorsement form to add the Landlord and any other persons the parties have contracted to add as additional insureds on the Tenant's CGL policy.

Attached as **Form F** is ISO CG 20 26 07 04 Additional Insured – Designated Person or Organization. This is ISO's endorsement form to add the Tenant and any other persons the parties have contracted to add as additional insureds on the Landlord's CGL policy.

Attached as **Form G** is ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization is ISO's endorsement to add the Landlord, Tenant or any other person the parties have contracted to add as additional insureds on the named insured's CGL policy. Form G has been completed to reflect Landlord and Tenant being added as additional insureds on the Tenant's contractors CGL policy. Additionally, an ISO CG 20 10 07 04 endorsement can be added to the Tenant's CGL policy to add the Landlord on Tenant's CGL policy to cover the exclusion from coverage for construction activities contained in **Form E** ISO CG 20 11 01 96.

b. Coverage if ISO Endorsement Forms are Used but Without Further Manuscripted Changes

In the absence of implementing manuscript changes to the ISO endorsement forms, the following coverage results. Both Landlord and Tenant are additional insureds on the other party's CGL insurance. Assuming that Landlord's and Tenant's CGL policies are on the current ISO CGL policy form, including having been endorsed with the 1997 mandatory "other insurance" change in language endorsement, then each additional insured shall be covered for the risks identified in the additional insured endorsement on a primary coverage basis without the additional insured's other insurance being called on to contribute to cover the primary liability to the extent of the limits of the named insured's insurance.

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

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to Tenant's contractor's CGL policy listing Landlord and Tenant as additional insureds will

cover Landlord and Tenant for bodily injury, property damage, and personal injury caused in whole or in part by the contractor's acts or omissions or the acts or omissions of those acting on the contractor's behalf in the performance of contractor's ongoing operations at the Building and related property.

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to the Tenant's CGL policy listing Landlord as an additional insured will cover Landlord for bodily injury, property damage, and personal injury caused in whole or in part by the Tenant's acts or omissions or the acts or omissions of those acting on the Tenant's behalf in the performance of Tenant's ongoing operations at the Building and related property, without exclusion for construction activities.

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

c. Author's 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.

(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.

Form A5**Supplement to Insurance Addendum**

Lease

Date: June 30, 2006

Landlord: Crescent Real Estate, L.P.

Tenant: DeBaker & Coolidge, L.L.P.

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

A. Policies**1. Qualifications of Issuer**

All policies must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or *Standard & Poor Insurance Solvency Review* of A-, or better, and admitted to engage in the business of insurance in the State of Texas. ^[70]

2. Liability Policies**a. CGL Policies**

Commercial general liability policies must be on the most current ISO CG 00 01 or equivalent. ^[39] Separation of insured language must not be modified. If the named insured's liability policy does not contain the standard ISO separation of insureds provision, or a substantially similar clause, it shall be endorsed to provide cross-liability coverage. Defense will be provided as an additional benefit and not included within the limit of liability. Tenant's CGL policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord. Attached is the waiver form to be used. (See **Form H**).

b. Workers Compensation

Tenant's workers compensation policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord. Attached is the waiver form to be used. (See **Form K**).

c. Business Auto Policy

Tenant's business auto policy shall be endorsed to list Landlord as an additional insured. Attached is the additional insured endorsement form to be used. (See **Form I**). Tenant's business auto policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord. Attached is the waiver form to be used. (See **Form J**).

3. Additional Insurance Coverage With respects to the additional insured status:**a. Landlord as Additional Insured on Tenant's CGL Policy****(1) Required Endorsement Form**

Under Tenant's commercial general liability policy, Landlord shall be included as an additional insured using an ISO CG 20 11 01 96 endorsement or equivalent, and under the commercial umbrella, if any. During construction of the leasehold improvements by Tenant and its contractor, Landlord shall be included as an additional insured on Tenant's commercial general liability policy using an ISO CG 20 10 07 04 endorsement or equivalent.

(2) Modifications to Required Endorsement Form

The additional insured endorsement shall 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 shall 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.

b. Tenant as Additional Insured on Landlord's CGL Policy**(1) Required Endorsement Form**

Under Landlord's commercial general liability policy, Tenant shall be included as an additional insured using an ISO CG 20 26 07 04 endorsement or equivalent, and under the commercial umbrella.

(2) Required Modifications to Endorsement Form

The additional insured endorsement shall 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 shall 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.

4. Notification Provisions

Contain a provision for 30 days' prior written notice by insurance carrier to the additional insured as a requirement for cancellation, non-renewal, or substantial modification.

5. Primary and Noncontributory

The named insured's liability policy will be primary and noncontributory. ^[51] The additional insured's other insurance will be excess coverage and not contribute to the primary coverage provided by the named insured's policy.

6. Umbrella and Excess Insurance Policies

The umbrella policy shall be written on an umbrella basis in excess over and no less broad than the liability coverage referenced herein. Inception and expiration dates will be the same as the CGL insurance. Coverage must "drop down" for exhausted aggregate limits under the liability coverage referenced herein. The policy shall be endorsed to provide aggregate limits on insurance for this location.

7. Approved Revisions

No policy may include an endorsement restricting, limiting or excluding coverage required herein in any manner without the prior written approval of the other party.

8. Approved Deductibles and Self Insured Retentions

No deductible or self insured retention in excess of \$_____ shall be made without the prior written approval of the other party.

9. Superseding or Discontinued Forms

If the forms of policies, endorsements, certificates, or evidence of insurance required by this Exhibit are superseded or discontinued, the protected party will have the right to require other equivalent forms.

10. Approval Required for Different Forms

Any policy or endorsement form other than a form specified in this Addendum as hereby supplemented must be approved in advance by the protected party.

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

1. Liability Insurance

ACORD Form 25 *Certificates of Liability Insurance* for liability coverages in the form attached hereto as an **Exhibit**.^[69]

2. Property Insurance

ACORD Form 24 *Certificate of Property Insurance* for property coverages in the form attached hereto as an **Exhibit**.^[69]

3. Time to Be Provided

Evidence to be delivered to the protected party prior to Tenant's occupancy of the Premises and at least 30 days prior to the expiration of current policies.

4. Certificate of Insurance Certificates must—^[69]**a. Certificate Holder**

Show the protected party as certificate holders (with the protected party's mailing address).

b. Issuers

Show the insurance companies producing each coverage and the policy number and policy date of each coverage.

c. Producer

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

d. Endorsements

Specify the additional insured status and/or waivers of subrogation and be accompanied by copies of all required endorsements.

e. Deductibles and SIRs

State the amounts of all deductibles and self-insured retentions.

f. Primary Status and Aggregate Limits

Show the primary status and aggregate limit per project or location where required.

g. Revisions to Acord Printed Form

The phrases “endeavor to” and “but failure to mail such notice will impose no obligation or liability of any kind upon Company, its agents or representatives” must be deleted from the cancellation provision of the ACORD 25 certificate and the following express provision added: “This is to certify that the policies of insurance described herein have been issued to the Insured for whom this certificate is executed and are in force at this time. In the event of cancellation, non-renewal, or material reduction in coverage affecting the certificate holder, 30 days’ prior written notice will be given to the certificate holder by certified mail or registered mail, return receipt requested.”

C. Contractors

Tenant shall also require its Contractor performing the Work for the Tenant Improvements to carry liability insurance meeting the above requirements, except that the Landlord and Lienholder will be listed as additional insureds on an ISO form CG 20 10 07 04, unmodified and in the form attached as an **Exhibit**. (See **Form G** to this Article). If requested in writing by Landlord, Tenant will provide to Landlord a certified copy of any or all insurance policies or endorsements required by this lease. ^[71]

D. Disclaimer

By requiring insurance coverage herein, a party does not represent to the other party that coverage and limits will necessarily be adequate to protect the named insured or the additional insured or any other person, and such coverage and limits shall not be deemed as a limitation on the Indemnifying Person’s liability under the indemnity granted to the Indemnified Person.

Forms B - D**Certificate of Insurance as to Coverage Furnished by
Landlord, Tenant and Tenant’s Contractor**

The following are 3 sample certificates of liability and property insurance for the insurance required in the Hypothetical of the Landlord, the Tenant and the Tenant’s Contractor. ^[69]

Form B	Tenant’s Certificate of Liability and Property Insurance
Form C	Landlord’s Certificate of Liability and Property Insurance
Form D	Contractor’s Certificate of Liability and Property Insurance

Form B

Tenant's Certificates of Liability and Property Insurance [69]

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

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
A		GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> _____ <input type="checkbox"/> _____ GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input checked="" type="checkbox"/> LOC	CLP1234567	08/01/05	08/01/06	EACH OCCURRENCE \$1,000,000
	DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 50,000					
	MED EXP (Any one person) \$ 5,000					
	PERSONAL & ADV INJURY \$1,000,000					
	GENERAL AGGREGATE \$					
	PRODUCT-COMP/OP AGG \$2,000,000					
B		AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS <input type="checkbox"/> _____ <input type="checkbox"/> _____	CAP	08/01/05	08/01/06	COMBINED SINGLE LIMIT (Ea accident) \$2,000,000
	BODILY INJURY (Per person) \$					
	BODILY INJURY (Per accident) \$					
	PROPERTY DAMAGE (Per accident) \$					
		GARAGE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/>				AUTO ONLY-EA ACCIDENT \$
						OTHER THAN <u>EA ACC</u> \$
						AUTO ONLY: <u>AGG</u> \$

A		EXCESS LIABILITY	123456	08/01/05	08/01/06	EACH OCCURRENCE	\$5,000,000	
		<input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE				AGGREGATE	\$5,000,000	
		<input type="checkbox"/> DEDUCTIBLE					\$	
		<input type="checkbox"/> RETENTION \$					\$	
A		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY	ABCDE	08/01/05	08/01/06	WC STATUTORY LIMITS	OTHER	\$
		ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?				E.L. EACH ACCIDENT	\$1,000,000	
		If yes, describe under SPECIAL PROVISIONS below				E.L. DISEASE-EA EMPLOYEE	\$1,000,000	
						E.L. DISEASE-POLICY LIMIT	\$1,000,000	
		OTHER						
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS (See Attachment.)								
CERTIFICATE HOLDER				CANCELLATION				
Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768 General Electric Commercial Credit 2 Rockefeller Plaza New York, NY				SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.				
				AUTHORIZED REPRESENTATIVE /s/ Joe Dirt				
ACORD 25 (2001/08)						© ACORD CORPORATION 1988		

IMPORTANT

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

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

DISCLAIMER

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

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

Form B [69]

ACORD™	CERTIFICATE OF LIABILITY INSURANCE	Date 03/01/06
PRODUCER U. S. Casualty. & Property 1 Rockefeller Plaza New York, NY INSURED DeBaker and Coolidge, L.L.P. P. O. Box 1234 Houston, TX 78768-1234	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW, EXCEPT AS SPECIFIED.	
	COMPANIES AFFORDING COVERAGE	
	COMPANY A U. S. Casualty & Property	
	COMPANY B	
	COMPANY C	
	COMPANY D	

COVERAGES

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

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION	COVERED PROPERTY	LIMITS
A	PROPERTY	CP12345	08/01/05	08/01/06	<input checked="" type="checkbox"/> BUILDING	\$5,000,000
	CAUSES OF LOSS				<input checked="" type="checkbox"/> PERSONAL PROPERTY	\$1,000,000
	<input type="checkbox"/> BASIC				<input checked="" type="checkbox"/> BUSINESS INCOME	\$1,000,000
	<input type="checkbox"/> BROAD				<input checked="" type="checkbox"/> EXTRA EXPENSE	\$ 500,000
	<input checked="" type="checkbox"/> SPECIAL				<input type="checkbox"/> BLANKET BUILDING	
	<input type="checkbox"/> EARTHQUAKE				<input type="checkbox"/> BLANKET PERS PROP	
	<input type="checkbox"/> FLOOD				<input type="checkbox"/> BLANKET BLDG & PP	
	INLAND MARINE					\$
	TYPE OF POLICY					\$
						\$
	CAUSES OF LOSS					\$
	<input type="checkbox"/> NAMED PERILS					\$
	<input type="checkbox"/> OTHER					\$
	CRIME					\$
	TYPE OF POLICY					\$
						\$
	BOILER & MACHINERY					\$
						\$
	OTHER					

LOCATION OF PREMISES/DESCRIPTION OF PROPERTY (See Attachment.)

SPECIAL CONDITIONS/OTHER COVERAGES

CERTIFICATE HOLDER	CANCELLATION
Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768 and General Electric Commercial Credit 2 Rockefeller Plaza New York, NY	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES. AUTHORIZED REPRESENTATIVE /s/ Joe Dirt
ACORD 24 (1/95)	© ACORD CORPORATION 1995

Commentary:

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

Form C

Landlord's Certificates of Liability and Property Insurance

ACORD™		CERTIFICATE OF LIABILITY INSURANCE		Date (MM/DD/YY) 03/01/06
PRODUCER Crescent Captive 908 Fannin Houston, TX 78768		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW EXCEPT AS SPECIFIED.		
		INSURERS AFFORDING COVERAGE		NAIC
		INSURER A: U. S. Casualty		
INSURED Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768		INSURER B: U. S. Auto		
		INSURER C: U. S. Workers Casualty		
		INSURER D:		
		INSURER E:		

COVERAGES

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS		
A		GENERAL LIABILITY <input type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> _____ <input type="checkbox"/> _____ GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input checked="" type="checkbox"/> LOC	CLP12345	08/01/05	08/01/06	EACH OCCURRENCE	\$5,000,000	
						DAMAGE TO RENTED PREMISES (Ea occurrence)	\$1,000,000	
						MED EXP (Any one person)	\$ 5,000	
						PERSONAL & ADV INJURY	\$5,000,000	
						GENERAL AGGREGATE	\$	
						PRODUCT-COMP/OP AGG	\$10,000,000	
B		AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS <input type="checkbox"/> _____ <input type="checkbox"/> _____	CAP12345	08/01/05	08/01/06	COMBINED SINGLE LIMIT (Ea accident)	\$	
						BODILY INJURY (Per person)	\$	
						BODILY INJURY (Per accident)	\$	
						PROPERTY DAMAGE (Per accident)	\$	
						AUTO ONLY-EA ACCIDENT	\$	
						OTHER THAN EA ACC	\$	
A		EXCESS LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> DEDUCTIBLE <input type="checkbox"/> RETENTION \$	CUP12345	08/01/05	08/01/06	EACH OCCURRENCE	\$	
						AGGREGATE	\$50,000,000	
							\$	
							\$	
							\$	
							\$	
C		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below	WC12345	08/01/06	08/01/06	<input checked="" type="checkbox"/> WC STATUTORY LIMITS	<input type="checkbox"/> OTHER	\$
						E.L. EACH ACCIDENT		\$
						E.L. DISEASE-EA EMPLOYEE		\$
						E.L. DISEASE-POLICY LIMIT		\$
						OTHER		

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

Commentary:

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

Form C

ACORD		CERTIFICATE OF PROPERTY INSURANCE			Date 38776		
PRODUCER Crescent Captive 908 Fannin Houston, TX 78768		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.					
INSURED Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768		COMPANIES AFFORDING COVERAGE					
		COMPANY A Crescent Captive & Casualty					
		COMPANY B					
		COMPANY C					
		COMPANY D					
COVERAGES							
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.							
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE	POLICY EXPIRATION	COVERED PROPERTY	LIMITS	
A	PROPERTY	CP12344	08/01/05	08/01/06	BUILDING	\$	
	CAUSES OF LOSS				PERSONAL	\$	
	BASIC				BUSINESS INCOME	\$	
	BROAD				EXTRA EXPENSE	\$	
	SPECIAL				BLANKET BUILDING	\$	
	EARTHQUAKE				BLANKET PERS PROP	\$	
	FLOOD				X	BLANKET BLDG & PP	\$150,000,000
							\$
	INLAND MARINE				\$		
	TYPE OF POLICY				\$		
	CAUSES OF LOSS				\$		
	NAMED PERILS				\$		
	OTHER				\$		
	CRIME				\$		
	TYPE OF POLICY				\$		
	BOILER & MACHINERY				\$		
	OTHER				\$		
LOCATION OF PREMISES/DESCRIPTION OF PROPERTY (See Attachment)							
SPECIAL CONDITIONS/OTHER COVERAGES							

Attachment To Landlord's Certificate Or Proof of Insurance

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

Dated (MM/DD/YY): 03/01/06.

Issued By: Crescent Captive
908 Fannin
Houston, Texas 78768

Insured: Crescent Real Estate, L.P. (the "Landlord" or "Building Owner")

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

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

As to Policies Issued By:

Company A: U. S. Casualty
 Company B: U. S. Auto
 Company C: U. S. Worker Casualty
 Company D: Crescent Captive & Casualty

Policy Nos.:

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

1. **In Force.** The insurance policies are currently in force.
2. **Notification.** None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificate holders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.
3. **Additional Insureds and Loss Payees.** The following persons: (a) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (b) Bank of America, N.A. ("Tenant's Lender"), (c) Joe AIA ("Tenant's Architect"), and (d) John Doe DeBaker, M.D., individually (collectively, "Additional Insureds") have been added as additional insureds to each of the Liability Insurance policies listed herein.
4. **Texas Licensees.** The issuers of the described insurance policies are licensed to do business in Texas.
5. **Waiver of Subrogation.** The issuers of the insurance policies have waived subrogation against (a) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (b) Bank of America, N.A. ("Tenant's Lender"), (c) Joe AIA ("Tenant's Architect"), and (d) John Doe DeBaker, M.D., individually (the "Released Persons").
6. **Severability of Interest.** This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.
7. **Certificate Holders.** This certificate is issued to DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant of the Property and to Bank of America, N.A., Tenant's Lender ("Certificate Holders").
8. **Premises.** For Policies A - D, the Premises is the Office Building, Parking Garage, tenants' leased premises, including the Tenant's Leased Premises, supporting facilities and personal property of Landlord, Tenant and of other tenants of Landlord located at 909 Fannin, Houston, TX described in Lease dated as of March 1, 2006 (copy attached)[the "Office Lease"] (the "Premises").

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

Policy (Identify by Co. Ltr.)	Endorsement Form Nos.
A. <u>U. S. Casualty</u> (Commercial General Liability)	Additional Insured No. <u>GL-12345 -TX</u> Waiver of Subrogation No. <u>GL-12345 TX</u>

- | | | |
|----|--|--|
| B. | <u>U. S. Auto</u>
(Automobile Liability) | Additional Insured No. <u>TE 99 01 B</u>
Waiver of Subrogation No. <u>TE 20 46 A</u> |
| C. | <u>U. S. Worker Casualty</u>
(Worker's Compensation/
Employer's Liability for
Texas only) | Additional Insured No. <u>(not applicable)</u>
Waiver of Subrogation No. <u>WC420304A</u> |
| D. | <u>Crescent Captive & Casualty</u>
(Causes of Loss - Special Form) | Loss Payee No. <u>(ordered)</u>
Ordinance/Law Coverage No. |

Copies of the Endorsements are attached hereto. (Appendices)

Dated Issued: March 1, 2006.

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

 Authorized Representative
 /S/ John Barclay III

 Typed Signature

Form D

Tenant's Contractor's Certificates of Liability and Property Insurance

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

COVERAGES

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS														
A		GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR <input checked="" type="checkbox"/> <u>Contractual</u> <input checked="" type="checkbox"/> <u>XCU Included</u> GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC	CLP3122976	08/01/05	08/01/06	<table style="width:100%; border-collapse: collapse;"> <tr><td style="width: 70%;">EACH OCCURRENCE</td><td style="width: 30%; text-align: right;">\$1,000,000</td></tr> <tr><td>DAMAGE TO RENTED PREMISES (Ea occurrence)</td><td style="text-align: right;">\$ 50,000</td></tr> <tr><td>MED EXP (Any one person)</td><td style="text-align: right;">\$ 5,000</td></tr> <tr><td>PERSONAL & ADV INJURY</td><td style="text-align: right;">\$1,000,000</td></tr> <tr><td>GENERAL AGGREGATE</td><td style="text-align: right;">\$</td></tr> <tr><td>PRODUCT-COMP/OP AGG</td><td style="text-align: right;">\$2,000,000</td></tr> </table>	EACH OCCURRENCE	\$1,000,000	DAMAGE TO RENTED PREMISES (Ea occurrence)	\$ 50,000	MED EXP (Any one person)	\$ 5,000	PERSONAL & ADV INJURY	\$1,000,000	GENERAL AGGREGATE	\$	PRODUCT-COMP/OP AGG	\$2,000,000		
EACH OCCURRENCE	\$1,000,000																			
DAMAGE TO RENTED PREMISES (Ea occurrence)	\$ 50,000																			
MED EXP (Any one person)	\$ 5,000																			
PERSONAL & ADV INJURY	\$1,000,000																			
GENERAL AGGREGATE	\$																			
PRODUCT-COMP/OP AGG	\$2,000,000																			
B		AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS <input type="checkbox"/> _____	CAP3122977	08/01/05	08/01/06	<table style="width:100%; border-collapse: collapse;"> <tr><td style="width: 70%;">COMBINED SINGLE LIMIT (Ea accident)</td><td style="width: 30%; text-align: right;">\$1,000,000</td></tr> <tr><td>BODILY INJURY (Per person)</td><td style="text-align: right;">\$1,000,000</td></tr> <tr><td>BODILY INJURY (Per accident)</td><td style="text-align: right;">\$1,000,000</td></tr> <tr><td>PROPERTY DAMAGE (Per accident)</td><td style="text-align: right;">\$1,000,000</td></tr> <tr><td>AUTO ONLY-EA ACCIDENT</td><td style="text-align: right;">\$</td></tr> <tr><td>OTHER THAN EA ACC</td><td style="text-align: right;">\$</td></tr> <tr><td>AUTO ONLY: AGG</td><td style="text-align: right;">\$</td></tr> </table>	COMBINED SINGLE LIMIT (Ea accident)	\$1,000,000	BODILY INJURY (Per person)	\$1,000,000	BODILY INJURY (Per accident)	\$1,000,000	PROPERTY DAMAGE (Per accident)	\$1,000,000	AUTO ONLY-EA ACCIDENT	\$	OTHER THAN EA ACC	\$	AUTO ONLY: AGG	\$
COMBINED SINGLE LIMIT (Ea accident)	\$1,000,000																			
BODILY INJURY (Per person)	\$1,000,000																			
BODILY INJURY (Per accident)	\$1,000,000																			
PROPERTY DAMAGE (Per accident)	\$1,000,000																			
AUTO ONLY-EA ACCIDENT	\$																			
OTHER THAN EA ACC	\$																			
AUTO ONLY: AGG	\$																			
		GARAGE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> _____				<table style="width:100%; border-collapse: collapse;"> <tr><td style="width: 70%;">AUTO ONLY-EA ACCIDENT</td><td style="width: 30%; text-align: right;">\$</td></tr> <tr><td>OTHER THAN EA ACC</td><td style="text-align: right;">\$</td></tr> <tr><td>AUTO ONLY: AGG</td><td style="text-align: right;">\$</td></tr> </table>	AUTO ONLY-EA ACCIDENT	\$	OTHER THAN EA ACC	\$	AUTO ONLY: AGG	\$								
AUTO ONLY-EA ACCIDENT	\$																			
OTHER THAN EA ACC	\$																			
AUTO ONLY: AGG	\$																			
A		EXCESS LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> DEDUCTIBLE <input checked="" type="checkbox"/> RETENTION \$	CUP253520 Umbrella Liability	38624	38974	<table style="width:100%; border-collapse: collapse;"> <tr><td style="width: 70%;">EACH OCCURRENCE</td><td style="width: 30%; text-align: right;">\$5,000,000</td></tr> <tr><td>AGGREGATE</td><td style="text-align: right;">\$5,000,000</td></tr> <tr><td></td><td style="text-align: right;">\$</td></tr> <tr><td></td><td style="text-align: right;">\$</td></tr> <tr><td></td><td style="text-align: right;">\$</td></tr> </table>	EACH OCCURRENCE	\$5,000,000	AGGREGATE	\$5,000,000		\$		\$		\$				
EACH OCCURRENCE	\$5,000,000																			
AGGREGATE	\$5,000,000																			
	\$																			
	\$																			
	\$																			

A	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY	WC3122979	08/01/05	08/01/06	X	WC STATUTORY LIMITS	OTHER	\$
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below				E.L. EACH ACCIDENT		\$1,000,000	
					E.L. DISEASE-EA EMPLOYEE		\$1,000,000	
					E.L. DISEASE-POLICY LIMIT		\$1,000,000	
	OTHER							
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS (See Attached.)								
CERTIFICATE HOLDER				CANCELLATION				
Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768 and DeBaker and Coolidge, L.L.P. P. O. Box 1234 Houston, TX 78768-1234				SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.				
				AUTHORIZED REPRESENTATIVE /s/ Jimmy Balagia				
ACORD 25 (2001/08)				© ACORD CORPORATION 1988				

Commentary:

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

IMPORTANT

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

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

DISCLAIMER

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

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

ACORD		CERTIFICATE OF PROPERTY INSURANCE			Date (MM/DD/YY)	
					03/06/06	
PRODUCER SGP Commercial Insurance P. O. Box 2291 Houston, TX 78768-2291		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW, EXCEPT AS SPECIFIED.				
INSURED ABC Constructors, Inc. P. O. Box 666 Houston, TX 78768-666		COMPANIES AFFORDING COVERAGE				
		COMPANY A American Mfgs. Mutual Ins. Co.				
		COMPANY B				
		COMPANY C				
		COMPANY D				
COVERAGES						
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.						
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	COVERED PROPERTY	LIMITS
A	<input type="checkbox"/> PROPERTY Bldgs, Risk	3AE63673805	08/01/05	08/01/06	<input checked="" type="checkbox"/> BUILDING	\$8,000,000
	CAUSES OF LOSS				<input checked="" type="checkbox"/> PERSONAL	\$1,000,000
	<input type="checkbox"/> BASIC				<input checked="" type="checkbox"/> BUSINESS INCOME	\$1,000,000
	<input type="checkbox"/> BROAD				<input checked="" type="checkbox"/> EXTRA EXPENSE	\$1,000,000
	<input checked="" type="checkbox"/> SPECIAL				<input type="checkbox"/> BLANKET BUILDING	\$
	<input type="checkbox"/> EARTHQUAKE				<input type="checkbox"/> BLANKET PERS PROP	\$
	<input type="checkbox"/> FLOOD				<input type="checkbox"/> BLANKET BLDG & PP	\$
	<input checked="" type="checkbox"/> (See Attachment.)					\$
	<input type="checkbox"/> INLAND MARINE					\$
	TYPE OF POLICY					\$
	CAUSES OF LOSS					\$
	<input type="checkbox"/> NAMED PERILS					\$
	<input type="checkbox"/> OTHER					\$
	<input type="checkbox"/> CRIME					\$
	TYPE OF POLICY					\$
<input type="checkbox"/> BOILER & MACHINERY		\$				
<input type="checkbox"/> OTHER		\$				
LOCATION OF PREMISES/DESCRIPTION OF PROPERTY (See attachment.)						
SPECIAL CONDITIONS/OTHER COVERAGES						

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

Attachment To Contractor’s Certificate Or Proof of Insurance

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

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

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

Insured: ABC Construction, Inc. (“Tenant’s Contractor”)

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

Policy Types: **Liability Insurance:** A. Commercial General Liability
B. Automobile Liability
C. Workers Compensation and Employer’s Liability
Property Insurance: D. Builder’s Risk - Causes of Loss - Special Form

As to Policies Issued By:

Company A: Bituminous Fire & Marine Insurance
Company B: Bituminous Fire & Marine Insurance
Company C: Bituminous Fire & Marine Insurance
Company D: American Manufacturers Insurance Company

Policy Nos.:

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

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

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

3. **Additional Insureds and Loss Payees.** The following persons: (a) Crescent Real Estate, L.P. and its successors and assigns as owner of the Property (the “Building Owner”), and its directors and employees, (b) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (c) Crescent Management, L.L.P. (the “Property Manager”), (d) _____ (“Building Owner HVAC Contractor”), (e) _____ (“Building Owner Security Service”), (f) _____ (“Parking Garage Operator”), (g) _____ (“Building Owner’s Architect”), (h) General Electric Commercial Credit (“Building Owner’s Lender”), (i) Bank of America, N.A. (“Tenant’s Lender”), and (j) John Doe DeBaker, M.D., individually (“**Additional Insureds**”), have been added as additional insured to each of the Liability Insurance

policies listed herein, under Endorsements making the coverage available to the Additional Insureds primary over insurance available to the Additional Insureds or any self-insurance program of the Additional Insureds and as Loss Payees together with the Contractor and its subcontractors and sub-subcontractors as to the Builder’s Risk Policy listed below.

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

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

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

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

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

9. **Premises.** For Policies A - C, the Premises is the Office Building, Parking Garage, tenants’ leased premises, including the Tenant’s Leased Premises, supporting facilities and personal property of Landlord, Tenant and of other tenants of Landlord located at 909 Fannin, Houston, TX described in Lease dated as of March 1, 2006 (copy attached)[the “Office Lease”]. For Policy D, the Premises is Suite 123 (including all tenant improvements thereto) under Construction Contract dated as of March 2, 2006 (copy attached), as amended from time to time (the “Premises”).

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

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

Copies of the Endorsements are attached hereto. (See Form G)

Dated Issued: March 6, 2006.

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

Authorized Representative
/S/ Jimmy Balagia

Typed Signature

Form E

Endorsement to Tenant’s CGL Insurance Making Landlord Additional Insured

CGL Endorsement - CG 20 11 01 96

**Additional Insured–
Managers or Lessors of Premises**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

- 1. Designation of **Premises** (Part Leased to You*): Suite 1, Floor 1, Building 1, Fannin Center, 909 Fannin, Houston, Texas and the appurtenant use of the Common Areas and Parking Garage as defined in the Office Lease between DeBaker & Coolidge, L.L.P. as Tenant and Crescent Real Estate, L.P., as Landlord.
- 2. Name of Person or Organization (Additional Insured): (a) Crescent Real Estate, L.P., and its successors and assigns as owner of the Property (the “Building Owner”), and its directors and employees, (b) Crescent Management, L.L.P. (the “Property Manager”), (c) _____ (the “Building Owner HVAC Contractor”), (d) _____ (the “Building Owner Security Service”), (e) _____ (“Parking Garage Operator”), (f) _____ (“Building Owner’s Architect”), (g) General Electric Credit Corporation (“Building Owner’s Lender”).

3. Additional Premium: _____.

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

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

This insurance does not apply to:

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

CG 20 11 01 96 [Copyright, Insurance Services Office, Inc., 1994] [**Emphasis added**] Page 1 of 1

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

Commentary:

I. ISO FORM

A. Adding Landlord to Tenant’s CGL Policy

This endorsement is used most commonly when a landlord is to be listed as an additional insured on the tenant’s liability insurance policy.

B. Coverage

1. “Arising out of ownership, maintenance or use”

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).” This language is broad. See discussion of the scope of coverage an additional insured’s negligence “arising out of” at Footnote ^[44-46].

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.

2. “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).

As explained in III B4c of the Basic Principles portion of this Article 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, also as note in the discussion in the Basic Principles some courts have placed a literal meaning on the “*premises*” and have required the injury to occur in the premises leased to the Tenant.

3. Carveouts from coverage

a. No coverage for Injuries arising after lease ends

This endorsement contains two significant carve outs. The first is for liabilities for Injuries that “*take place after (the tenant) ceases to be a tenant in that premises.*” This carve out excludes coverage for liabilities for Injuries that technically occur after cessation of the tenancy but relate to acts or omissions during the tenancy. Coverage for liabilities for Injuries arising after expiration of the tenancy but attributable to the tenant’s acts or omissions prior to completion may be added by requiring both this endorsement and the CG 29 37 endorsement.

b. No coverage for Injuries arising out of construction operations

The second carve out is for alterations, new construction or demolition operations “*by or on behalf of the (additional insured—e.g., the landlord).*” This carve out excludes protection for liabilities for Injuries associated with construction activities. If the tenant will be engaged in any construction activities (*e.g.*, tenant improvements), then another endorsement form should be used.

C. Manual’s Insurance Addendum Insurance Requirement

1. Unavailable Coverage Specified

The general reference in the Manual’s Insurance Addendum to the Landlord being listed as an additional insured on the Tenant’s liability policy does not specify the scope of the matters to be covered by the additional insured endorsement other than to state that the additional insured endorsement form will not

exclude coverage for the sole or contributory ordinary negligence of the Landlord or Lienholder.^[44-46] The ISO industry standard additional insured endorsement form above does not expressly extend coverage to the additional insured's sole negligence.

It also does not expressly exclude coverage of the Landlord's sole negligence.

In 2004 ISO modified several of its endorsement forms (but not this one) to expressly exclude from coverage the sole negligence of the additional insured. An issue may exist as to whether the above ISO endorsement form extends to cover the Landlord's sole negligence.

Many insurers additional insured forms now contain express exclusions of the additional insured's sole negligence.

It is unlikely that a Tenant can easily or economically provide an additional insured endorsement to its CGL policy that expressly covers the Landlord's sole negligence. As a result it is possible that the additional insured endorsement furnished by Tenant will not be in compliance with this insurance requirement of the Insurance Addendum.

2. No Geographic Limitation of Tenant's Additional Insured Endorsement Coverage Specified

Insurance Addendum ¶ 2a does not specify or limit geographically the area of the Building to which Landlord's protection as additional insured is to extend. ¶ 2a states that Landlord is to be listed as an additional insured on Tenant's CGL policy. This specification in the Insurance Addendum does not state that Landlord's additional insured coverage is to be limited to its liability for bodily injury or property damage occurring in the Premises.

The Lease employs geographic limits on the respective indemnity of Landlord and Tenant. 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.

3. Persons to Be Listed as Additional Insureds on Tenant's CGL Policy

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

4. Coverage if ISO Endorsement Forms are Used but Without Further Manuscripted Changes

In the absence of implementing manuscript changes to the ISO endorsement forms, the following coverage results. Both Landlord and Tenant are additional insureds on the other party's CGL insurance. Assuming that Landlord's and Tenant's CGL policies are on the current ISO CGL policy form, including having been endorsed with the 1997 mandatory "other insurance" change in language endorsement, then each additional insured shall be covered for the risks identified in the additional insured endorsement on a primary coverage basis without the additional insured's other insurance being called on to contribute to cover the primary liability to the extent of the limits of the named insured's insurance.

The CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises added to the Tenant's CGL policy listing Landlord as an additional insured will cover the Landlord as an additional insured on Tenant's CGL policy for all liability arising out of the ownership, maintenance or use of that part of the premises leased to Tenant, but not for any occurrence which takes place after the Tenant ceases to be a Tenant and not for

any liabilities arising out of structural alterations, new construction or demolition operations performed by or on behalf of the Landlord.

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

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to the Tenant’s CGL policy listing Landlord as an additional insured will cover Landlord for bodily injury, property damage, and personal injury caused in whole or in part by the Tenant’s acts or omissions or the acts or omissions of those acting on the Tenant’s behalf in the performance of Tenant’s ongoing operations at the Building and related property.

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

II. AUTHOR’S “FAIR FORM” MANUSCRIPT REVISION TO TENANT’S INSURANCE

Should Tenant indemnify Landlord for Injuries occurring either outside or in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual’s approach is to allocate 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. ISO’s approach under the CG 20 11 is to allocate to the named insured Tenant all liability arising out of the use of the premises leased to Tenant without an express carve out for the additional insured Landlord’s sole negligence or Landlord’s negligence if it is the chief cause of the Injury or on a “inside” vs. “outside” formula as employed in the Forms Manual.

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 or in 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 order to effectuate the Author’s recommendation, the following revisions to the ISO CG 20 11 form should be requested to be made to the Tenant’s CGL carrier:

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

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

The insurance does not apply to:

3. Any “bodily injury”, “property damage” or “personal and advertising injury” caused:
 - a. in whole by the negligent acts or omissions or willful misconduct of the Landlord, or
 - b. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord if the aggregate of the Landlord’s plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater.

A further limitation might be considered to exclude from the additional insured coverage of the Landlord all occurrences outside of the Leased Premises, whether or not caused in part by Tenant or by persons acting on behalf of Tenant. This further limitation is along the lines of the Forms Manual’s geographic division of liability.

Additionally, an argument may be made that an Injury occurring outside of the Leased Premises should be covered by the project's liability insurance since all tenants, including Tenant, are paying for such coverage as an Operating Expense. This approach would be reflected by a manuscripted additional insured endorsement to the Landlord's CGL policy (see the manuscripted endorsement language to Form F below).

The following is a manuscripted endorsement to the ISO CG 20 11 to the Tenant's CGL insurance to reflect both a geographic approach and a 51% negligence exclusion:

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

The term "premises" as used in this Endorsement means the "Building", including "Common Areas", of which a part is leased to you as Tenant and called herein the "Leased Premises, the Leased Premises itself and the "Parking Garage" and other "Support Facilities" (as such capitalized terms are defined in the Office Lease between you as Tenant and the additional insured identified above as Landlord).

3. The insurance does not apply to any "bodily injury" or "property damage" or "personal and advertising injury" caused:
- a. in whole by the negligent acts or omissions or willful misconduct of the Landlord or by persons acting on behalf of Landlord, or
 - b. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord occurring **outside** of the Leased Premises, such as occurring in the Common Areas, the Parking Garage or the Support Facilities.
 - c. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord occurring **inside** the Leased Premises, if the aggregate of the Landlord's plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater.

Form FEndorsements to Landlord's Insurance Making Tenant An Additional InsuredCGL Endorsement - CG 20 26 07 04**Additional Insured–Designated Person or Organization**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: (a) DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, (b) Bank of America, N.A. ("Tenant's Lender"), and (c) John Doe DeBaker, M.D., individually.

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

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

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

CG 20 26 07 04 [Copyright, Insurance Services Office, Inc., 2004] [**Emphasis added**] Page 1 of 1

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

Commentary:**I. ISO FORM****A. Adding Tenant to Landlord's CGL Policy**

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

B. Coverage**1. "Caused, in whole or in part, by" Landlord**

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 Landlord's property.

2. No Carve Outs

This endorsement form does not contain any carve outs from coverage like other ISO additional insured endorsement forms. However, by its express coverage terms it eliminates certain coverages.

For example, the injury must be caused at least in part by the named insured. This eliminates coverage for the additional insured's sole negligence.

The injury must occur in connection with premises owned by the named insured. The term "premises" is not defined, but likely will be given a broad meaning by courts. In the context of a lease, courts will likely interpret this endorsement listing the Tenant as an additional insured on the Landlord's CGL policy as covering more than merely the "Premises" leased to Tenant, but also the Common Areas, Parking Garage and Support Facilities.

3. Coverage if ISO Endorsement Forms are Used but Without Further Manuscripted Changes

In the absence of implementing manuscript changes to the ISO endorsement forms, the following coverage results. Both Landlord and Tenant are additional insureds on the other party's CGL insurance. Assuming that Landlord's and Tenant's CGL policies are on the current ISO CGL policy form, including having been endorsed with the 1997 mandatory "other insurance" change in language endorsement, then each additional insured shall be covered for the risks identified in the additional insured endorsement on a primary coverage basis without the additional insured's other insurance being called on to contribute to cover the primary liability to the extent of the limits of the named insured's insurance.

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

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

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

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

II. AUTHOR'S "FAIR FORM" MANUSCRIPT REVISION TO LANDLORD'S INSURANCE

Should Tenant indemnify Landlord for Injuries occurring in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual's approach is to allocate 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. A "fairer" approach may be to provide each party with coverage on a primary basis on the other party's CGL policy for injuries occurring in a geographic area (e.g., inside or outside the

Premises; in the Common Areas and the Parking Garage) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence.

In order to effectuate the Author's recommendation, the following revisions to the ISO CG 20 26 form should be requested to be made to the Landlord's CGL carrier:

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

The term "premises" as used in this Endorsement means the "Building", including "Common Areas", of which a part is leased to the additional insured as Tenant and called herein the "Leased Premises, the Leased Premises itself and the "Parking Garage" and other "Support Facilities" (as such capitalized terms are defined in the Office Lease between the additional insured as Tenant and you as the named insured as Landlord).

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

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

Additionally, an argument may be made that an Injury occurring outside of the Leased Premises should be covered by the project's liability insurance since all tenants, including Tenant, are paying for such coverage as an Operating Expense. This approach would be reflected by the following manuscripted additional insured endorsement to the Landlord's CGL policy:

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

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

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

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

Form G

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

CGL Endorsement - CG 20 10 07 04

Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

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

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

A. Section II - Who Is An Insured is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused, in whole or in part, by:

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

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

(1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or

(2) That portion of “your* work” out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

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

2. Exclusions

This insurance does not apply to “bodily injury” or “property damage” occurring after:

Commentary:

Hypothetical: This endorsement has been completed as an endorsement to the Contractor's CGL insurance to list as additional insureds the persons in the Schedule (the Landlord-Related Persons and the Tenant-Related Persons).

Insurance. This endorsement provides additional coverage to the additional insured for an owner on the contractor's CGL policy (or for a contractor on a subcontractor's CGL policy) for "liability" "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 endorsement language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties. Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent, the additional insured was the sole negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent.

The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named insured is barred by the workers' comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer.

Liabilities **occurring after** completion of the work are not covered.

Coverage for Liabilities arising after completion of the contractor's operations but attributable to the contractor's acts or omissions prior to completion may be added by requiring both this endorsement and a CG 20 37 Additional Insured-Owners, Lessees or Contractors-Completed Operations endorsement.

Form HEndorsement to Tenant's CGL Insurance Waiving Tenant's Carrier's Right of SubrogationCGL Waiver of Subrogation Endorsement - CG 24 04 10 92**Waiver of Transfer of Rights or Recovery Against Others To Us**

This endorsement modifies insurance provided under the following:

SCHEDULE

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

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

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

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

CG 24 04 10 92

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Page 1 of 1

Commentary:

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

Form I

Endorsement to Tenant’s Business Auto Policy Making Landlord Additional Insured

TE 99 01B (BAP Texas) Additional Insured

This endorsement modifies insurance provided under the following:

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

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

Endorsement Effective: March 6, 2006	Policy Number: CAP 3 122 977
Name Insured: DeBaker & Coolidge, L.L.P.	Summit Global Partners Countersigned by /s/

(Authorized Representative)

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

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

[Enter Name and Address of Additional Insured.]

(a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service"), (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner’s Architect"), and General Electric Credit Corporation ("Building Owner’s Lender")

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

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

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

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

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

Texas Standard Automobile Endorsement Prescribed March 18, 1992

Commentary:

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

Insurance: BAP policies ^[57-58] contain blanket additional insured provisions. This form is approved for use in Texas. This form can be used to either confirm the existence of a general "any person" additional insured provision in the BAP or to specifically designate persons to be additional insureds. This endorsement also contains a requirement that the insurer notify the additional insured in advance of insurance cancellation.

Form J

**Endorsement to Tenant's Business Auto Policy Waiving Insurer's Subrogation Rights
As to Claims Against Landlord**

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

This endorsement modifies insurance provided under the following:

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

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

Endorsement Effective: March 6, 2006	Policy Number: CAP 3 122 977
Name Insured: DeBaker & Coolidge, L.L.P.	Summit Global Partners Countersigned by /s/

(Authorized Representative)

The CONDITION entitled "TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US" does not apply to

(a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service"), (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), and General Electric Credit Corporation ("Building Owner's Lender")

[e.g., organizations for whom the named insured is operating under a written contract when such contract requires a waiver of subrogation].

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

Prescribed March 18, 1992

(Emphasis Added)

Commentary:

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

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

Form K

Endorsement to Tenant's Workers Compensation Policy Waiving Insurer's Subrogation Rights as to Claims Against Landlord

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

(Ed. 1-00)

TEXAS WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS ENDORSEMENT

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

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

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

The premium for this endorsement is shown in the Schedule.

Schedule

1. () Specific Waiver

Name of person or organization

(X) Blanket Waiver

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

2. Operations. All Texas operations.

3. Premium: Incl._____.

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

4. Advance Premium. Incl._____.

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

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

Endorsement Effective 3/6/06 Policy No. WC3122979 Endorsement No. _____

Insured DeBaker & Coolidge, L.L.P. Premium -0-

Insurance Company _____ Countersigned by /S/ _____

Commentary:

Hypothetical: This endorsement has been completed as to the Contractor. The Landlord and the other Landlord-Related Persons will require a similar endorsement to be issued by the Tenant's workers' comp. carrier in their favor. Similarly, the Tenant will wish a similar endorsement to be issued by the Landlord's workers' comp. carrier.

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

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FOOTNOTES

I. Indemnity.

A. Scope.

1. Elements of indemnity provisions.

^[1] An indemnity is comprised of the following five components:

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

2. "Indemnity".

^[2] "**Indemnity**" is a shifting of the risk of a loss from a liable person to another. However, many times scrivener's use an indemnity provision when they do not know whether the Indemnified Person is a potentially liable person. Sometimes, the indemnity provisions are no more than a restatement of existing duties, "I will indemnify you for my wrongs;" "You will indemnify me for your wrongs." However, it is not necessary that the words "indemnify" or "indemnity" be used or even that the promise be in writing. 14 TEX. JUR. 3d *Contribution and Indemnification* § 14 Form (1997); 26 TEX. JUR. 2d *Statute of Frauds* § 29. William H. Locke, Jr., *Annotated Risk Management Forms – Indemnity, Additional Insureds, Waiver of Subrogation, Exculpations and Releases*, 13TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2003); and Aaron Johnston, Jr., and Charles E. Comiskey, *Lease Risk Management and Insurance Concepts*, 15TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2004). As discussed in the foregoing referenced articles, care should be taken in crafting the scope of and exclusions from the liabilities indemnified, such as providing for the defense of the indemnified party by the indemnifying party ("indemnify, **defend**, and hold harmless"), settlement authority, and choice of laws applicable.

B. Indemnified liabilities.

1. "Claims".

^[3] "**All Claims.**" The Texas Supreme Court in *Fisk Elec. Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813 (Tex. 1994) found that the following language **did not** meet the express negligence test:

Provision:

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

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

2. Liabilities or damages.

a. "Liabilities" or "damages".

^[4] Indemnities have sometimes been classified as an "indemnity against **liability.**" *Russell v. Lemons*, 205 S.W.2d 629, 631 (Tex. Civ. App.--Amarillo 1947, *writ ref'd n.r.e.*). In the case of a promise to indemnify against liability, a cause of action accrues to the indemnified person only when the liability has become fixed and certain, as by rendition of a judgment. Possibility that liability triggering indemnity will be incurred in pending action is a "future hypothetical event" within meaning of rule that Uniform Declaratory Judgments Acts gives court no power to pass upon hypothetical or contingent situations. *Boorhem-Fields, Inc. v. Burlington Northern Railroad Co.*, 884 S.W.2d 530 (Tex. App.--Texarkana 1994, *no writ*); § 37.001 TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 1997).

b. "Punitive damages".

^[5] In drafting the classes of liabilities covered by an indemnity care should be given to the scope of covered items. For example, are "**punitive damages**" of the Indemnified Person to be covered? Are the punitive damages of an employee or an agent covered, if the employer is not liable? For a discussion of "punitive damages" see *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981) and TEX. CIV. PRAC. & REM. CODE §§ 41.001 *et seq.* (Vernon 1997).

3. Attorney's fees and costs.

^[6] a. Must first pass express negligence test to be indemnified for defense costs.

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

b. Attorney's fees.

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

c. Costs.

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

d. Allocation of costs of defense defending indemnified person and persons not indemnified.

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

e. Settlement by Indemnifying Person Negates Indemnity for Defense Costs Incurred by Indemnified Person.

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

C. Indemnified matters.

1. Vicarious liability - common law exposure to vicarious liabilities.

⁷¹ The common law imposed "vicarious" liability, sometimes called "imputed negligence", on persons in certain circumstances through the doctrine of respondeat superior, under which a master (employer) is liable for the torts of its servants. The respondeat superior doctrine imposes liability on the employer even though the employer did not contribute to the servant's negligent act. The independent contractor rule evolved as a means to combat the harshness of the general common law rule. Under the independent contractor exception a person is not liable for the negligence of its independent contractors.

However, numerous exceptions evolved to the independent contractor exception resulting in the risk of the reimposition of liability even though the work is performed by independent contractors. Some of these exceptions are the following:

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

